# NEW YORK CITY LAW REVIEW

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The 1998 volume of the *New York City Law Review* is dedicated to the memory of our comrades

*W. Haywood Burns*

*M. Shanara Gilbert*

and

*Sanford S. Blair*

with special thanks to

*Tona Schmidt*

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# THE PENILE CODE: THE GENDERED NATURE OF THE LANGUAGE OF LAW

*Matthew A. Ritter*†

## I. INTRODUCTION

*pen•al* (pēn'əl) *adj.* [[< Gr *poinē*, penalty]] of, for, constituting, or deserving punishment[1]

*pen•cil* (pen'səl) *n.* [[< L *penis*, tail]] a rod-shaped instrument with a core of graphite, crayon, etc. that is sharpened to a point for writing, etc.[2]

*pe•nis* (pē'nis) *n.* . . . [[L]] the male organ of sexual intercourse[3]

My fingers rest uneasily upon the keyboard of my electronic pen as I reflect upon how to write a paper regarding Women and Law.[4] I am sensitive to being male—a white, heterosexual male—thoroughly steeped (both culturally and academically) in the legal, philosophical, and theological heritage of the West.[5] Feminist thought has taught me that all things said are said from a particular perspective.[6] More profoundly, feminist thought has taught me that gender identity may well inform the very structure of thought from which one's perspective is articulated.[7] In large measure, this

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1 WEBSTER'S NEW WORLD DICTIONARY 434 (1990) (emphasis added).

2 *Id.* (emphasis added).

3 *Id.* at 435 (emphasis added).

4 Contrary to my academic training and inclination, I will write in the first person. As much as I am able, I will thus refrain from disguising my personal voice as that of the anonymously authoritative "third person."

5 I hold a Bachelor of Arts in both philosophy and religious studies, a Master of Divinity in biblical studies and theology, a Master of Sacred Theology in philosophical theology, a Master of Arts, a Master of Philosophy, and a Doctor of Philosophy in philosophical theology, and a Doctor of Jurisprudence.

6 *See generally* Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 57-74 (1987) [hereinafter Minow, *Justice Engendered*].

7 Feminist thought thus stands firmly (albeit critically) upon the ground provided it by the history of Western philosophy. From Descartes through Kant, Hegel, Nietzsche (especially Nietzsche, having been the first to declare that knowledge has to do not with the expression of truth, but with the possession of power) to both Heidegger and Wittgenstein, philosophy has been essentially the attempt to think thinking—to articulate the structure of thinking whereby humans experience, understand, know, judge, feel, and act in the world. *See generally* E.W.F. TOMLIN, THE WESTERN PHILOSOPHERS: AN INTRODUCTION (1967).

paper will be an inquiry into that claim. It will consequently be an inquiry that is perhaps informed by the very structure of thought into which it inquires. I am, after all, a man.

This inquiry will focus on the language of law. In the West, the law is written law; and it has been predominately written by men. Are these two facts related, and if so, how? Is it significant that the law is *penned* by those with a *penis*? Is there a structural relationship between the pen and the penis—a *penile code*? And if so, how has it framed the character of the law? These questions will govern my inquiry into the language of law.

"Legal language does more than express thoughts."[8] Lucinda Finley suggests law is a realm of discourse that exercises an extraordinary influence over the construction of social reality.[9] "[T]hose who seek to use law to help empower and positively change the status of a group such as women must, in their theory and practice, be concerned with the origins, nature, and structure of legal language and legal reasoning."[10] This concern, expanded here to include not only the status of women but the status of men as well, will guide my own inquiry into the language of law.

One might well ask why I—as a man—choose to occupy myself with a feminist concern. It is certainly not because I feel the need to champion the cause of women. Women are quite well able to champion their own cause. Moreover, there is no need for men to speak for women—we have presumed to do that for long enough. Nor is it because I wish to add my voice in protest against the atrocities systematically practiced against women by men around the globe: African female genital mutilation,[11] Chinese abandonment of infant girls,[12] Serbian military strategies of rape,[13] Indian bride- or widow-burning,[14] Thai sexual slavery,[15] world-wide domestic vio-

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[8] Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989).

[9] *Id.*

[10] *Id.* at 890.

[11] *See generally* Nahid Toubia, *Female Genital Mutilation*, *in* WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 224 (Julie Peters & Andrea Wolper eds., 1995); Hope Lewis, *Between* Irua *and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995).

[12] *See generally* Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards An(other) Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1992).

[13] *See generally* HUMAN RIGHTS WATCH, 2 WAR CRIMES IN BOSNIA-HERCEGOVINA (1993); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996).

[14] *See generally* Indira Jaising, *Violence Against Women: The Indian Perspective*, *in* WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 51 (Julie Peters & Andrea Wolper eds., 1995).

lence,[16] to name a few. Rather, my feminist concerns are prompted by the extraordinarily mundane yet myriad ways in which men exercise sexual authority over women—a sexual authority systematically reinforced by the law.

The fabric of our culture, both public and private, is interwoven with the subordination of the feminine to the dominance of the masculine. In a strong sense, the *meaning* of manhood is the *demeaning* of womanhood. From this oppression of women, all men benefit in countless subtle and not so subtle ways. As a man, this is my privilege as well. I am profoundly distressed by this. Thus, in order to overcome it, I must understand it. Hence, my feminist concerns and the motive for this discussion.

I have divided my inquiry into three stages. First, I will reflect upon the epistemological structure of language as it pertains to the logic of the written word. Second, I will articulate a feminist critique of legal language. Third, on the basis of these epistemological and feminist critiques, I will offer a revisionary understanding of the sexual oppression ostensibly endemic to the language of law. My central thesis is that the sexual oppression exercised by men over women is coincident, if not confluent, with the logic of the written word, and that the law consequently manifests this sexually oppressive logic. In conclusion, I will propose a way to counter, if not overcome, this oppression.

## II. THE OCULAR EPISTEMOLOGY OF THE PEN(IS)

*[T]he written letters bring death but the Spirit gives life.*[17]

In about the fifth-century B.C.E., the written word began to assume its status as the quintessential mode for the cultural communication of ideas.[18] Writing became the paradigmatic form of

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15 *See generally* HUMAN RIGHTS WATCH, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND (1993).

16 *See generally* Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116 (Rebecca J. Cook ed., 1994); Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 532 (Rebecca J. Cook ed., 1994); Kenneth Roth, *Domestic Violence as an International Human Rights Issue, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326 (Rebecca J. Cook ed., 1994).

17 2 *Corinthians* 3:6 (Jerusalem) (emphasis added).

18 Within a few decades of each other, the texts that founded most of the so-called modern world cultural/religious movements had been written: the Platonic Dialogues (Plato), *see* GREAT DIALOGUES OF PLATO (Eric H. Warmington & Philip G. Rouse eds. & W.H.D. Rouse trans., 1956); Jewish Prophecy (Ezekiel, Isaiah, Jeremiah), *see* MEYER WAXMAN, A HANDBOOK OF JUDAISM (2d ed. 1984); the Avesta (Zoroaster), *see* A.V. WILLIAMS JACKSON, ZOROASTER: THE PROPHET OF ANCIENT IRAN (1926); the Bhagavad Gītā,

expression. It remains so today. The communication of ideas must be written if it is to be taken seriously. The structure of the written word consequently governs not only what we say, but how we say it. More profoundly, it governs how we think.[19] Our thinking is dictated by the pen.

An examination of how the written word governs the way we think would properly comprise a lengthy philosophical treatise. Given the constraints of the present discussion, I will confine myself to a few specific remarks on the matter. For these remarks, I am indebted to the work of Walter J. Ong, S.J., who has written extensively on the cognitive dynamics attendant upon the various forms of communication (oral/aural, textual, printed, and telecommunicational).[20]

Communication through the written word is one effected through ocularity. The written word is seen, not heard. The cognitive dynamics endemic to the written word are consequently governed by the logic of vision. Knowing becomes essentially a matter of seeing. Consider the various metaphors we use for understanding:[21] insight, reflection, speculation, illumination, observation, exposition, idea (Latin *video*, to see[22]), glimmering of, evidence, elucidate, explicate, clarify, represent, demonstrate, show, discern, analyze, distinguish, define, outline, envision, cast light on, farsighted, etc. Consider as well the various metaphors we use for not understanding: obscure, clouded, unclear, indistinct, complicated,

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*see* A.C. BHAKTIVEDANTA SWAMI PRABHUPĀDA, BHAGAVAD-GĪTĀ: AS IT IS (1972); the Buddhist Sutras, *see* ENTERING THE STREAM: AN INTRODUCTION TO THE BUDDHA AND HIS TEACHINGS (Samuel Bercholz & Sherab Chödzin Kohn eds., 1993); the Tao-Te Ching (Lao Tzu), *see* A SOURCE BOOK IN CHINESE PHILOSOPHY (Wing-Tsit Chan trans., 1963); and the Sayings of Confucius, *see id.* *See generally* DAVID S. NOSS & JOHN B. NOSS, MAN'S RELIGIONS (7th ed. 1984). Prior to that, cultural/religious heritage was communicated largely through the mythologies and cosmogonies of oral tradition. *Id.* It is not coincidental that the emergence of religious/ethical sensibility arose with the advent of the written word. Nor is it coincidental that in the West, the modern revolutions—religious (Reformation), *see* TOMLIN, *supra* note 7; philosophical (Idealism), *see id.*; political (Democracy), *see id.*; economic (Capitalism), *see id.*; technological (Industrial), *see* GEORGE BASALLA, THE EVOLUTION OF TECHNOLOGY (1988); and literary (the novel), *see* J.M. COHEN, A HISTORY OF WESTERN LITERATURE (1963)—followed upon the advent of the printed word (hence, mass textuality and the beginning of common literacy).

19 *See generally* WALTER J. ONG, S.J., PRESENCE OF THE WORD (1967) [hereinafter ONG, PRESENCE OF THE WORD].

20 *See id.*; *see also* WALTER J. ONG, S.J., INTERFACES OF THE WORD (1977) [hereinafter ONG, INTERFACES OF THE WORD]; WALTER J. ONG, S.J., ORALITY AND LITERACY (1982) [hereinafter ONG, ORALITY AND LITERACY].

21 ONG, INTERFACES OF THE WORD, *supra* note 20, at 133.

22 CASSELL'S LATIN DICTIONARY 641-42 (1959).

dark, hidden, elusive, scattered, shortsighted, etc. The logic of vision structures that which we understand as knowledge and meaning. Under the paradigm of the written word, knowledge is governed by the dynamics of vision—the ocular epistemology of the pen.

Within such an epistemology, knowledge is quintessentially a matter of explanation[23] (Latin *explanare*, to lay out on a surface[24]). This laying out characterizes the mode of knowledge as well as the subject matter of knowledge. On the one hand, the written word, as the mode of knowledge, is constituted as a literal laying out. Words are laid out: strung together—articulated (Latin *articulare*, to join[25])—in terms of a particular grammatical and semantic order. On the other hand, the subject matter of knowledge is also constituted as a laying out. Vision has to do with surfaces: it directionally reflects one thing after another in an ordered succession of fixes.[26] Ocular knowledge is consequently a dissecting apprehension, characterized principally as definition (Latin *definire*, to draw a line around[27]) and analysis (Greek *ana-liein*, to break into parts[28]). As explanation, knowledge therefore takes the measure of things, laying them out in ordered succession. Entombed within the order of the written word, this measure of things becomes fixedly permanent—a text.[29]

Ocular epistemology further exerts a profound impact on the nature of both the subject and object of knowledge. In essence, it serves radically to distinguish the subject from the object of knowledge.[30] The visual paradigm of knowledge places the viewed world

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23 ONG, INTERFACES OF THE WORD, *supra* note 20, at 122.

24 CASSELL'S LATIN DICTIONARY, *supra* note 22, at 230.

25 *Id.* at 59.

26 ONG, PRESENCE OF THE WORD, *supra* note 19, at 129.

27 CASSELL'S LATIN DICTIONARY, *supra* note 22, at 173.

28 THE OXFORD DICTIONARY OF MODERN GREEK 10 (1982).

29 ONG, PRESENCE OF THE WORD, *supra* note 19, at 136. Note the idiom of referring to a text as a "monument" to one's thought. Worthy of note also is the fact that when knowledge or understanding becomes fixed within textuality, it becomes abstract. This is because the written word must establish its own internal context of meaning. Unlike the spoken word, the written word cannot rely upon the circumstantial context of actuality that surrounds oral communication. ONG, PRESENCE OF THE WORD, *supra* note 19, at 116. In a sense, a text must comprise its own world. By its nature, a text is therefore an abstract body of meaning, abstracted from the world in which it was written.

30 ONG, PRESENCE OF THE WORD, *supra* note 19, at 135. It might even be argued that the subject and the object of knowledge, as epistemological categories, are themselves generated by the logic of an ocular epistemology. That is, absent an ocular epistemology, knowledge may well not be structured in terms of a subject and object at all. Such a claim, of course, is philosophically problematic by virtue of the fact that

out in front of the viewer; the viewer is backed away from the viewed. No longer part of the viewed, the viewer becomes radically other than the viewed. The eye can only look upon what is other than itself. In effect, reality is objectified as external.[31] As the external object of knowledge, reality is reduced to the seen: the explained; the defined and analyzed; the measured, ordered, and ruled.

Inasmuch as the object of knowledge becomes radically exteriorized within an ocular epistemology, the subject of knowledge is made ultimately to disappear.[32] Able to see only what is other than itself, the eye distances itself from all that is seen. Vision therefore radically individuates the viewer. Under this visual paradigm, the subject of knowledge is consequently an individual *I*. Having individuated itself, the subject of knowledge is alienated from an objectified reality. The seeing *I* is backed away from the seen world. The individual *I* is consequently an abstract *I*. As an abstracted *I*, the subject of knowledge is lifted from the order of objective reality. The abstract individual *I* is consequently an autonomous *I*: not subject to the rule or measure of what is seen as other than itself. The abstract autonomous individual *I* is thus elided from reality. As elided from reality, the subject of knowledge becomes the universal *I*: characterized by no particularity; circumscribed by no definition; seeing but not seen. In ultima, the subject of knowledge disappears.[33]

Ocular epistemology thus generates on the one hand an object of knowledge characterized by exteriority, and on the other hand a subject of knowledge characterized by a universally abstract autonomous individuality—the *I*. The paradigmatic form for the expression of such knowledge is the written word. And from the structure of the written word, the *I* acquires its linguistic character as author.[34] As author, however, the *I* would retain its universally abstract autonomous individuality. Indeed, the authority of a text

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the subject/object distinction would itself be construed as an object of knowledge. But aside from this logistical difficulty, the argument would contribute little to the present discussion.

31 ONG, PRESENCE OF THE WORD, *supra* note 19, at 228.

32 ONG, INTERFACES OF THE WORD, *supra* note 20, at 121-22 (quoting Father Bernard Lonergan, Consciousness and the Trinity, Address Before the North American College in Rome (Spring 1963)).

33 Hegel perhaps said it best when he offered his ultimate definition of the "I": "Ego is Ego, I am I." G.W.F. HEGEL, THE PHENOMENOLOGY OF MIND 219 (J.B. Baillie trans., Harper & Row 1987) (1807).

34 When law is expressed, or written, it acquires a "relatively objective quality." ONG, PRESENCE OF THE WORD, *supra* note 19, at 229.

is wholly contingent upon this retention. The written word exercises authority to the extent that it reflects the order of objectified reality.[35] This is achieved, oddly enough, through the elision of the author. The author must disappear from the text. For the text to speak, its author must be silent.[36] An authoritative word is the universal word; abstracted from the context of its author; autonomously meaningful. Intrusion of the author into the fabric of a text detracts from its authority. True authorship is therefore achieved through the authority of the text itself. For thus does the authority of the text truly express its author: the universally abstract autonomous individual. The invisible *I* writes as an absent author.

Hence the ocular epistemology of the pen. The important thing to note here is that the epistemological structure of the written word dictates not only the character of the subject and object of knowledge respectively, but it dictates accordingly the character of textual authority—an explanatory fixation of the object of knowledge as authored by an elided subject of knowledge. The written word *pens* reality: fixes it, marks it, lays it out, and articulates it. By virtue of such *pene*tration, the text exercises its authority, thereby absenting its author.

Historically, men have held the pen. Characterized by the abstract autonomy and universal individuality of the invisible *I*, the absent author has nonetheless invariably been male. Ironically enough, this absention is seldom, if historically ever, remarked upon by men.[37] Rather, it has been remarked almost invariably by women; and, as Mary Daly notes, it is a remark that seems especially distressing to men. "Having penned women into the mirror world of their archetypes, the authorized authors have refused women the right to write saying to wayward women that to publish is to perish."[38] Why this distress? The remark poses a disturbing question: does gender inform the logic of the written word? Is the ocular epistemology of the pen informed by the penis? This question is addressed by the feminist critique of legal language.

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[35] *See supra* note 29 and accompanying text. A text is authoritative to the extent that it internally and independently manifests the reality it lays out (i.e., explains). Structurally abstracted from reality, the authority of the written word is thus a function of its internal and independent coherence as adequate to the order of reality it scripts.

[36] Contrast this to the authority exercised by the speech of oral cultures: the authority of "we say." ONG, PRESENCE OF THE WORD, *supra* note 19, at 229.

[37] There is a reason for this. As will be discussed below, this remark obviates the abstract autonomy and universal individuality of the absented author. It provides him, horror of horrors, with a gender identity.

[38] MARY DALY, PURE LUST 121 (1984) [hereinafter DALY, PURE LUST].

## III. ENGENDERED LAW

*Man fucks woman; subject verb object.*[39]

The law is written. It is constituted as a realm of discourse in terms of which the social relationships of a culture are legally constructed.[40] Through its written word, the law therefore structures social reality, it lays it out and codifies it. Due to the fact that it enforces the social reality it structures, the law is a uniquely powerful form of discourse.[41] Perhaps more than any other realm of discourse, the law thus manifests the logic of the written word.

In this section, I will first offer a philosophical critique of what may viably be construed as the governing language of the law, rights talk. I will then detail a feminist critique of rights talk. Through these respective critiques, I will demonstrate how the language of the law is gendered, both formally and substantively.

In many cultures, talk of rights has become the authoritative language of law.[42] We have come to understand what the law means in terms of human rights. Rights talk dictates not only what the law is, but what the law should be. In some strong sense, law has become for us a function of rights talk. For contemporary jurisprudence, such rights are possessed by individuals,[43] and they are held by any one individual to the extent that they are held by all individuals. "Rights" are characteristically abstract, intangible, and therefore alienating. As such, rights talk requires that the "reproduction of [that] alienation [be] a condition of group membership," and one that applies equally to all.[44] Thus, intrinsic to the notion of human rights is the idea that they are equally held by all human beings.[45] The central claim of rights talk, in other words, is

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39 Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 541 (1982) [hereinafter MacKinnon, *Feminism, Marxism, Method, and the State*] (emphasis added).

40 Finley, *supra* note 8, at 888.

41 *See* Carol Smart, *Law's Power, the Sexed Body, and Feminist Discourse*, 17 J.L. & SOC'Y 194, 196 (1990); *see also* Finley, *supra* note 8, at 888.

42 MARY ANN GLENDON, RIGHTS TALK 7 (1991).

43 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1978).

44 Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, *in* JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 226, 226 (Robert L. Hayman, Jr. & Nancy Levit eds., 1994).

45 "Government must not only treat people with concern and respect, but with equal concern and respect." DWORKIN, *supra* note 43, at 272-73. Dworkin distinguishes the right to equal treatment from the right to treatment as an equal. The latter right is the more fundamental, embodying an essentially moral claim; the former is a derivative economic right having to do with the distribution of societal goods. DWORKIN, *supra* note 43, at 273.

the claim to equality.[46] Rights talk dictates that all individuals equally possess certain human rights. "By 'rights' . . . [are meant] those rights which are alleged to belong to human beings as such and . . . to attach equally to all individuals . . . ."[47]

In essence, then, rights talk speaks about the universality of the individual—the individual as such. Rights talk thus must construe the individual as an abstract individual.[48] The individual spoken by rights talk is an individual abstracted from any particular communal identity. Communal identity is subsequent to the essential being of the individual. How the abstract individual communally identifies himself or herself is consequently a function not of how he or she *ought* to do so (in proper accordance with its essential communal nature), but how he or she *chooses* to do so. The abstract individual is thus an *autonomous* individual.[49] What the abstract autonomous individual chooses to be is constrained only by his or her discretion.[50]

Rights talk substantively speaks the abstract autonomy of the universal individual through the proclamation of two fundamental complementary rights: the right to privacy,[51] and the right to self-

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46 DWORKIN, *supra* note 43, at 273.

47 ALISDAIR MACINTYRE, AFTER VIRTUE 66 (1981).

48 On the one hand, individuals are construed as abstractly given—given interests, needs, desires, etc. On the other hand, society is construed as the set of possible social relationships which are suited, more or less adequately, to individuals' requirements. Societal rules and institutions are accordingly construed as the means of permitting this fit between the individual and society. "The crucial point about this conception is that the relevant features of individuals determining the ends which social arrangements are held (actually or ideally) to fulfil[l] . . . are assumed as given, independently of a social context." STEVEN LUKES, INDIVIDUALISM 73 (1973).

> A "right" has three phenomenological dimensions. First, to the extent that individuals are represented as "having" rights, these rights signify social experiences that are merely possible rather than the experiences themselves. . . . Second, these rights are conceived as being granted to the individual from an outside source, from "the State" which either creates them (in the positivist version of the constitutional thought-schema) or recognizes them (in the natural-law version) through the passage of "laws." Thus, insofar as the individual emerges from his passive station to act and interact with others on the basis of his rights, he does so because he has been "allowed" to do so in advance. Third, intersubjective action itself is conceived to occur "through" or "by virtue of" the "exercise" of these rights.

Gabel, *supra* note 44, at 227.

49 MACINTYRE, *supra* note 47, at 58.

50 Such autonomy, however, is not arbitrary. It simply means that the behavior of the individual is ultimately that of the individual—not a function of social constraint beyond the control of the individual.

51 *See* LUKES, *supra* note 48, at 59-66.

> In general the idea of privacy refers to a sphere that is not of

development.[52] The right to privacy dictates that individual autonomy be respected by the various communal involvements of the individual. Privacy generates a host of protective rights—leave me alone.[53] The right to self-development dictates that the individual be allowed autonomously to pursue whatever mode of self-realization the individual should choose. Self-development generates a host of promotive rights—let me be me.[54] The complementary rights of privacy/self-development programmatically inform all communal involvements of the universally abstract autonomous individual: political,[55] economic,[56] religious,[57] and philosophical.[58]

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> proper concern to others. It implies a negative relation between the individual and some wider 'public[,'] including the state—a relation of non-interference with, or non-intrusion into, some range of his thoughts and/or action. This condition may be achieved either by his withdrawal or by the 'public's' forbearance.

LUKES, *supra* note 48, at 66.

The modern pre-occupation with privacy stands in rather stark contrast to classical thought on the matter:

> the privative trait of privacy, indicated in the word itself, was all-important; it meant literally a state of being deprived of something . . . . A man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian, had chosen not to establish such a realm, was not fully human.

LUKES, *supra* note 48, at 59 (quoting HANNAH ARENDT, THE HUMAN CONDITION 35 (1959)).

For modernity, however, privacy does not denote a privation. In fact, "[s]imilar to property in its heyday, privacy was vaunted as a superright, a trump." GLENDON, *supra* note 42, at 60. The singularly American insistence upon the right to privacy is probably most directly attributable to the writings of John Stuart Mill, *see* JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859). Although it did not enter the American vernacular until the late nineteenth century, it has since become the right in terms of which all other protective rights are understood. GLENDON, *supra* note 42, at 48-61. "It is the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

52 The right to self-development has primarily to do with the preservation of individuality as such. It is generally traceable to German Romantic notions of uniqueness. LUKES, *supra* note 48, at 67.

53 For example, rights against various forms of government intrusion, *see, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Roe v. Wade, 410 U.S. 113 (1973); religious commitments, *see, e.g.*, Board of Educ. v. Grumet, 512 U.S. 687 (1994).

54 For example, rights to life and liberty, *see, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) and Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990); the freedom of speech, *see, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) and R. A. V. v. City of St. Paul, 505 U.S. 377 (1992); the right to association, *see, e.g.*, Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); the right to procreate, *see, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961) and Griswold v. Connecticut, 381 U.S. 479 (1965); the right to education, *see, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

55 The form of political government programmatically appropriate to the idea of the abstract autonomous individual is a government whose authority is based upon the consent of its individual citizens—a democratized social contract whereby the government protects/promotes the interests of its individual citizens. LUKES, *supra* note

In speaking about the universally abstract autonomous individual, rights talk thus constructs a social reality of competing individuals perennially anxious of societal intrusion.[59] Inasmuch as law

48, at 79-87. This view, of course, has a long lineage traceable to Hobbes, *see* THOMAS HOBBES, MAN AND CITIZEN (Bernard Gert ed. & Charles T. Wood et al. trans., Hackett Publishing Company 1991) (1658 and 1642); Locke, *see* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1990) (1690); and Rousseau, *see* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, *in* BASIC POLITICAL WRITINGS (Donald A. Cress ed. & trans., Hackett Publishing Co. 1987) (1762).

[56] "*Economic individualism* implies a consequent presumption against economic regulation, whether by Church or State." LUKES, *supra* note 48, at 88 (emphasis added). This view received much of its controlling ideology from Adam Smith, *see* ADAM SMITH, THE WEALTH OF NATIONS (Edwin Cannan ed., Random House, Inc. 1937) (1776).

[57] *See* LUKES, *supra* note 48, at 94-99.

> *Religious individualism* may be defined as the view that the individual believer does not need intermediaries, that he has the primary responsibility for his own spiritual destiny, that he has the right and duty to come to his own relationship with his God in his own way and by his own effort.

LUKES, *supra* note 48, at 94.

[58] Ostensibly beginning with Descartes (*see* RENE DESCARTES, DESCARTES SELECTIONS (Ralph M. Eaton ed., Charles Scribner's Sons 1955) (1911-12)), and receiving progressively sophisticated treatment through a lineage highlighted by Hume (*see* DAVID HUME, ESSAYS: MORAL, POLITICAL, AND LITERARY (Eugene F. Miller ed., 1987) (1777)), Kant (*see* THE PHILOSOPHY OF KANT (Carl J. Friedrich ed., Random House, Inc. 1993)), and Husserl (BARRY SMITH & DAVID WOODRUFF SMITH, THE CAMBRIDGE COMPANION TO HUSSERL (1995)), the structural criteriology of knowledge is held to reside within the individual.

[59] On the one hand, rights talk structures a bifurcation between the individual and the society in which the individual would exercise its self-protection/promotion. MACINTYRE, *supra* note 47, at 33. Rights are designed to preserve the individual against intrusion upon its autonomy. "The formal legal framework of modern democratic societies is the guardian of the abstract individual." LUKES, *supra* note 48, at 152-53. What rights talk guards against is intrusion upon individual autonomy by various and sundry forms of society, whether political, ethical, or religious. Rights talk speaks the autonomy of the abstract individual. Insofar as rights talk thus speaks, it protests against societal intrusion, hence a structural division between the individual and the society in which the individual would exist as such.

On the other hand, rights talk structures as well a divisiveness between members of a society. The fundamental complementarity between rights to privacy and rights to self-development diverges when they are respectively claimed by competing individuals. The self-promotion of one inevitably and invariably infringes upon the self-protection of another. Communal dialogue is replaced by the protest of competing claims, social accommodation by righteous indignation, mutual amelioration by strident self-assertion.

> [R]ights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. . . . Our rights talk is like a book of words and phrases without a grammar and syntax. Various rights are proclaimed or proposed. The catalog of individual liberties expands, without much consideration of the ends to which they are oriented, their relationship to one an-

speaks the substantive language of rights talk, it adjudicates social conflict by measuring the rights of claimants against each other. As Leslie Bender notes, rights talk therefore conduces to a jurisprudence of abstract universal principles.[60] In order to adjudicate the claims of competing rights, appeal must be made to principles that are independent of particular circumstances. "Legal language seeks universal applicability, regardless of the particular traits of an individual."[61] Such adjudication is appropriately effected by a neutral judiciary on the basis of objective principles of law. Accordingly, the primary goal of adjudication is circumstantially to vindicate abstract universal rights; "law is conceptualized as a rule-bound system for adjudicating the competing rights of self-interested, autonomous, essentially equal individuals capable of making unconstrained choices."[62] The language of law is spoken by a jurisprudential voice singularly universal and programmatically abstract.[63] Hence its formal character.

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> other, to corresponding responsibilities, or to the general welfare. Lacking a grammar of cooperative living, we are like a traveler who can say a few words to get a meal and a room in a foreign city, but cannot converse with its inhabitants.

GLENDON, *supra* note 42, at 14.

Rights talk generates a sociality resembling more a cacophony of discord than a community of discourse. Such discord, moreover, is not happenstance. It is structurally intrinsic to the moral discourse of rights talk. "The fact is that the . . . ideal of self-sufficiency cannot be successfully democratized. A large collection of self-determining, self-sufficient individuals cannot even be a society." GLENDON, *supra* note 42, at 74. The abstract autonomous individual that programmatically speaks rights talk is intrinsically non-social. Its governing social interest is self-interest. "Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers . . . ." GLENDON, *supra* note 42, at 77.

60 Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, in* GENDER AND LAW 592 (Katharine T. Bartlett ed., 1993).

61 Minow, *Justice Engendered, supra* note 6, at 45.

62 Finley, *supra* note 8, at 896.

63 This abstract universalism of the law has recently come under rather severe critical scrutiny by non-Western writers whose cultures have been forced to endorse the rights talk of the West—a rights talk spoken by an international law that to date has been dictated by Western jurisprudence. "The prevailing human rights discourse . . . is abstracted from social history and thereby arrives at conclusions which make human rights both eternal in historical time and universal in social place." ISSA G. SHIVJI, THE CONCEPT OF HUMAN RIGHTS IN AFRICA 43 (1989). Such writers voice the suspicion that the abstract universalism of the West may very well be peculiar to the West. *See generally* Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 HASTINGS INT'L & COMP. L. REV. 373 (1989); Makua wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995); J.B. Ojwang, *Laying a Basis for Rights: Towards a Jurisprudence of Development, in* AFRICAN LAW AND LEGAL THEORY 351 (Gordon R. Woodman & A.O. Obilade eds., 1995); Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982).

The language of law thus manifests the logic of the written word both formally and substantively. Formally, it codifies social reality in terms of the abstract universal jurisprudence of rights talk. Substantively, it speaks the language of abstract autonomous individuals universally possessing such rights. Historically, however, the authors of legal language have not so much been abstract autonomous individuals as they have been men. "Men have shaped it, they have defined it, they have interpreted it . . . ."[64] Feminist legal scholars therefore suspect legal language of expressing not so much an abstract universal jurisprudence as expressing the particularly masculine jurisprudence of its authors.[65] But inasmuch as the language of law speaks with the voice of authority, it effectively privileges the male perspective as authoritative. Feminists therefore further suspect that legal language disguises the male voice as the universal voice.[66] "Because it is embedded in a patriarchal framework that equates abstraction and universalization from only one group's experiences as neutrality, legal reasoning views male experiences and perspectives as the universal norm around which terms and entire areas of law are defined."[67] The abstract universal voice of legal authority is therefore suspected by feminists as being the distinctively male voice of its authors.[68]

This feminist suspicion generates the perception that the logic of legal language is itself distinctively masculine. The language of abstract universality and autonomous individuality is construed as the linguistic penchant of men.[69] As such, it ostensibly serves distinctively masculine interests:

> Legal language frames the issues, it defines the terms in which speech in the legal world must occur, it tells us how we

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64 Finley, *supra* note 8, at 892.

65 Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58 (1988) [hereinafter West, *Jurisprudence and Gender*].

66 Finley, *supra* note 8, at 897.

67 Finley, *supra* note 8, at 897. Finley describes in some detail how the masculine perspective governs the law of torts, contracts, labor, and crime. *See* Finley, *supra* note 8, at 892-902. In understanding whether someone is negligent, how agreements should arise and be enforced, how a worker should be regarded and treated, and the appropriate response to criminal activity, the man's perspective is taken as "natural, inevitable, complete, objective, and neutral." Finley, *supra* note 8, at 892.

68 Finley, *supra* note 8, at 897.

69 "Universal and objective thinking is male language because intellectually, economically, and politically, privileged men have had the power to ignore other perspectives and thus come to think of their situation as the norm, their reality as reality, and their views as objective." Finley, *supra* note 8, at 893. *See also* Jennifer Nedelsky, *The Challenges of Multiplicity*, *in* GENDER AND LAW 878, 880 (Katharine T. Bartlett ed., 1993); West, *Jurisprudence and Gender*, *supra* note 65, at 590; Minow, *Justice Engendered*, *supra* note 6, at 33-45.

> should understand a problem and which explanations are acceptable and which are not. Since this language has been crafted primarily by white men, the way it frames issues, the way it defines problems, and the speakers and speech it credits, do not readily include women. Legal language commands: abstract a situation from historical, social, and political context; be "objective" and avoid the lens of non[-]male experience; invoke universal principles such as "equality" and "free choice;" speak with the voice of dispassionate reason; be simple, direct, and certain; avoid the complexity of varying, interacting perspectives and overlapping multi-textured explanations; and most of all, tell it and see it "like a man"—put it in terms that relate to men and to which men can relate.[70]

To the extent that legal language serves characteristically masculine interests, it disserves characteristically feminine interests. This point is readily made by the feminist critique of rights talk.

The controlling insight of feminist discomfort with rights talk is that rights universally inhere in human beings to the extent, and only to the extent, that a human being shares the fundamental sameness of humanity presupposed by rights talk.[71] Rights talk systematically excludes from the ambit of equal regard those who differ from the essential sameness allegedly characteristic of human beings. To the extent that women fail to manifest this essential sameness of abstract autonomous individuality, rights talk fails to address them.[72]

Mary Ann Glendon has observed that, contrary to the paradigm of abstract autonomous individuality, women in our culture concern themselves with the "values of care, relationship, nurture, and contextuality."[73] Because rights talk fails to address itself to this concern, it fails to speak to women. "Once again, the premise of a basic human nature, found in the abstract individual . . . risks excluding any who do not meet it."[74] As Robin West contends, women concern themselves with communal connection, men with individuated disconnection.[75] Rights talk serves the interests of the

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70 Finley, *supra* note 8, at 905.

71 MARTHA MINOW, MAKING ALL THE DIFFERENCE 147 (1990) [hereinafter MINOW, MAKING ALL THE DIFFERENCE].

72 Rights talk "presumes to address only autonomous, independent individuals who can separate themselves from others and enter freely, unencumbered, into an agreement about how to conduct private and public affairs." *Id.* at 150.

73 GLENDON, *supra* note 42, at 174.

74 MINOW, MAKING ALL THE DIFFERENCE, *supra* note 71, at 156.

75 West, *Jurisprudence and Gender*, *supra* note 69, at 2-3. *See also* Nedelsky, *supra* note 68, at 880; Finley, *supra* note 8, at 905. This disparity between masculine and feminine interests is commonly characterized in feminist literature as the difference be-

latter, and therefore disserves the interests of the former.[76]

To the extent, however, that women live within the legal culture authored by men, their distinctly feminine interests are subjected to the distinctly male interests that govern the language of the law. As Martha Minow argues, "[a] notion of equality that demands disregarding a 'difference' calls for assimilation to an unstated norm."[77] This unstated norm, of course, is the male norm ostensibly articulated by rights talk of the universal abstract autonomous individual. Inasmuch as the rights talk of law serves to structure social reality, female experience of this reality is mediated through male paradigms.[78] Ann Scales refers to this as the "episte-

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tween an ethics of rights and an ethics of care. Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1045 (1996).

76 The discomfort of feminism with rights talk, then, is twofold. On the one hand, it has to do with the nature of equality presupposed by such talk.

> An admirable commitment to universality and inclusion accompanies this idea, an idea that all individuals could be self-sufficient and that all individuals, if removed from context, would share a fundamental humanity. . . . All persons are equal because of this fundamental sameness—yet this sameness seems to be the emptiness left when we are each sheared of all that makes us different.

MINOW, MAKING ALL THE DIFFERENCE, *supra* note 71, at 152 (footnote omitted). Rights talk proclaims an essential humanity equally inherent in all human beings, speaking as if this essential humanity were universal. But this universality of essential human being, this sameness that allegedly characterizes us all, is particularly male. It programmatically excludes the female. "The presentation of a type of human being as though it described all human beings risks excluding any who do not fit or treating such misfits as deviant." MINOW, MAKING ALL THE DIFFERENCE, *supra* note 71, at 153. From the feminist perspective, equal rights talk serves to perpetuate the very inequality it speaks against.

On the other hand, the social divisiveness that rights talk structures into the society that speaks it seems uniquely unsuited to the concerns of women. "[R]ights talk disserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social dimensions of human personhood." GLENDON, *supra* note 42, at 109. Historically, women are uniquely concerned with this social dimension:

> Traditionally, it has been women who have taken primary responsibility for the transmission of family lore and for the moral education of children. As mothers and teachers, they have nourished a sense of connectedness between individuals, and an awareness of the linkage among present, past, and future generations. Hence the important role accorded by many feminists to the values of care, relationship, nurture, and contextuality . . . .

GLENDON, *supra* note 42, at 174.

Rights talk therefore fails to address itself to the interests that women typically exhibit in the essentially communal nature of their being human. Rights talk engenders a society that structurally ignores the female by virtue of its peculiarly male standard: abstract autonomous individuality.

77 Minow, *Justice Engendered*, *supra* note 6, at 32.

78 *See* DALY, PURE LUST, *supra* note 38, at 50.

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[77] Minow, *Justice Engendered*, *supra* note 6, at 32.

[78] *See* DALY, PURE LUST, *supra* note 38, at 50.

Rights talk functions structurally to oppress women.[84] Authored by men, legal language constructs a social reality ostensibly serving the distinctively masculine interests of universal abstract autonomous individuality. It consequently identifies the interests of care, context, connectedness, and community as being distinctly feminine characteristics while simultaneously disserving them.[85] This difference is structured, moreover, as a difference of inequality effected by the very terms of equality dictated by legal language. Those concerns characterized as feminine are consequently subverted to those concerns characterized as masculine. The gender inequality authored by legal language therefore reflects the sexual authority that men exercise over women. "As sexual inequality is gendered as man and women, gender inequality is sexualized as dominance and subordination."[86] Legal language therefore speaks a social reality structured in terms of sexual oppression: "sexual difference is a function of sexual dominance."[87] This dominance is exercised, and exercised exclusively, by men.[88]

The language of law is therefore gendered in terms of sex. MacKinnon supports this contention in calling attention to Kate Millet's central thesis in *Sexual Politics*.[89] Sex has political aspects which involve both power and domination.[90] Sexuality provides the relational paradigm between men and women in terms of which the gender inequality of social reality is articulated. "[Sex] is a pervasive dimension of social life, one that permeates the whole, a dimension along which gender occurs and through which gender is socially constituted . . . ."[91] Throughout feminist literature, sexu-

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itly endorsed by rights talk as it is presupposed by rights talk. It is therefore not generally subject to legal challenge.

> So long as power enforced by law reflects and corresponds—in form and substance—to power enforced by men over women in society, law is objective, appears principled, becomes just the way things are. So long as men dominate women effectively enough in society without the support of positive law, nothing constitutional can be done about it.

*Id.* at 239.

84 As Kathryn Abrams remarks, the central claim of MacKinnon and the feminism that she represents is that "coercion is paradigmatic of heterosexual relations and constitutive of the social meaning of gender under gender inequality." Kathryn Abrams, *Ideology and Women's Choices*, *in* GENDER AND LAW 907, 908 (Katharine T. Bartlett ed., 1993).

85 *See* Finley, *supra* note 8, at 905-06.

86 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 241.

87 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 130.

88 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 127.

89 KATE MILLET, SEXUAL POLITICS (1970).

90 *Id.* at xi.

91 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 130.

ality is perceived as the exercise of male oppression over women: "the important difference between men and women is that women get fucked and men fuck: 'women,' definitionally, are 'those from whom sex is taken[]' . . . ."[92] Sexuality constructs women as objects for sexual use by men.[93] Sexuality is therefore constructed to serve male sexual interests.[94] Sex is penetration; sexual pleasure a function of erection and ejaculation.[95] Distinctly feminine sexual interests are subjected to distinctively masculine sexual interests. Men are the subject of sex; women its object.

The language of law therefore reflects the social reality of sex: male domination of women. "Male dominance is sexual."[96] The law is ostensibly authored by men to serve socially constructed male interests while the authority of law is exercised to disserve socially constructed female interests. "Male power is a myth that makes itself true."[97] Social reality is consequently constructed in terms of gender inequality. To the critical eye of feminism, men appear as the subject of this construction and women its object.[98] Those who have a penis wield the pen. Social reality is written accordingly.

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92 West, *Jurisprudence and Gender*, *supra* note 65, at 13.

93 "Being a thing for sexual use is fundamental to [women]." MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 130. Although lesbian sexuality might seem to obviate this claim, it actually vindicates it—at least, from a general cultural perspective. "Lesbianism, when visible, has been either a perversion or not, to be tolerated or not." MacKinnon, *Feminism, Marxism, Method, and the State*, *supra* note 39, at 531. From a lesbian perspective, of course, sex between women is viewed quite differently as an expression of the wholeness of women as women, i.e., as not a function of men. Rather, sex is seen "as an act of self-assertion and solidarity between women, it responds to repression precisely by rejecting the degrading role imposed on women by men's definition of them as dependent, relative beings that exist not for themselves but for men." GINETTE CASTRO, AMERICAN FEMINISM 107 (1990).

94 "[W]hat is sexual is what gives a man an erection. Whatever it takes to make a penis shudder and stiffen with the experience of its potency is what sexuality means culturally." MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 137.

95 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 137. MacKinnon notes that when someone announces (for whatever reason) they had sex three times, this means that the man had three orgasms. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 133. On the other hand, female sexual pleasure is generally understood as either "relatively unimportant . . . or mysterious. . . . Female sexual pleasure is constructed as unreliable or incomprehensible (or even voracious and insatiable) in a phallocentric culture." Smart, *supra* note 41, at 202. "[W]omen are often understood to be guardians of what men most want, but of which they have little understanding." Smart, *supra* note 41, at 202. What men most want—sex—is "inconveniently located in women's bodies." Smart, *supra* note 41, at 202.

96 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 127.

97 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 104.

98 "A theory of sexuality becomes feminist methodologically . . . to the extent it treats sexuality as a social construct of male power: defined by men, forced on women,

Hence the penile code: "Man fucks woman; subject verb object."[99]

## IV. Breaking the Penile Code

*Patriarchy is itself the prevailing religion of the entire planet, and its essential message is necrophilia.*[100]

A governing presumption of the above feminist critique of the penile code is that the code is authored by men as the exercise of sexual authority over women. This presumption yields the picture of pre-textual man utilizing the text of law to oppress pre-textual woman. "Sexuality remains largely pre-cultural and universally invariant, social only in that it needs society to take socially specific forms."[101] The sexuality of law—its constructed gender inequality—is thus construed as a function of pre-existent male interests exercising authority over pre-existent female interests. Legal language is thus presumed to articulate pre-linguistic sexual identity—an identity pre-structured in terms of the oppression of women by men.[102]

Carol Smart has remarked:

> It is, therefore, important for feminist theory to go beyond analyses of law which stop at the point of "recognition" that men (as a taken-for-granted biological category) make and implement laws whilst women (as a taken-for-granted biological category) are oppressed by them. We need instead to consider the ways in which law constructs and reconstructs masculinity and femininity, and maleness and femaleness, and contributes routinely to a common-sense perception of difference which sustains the social and sexual practices which feminism is attempting to challenge.[103]

The suspicion voiced here is that the gender inequality constructed by legal language is not properly understood as a function of prelinguistic sexual inequality. For feminist thought, this suspicion has devolved from the perception that the supposition of prelinguistic sexual identity in fact commits feminism to the same conceptual error of which it accuses the masculinism of legal language—namely, mistaking the perspectival for the universal, the partial for

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and constitutive of the meaning of gender." MacKinnon, Toward a Feminist Theory of the State, *supra* note 80, at 128.

99 MacKinnon, *Feminism, Marxism, Method, and the State*, *supra* note 39, at 541.

100 Daly, Gyn/Ecology: The Metaethics of Radical Feminism 39 (1978) [hereinafter Daly, Gyn/Ecology] (emphasis added).

101 MacKinnon, Toward a Feminist Theory of the State, *supra* note 80, at 132.

102 Smart, *supra* note 41, at 207.

103 Smart, *supra* note 41, at 201.

the impartial, the subjective for the objective.[104] This is as much true, moreover, for the prelinguistic sexual identification of men as it is for that of women.

On the one hand, the supposition of a prelinguistic sexual identity for women presumes that all women—as women—exhibit a common, essential femininity.[105] But to many feminists, this essential femininity fails to account for the experience of a great many women.[106] Not only, however, does such an essentialized femininity illegitimately presuppose some sort of monolithic female experience; it further presupposes that this female experience is normative. As Martha Minow remarks, this latter presupposition uncritically endorses the traditionally male paradigm of knowledge whereby the perspective of the few is mistaken for the truth of the many:

> Thus, feminists make the mistake we identify in others—the tendency to treat our own perspective as the single truth—because we share the cultural assumptions about what counts as knowledge, what prevails as a claim, and what kinds of intellectual order we need to make sense of the world.[107]

In other words, such an essentialist perspective commits the same conceptual error of abstract universalism that feminism would accuse men of having committed.[108] "We risk becoming embroiled

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104 "[B]y urging the corrective of the women's perspective, or even a feminist standpoint, feminists have jeopardized our own challenge to simplification, essentialism, and stereotyping." Minow, *Justice Engendered*, *supra* note 6, at 62.

105 ELIZABETH V. SPELMAN, INESSENTIAL WOMAN 3 (1988).

106 Smart, *supra* note 41, at 200. Indeed, to many feminists, such an essential femininity looks suspiciously particular to the norm of womanhood advocated by the white, educated middle-class of the West. *See* Martha Minow, *Feminist Reason: Getting It and Losing It*, *in* GENDER AND LAW 872, 872 (Katharine T. Bartlett ed., 1993) [hereinafter Minow, *Feminist Reason*]; SPELMAN, *supra* note 105, at 3; Levit, *supra* note 75, at 1050; Annie Bunting, *Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies*, 20 J.L. & SOC'Y 6, 12 (1993).

107 Minow, *Feminist Reason*, *supra* note 106, at 874.

108 This has led some feminists to deny the possibility of a "feminist epistemology" altogether—inasmuch as such an epistemology would presuppose a universal and abstract access to the truth of matters, irrespective of the perspective of those seeking such access. Minow, *Justice Engendered*, *supra* note 6, at 64. As Audre Lorde remarks, "*the master's tools will never dismantle the master's house.* They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change." Audre Lorde, *The Master's Tools Will Never Dismantle The Master's House*, *in* THIS BRIDGE CALLED MY BACK 98, 99 (Cherríe Moraga & Gloria Anzaldúa eds., 1983). As far as I can tell, much of this line of feminist thought has devolved from the deconstructionist philosophy of Jacques Derrida, as filtered through the historical writings of Michel Foucault. *See* Annie Bunting, *Feminism, Foucault, and Law as Power/Knowledge*, 30 ALBERTA L. REV. 829 (1992). "Deconstruction clearly rejects any essential category of woman." Bunting, *supra* note 106, at 11.

in what we critique, entranced by what we would demystify."[109] In effect, by excluding those women who fail to exhibit the abstract universal character of what is essentially feminine, the supposition of a prelinguistic female sexual identity undermines the very devotion to care, connectedness, and community that it normatively advocates.[110] For these reasons, feminism has become increasingly disenchanted with the notion of a prelinguistic sexual identity of women.[111]

On the other hand, the supposition of a prelinguistic sexual identity for men presumes that all men—as men—exhibit a common, essential masculinity. Inasmuch as feminism has largely devoted itself to the distinctive interests of women, feminist inquiry into the distinctive interests of men has not been pursued to any great extent. "[A]part from the crucial role of culprit, men have been largely omitted from feminism."[112] Nevertheless, feminist thought has generally presumed a prelinguistic sexual identity of men distinctly antithetical to that of women.[113] This antithesis, moreover, is generally assumed to exhibit the logic of domination. "Dominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity."[114] The same criticisms may be offered against the notion of prelinguistic male sexual identity as were offered above against the notion of a prelinguistic female sexual identity. Moreover, the supposition of a prelinguistic male sexual identity would seem particularly counterproductive to the feminist agenda, namely, to dismantle the structures of male oppression. If men are essentially oppressive, the only viable way to end male oppression would be to eliminate all men.[115] The structures of an oppressive social reality can

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109 Minow, *Justice Engendered*, *supra* note 6, at 65.

110 "In theory, [feminism] demands that we make particularity, context, and diversity central, that we learn to be wary of generalization, that we pay attention to a multiplicity of voices and perspectives without assuming that they will fit into any preconceived category . . . ." Nedelsky, *supra* note 69, at 881-82.

111 Levit, *supra* note 75, at 1049.

112 Levit, *supra* note 75, at 1038.

113 "The potential for material connection with the other defines women's subjective, phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state." West, *Jurisprudence and Gender*, *supra* note 65, at 14.

114 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 130.

115 Or, to remove all men from all positions of power. Or, to have all women withdraw from any institutions of power dictated by men. At its logical extreme, this would entail not only that women remove themselves from all existing political-social-economic structures, but that women ultimately cease speaking the language that constructs them.

never be fixed if those who dictate them are essentially (hence, invariably and inevitably) oppressive.

In effect, moreover, prelinguistic sexual identity renders the essential identity of woman a function of the apposite sexual identity of men (and, of course, vice versa):

> [D]iscourses which reproduce the taken-for-granted natural differences reinforce our 'experience' as men and women. They are also constantly drawn into a dualistic frame of reference whereby the concept of woman is meaningful only so long as there is a concept of man against which it can be formulated. Woman becomes what man is not.[116]

This is especially counterproductive to the feminist agenda of relieving women of their status of being the object of sexual oppression. If women are identified essentially in terms of sexual oppression, it becomes entirely unclear what an unoppressed woman would be. "The point is that self-evident difference is presupposed even though it may be the overcoming of this difference which is the goal."[117] Prelinguistic sexual identity thus restricts the identity of women to their sexuality—a sexuality understood in terms of oppression. "Woman becomes the eternal victim because of her sex which is, in turn, a natural and self-evident attribute."[118] Women are more—much more—than their sex. A feminism that would restrict feminine identity to sexuality is a feminism that does women a disservice.

The notion of prelinguistic sexual identity, then, whether for men or women, seems particularly unhelpful and philosophically problematic. The central question here is whether prelinguistic sexual identity exists prior to the linguistic construction of gender difference.[119] A positive answer would identify distinctively masculine and feminine interests that dictate their linguistic construction as such.[120] Sexual identity is thus presumed to govern the linguistic construction of gender difference. Something prelinguistic, however, cannot be identified. Identification is a distinctively linguistic exercise. A prelinguistic sexual identity, in other words, is oxymoronic because it is understood in no other terms than in those dictated by linguistically constructed gender difference. Consequently, the linguistic construction of gender difference is not viably conceived as a function of prelinguistic sexual

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116 Smart, *supra* note 41, at 204.
117 Smart, *supra* note 41, at 204.
118 Smart, *supra* note 41, at 208.
119 JUDITH BUTLER, BODIES THAT MATTER xi (1993).
120 *Id.* at 5.

identity.[121]

The above perception has profound impact on the feminist critique of legal language. "Just as women have internalized stereotypes of inadequacy, men may have internalized the stereotypic images and behaviors of dominant norms."[122] Distinctively masculine interests are as much a function of the linguistic construction of social reality as are distinctively feminine interests.[123] Legal language, in other words, is not properly conceived as a tool whereby the former dominates the latter. Language does not serve a prelinguistic scheme of sexual oppression. Rather, this language articulates a scheme of linguistically constructed gender difference.[124]

Judith Butler therefore asks: "[i]f gender is a construction, must there be an 'I' or a 'we' who enacts or performs that construction?"[125] The perception here is that language is not dictated by a prelinguistic subjectivity. The subject is as much linguistically constructed as the object of language.[126] Man is not the prelinguistic subject of language, nor woman its object. In a sense, language speaks, and language speaks both man and woman.[127]

But the critical question of this entire discussion still remains: why does language engender the sexual oppression of women by men? "Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse"[128]—an abuse that language reinforces in myriad ways by subordinating distinctively feminine interests to distinctively masculine interests.

This reinforcement is due to the logic of the written word

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121 *Id.*

122 Levit, *supra* note 75, at 1084 (footnote omitted). Levit argues "[t]o the extent that legal precedents shape gender difference, the message is inescapably clear: real men embody power; they are society's breadwinners, criminals, and warriors; and they feel no pain." Levit, *supra* note 75, at 1114.

123 "Just as privilege is often invisible, so are the ways in which stereotypes trap members of dominant groups." Levit, *supra* note 75, at 1080-81.

124 *See generally*, BUTLER, *supra* note 119.

125 BUTLER, *supra* note 119, at 7.

126 "Subjected to gender, but subjectivated by gender, the 'I' neither precedes nor follows the process of this gendering, but emerges only within and as the matrix of gender relations themselves." BUTLER, *supra* note 119, at 7. *See* Bunting, *supra* note 108, at 831, 835-37.

127 An adequate understanding of this point would take us rather far afield into an inquiry of the writings of Martin Heidegger, for it is he who provided the philosophical foundation for this entire line of thought. "We leave the speaking to language." MARTIN HEIDEGGER, POETRY, LANGUAGE, THOUGHT 191 (Albert Hofstadter trans., 1971). Ludwig Wittgenstein may also be understood to have contributed to laying the same foundation. "Language must speak for itself." LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR pt. 1, ¶ 2, at 40 (Rush Rhees ed. & Anthony Kenny trans., 1974).

128 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 149.

whereby language in general, and legal language in particular, quintessentially articulates itself. I suggest it is due, in other words, to the ocular epistemology of the pen. As discussed above, the epistemological structure of the written word dictates not only the character of the subject and object of knowledge respectively, but dictates accordingly the character of textual authority. This character is reflected through an explanatory fixation of objectivity as authored by an elided subjectivity—a subjectivity characterized as universal abstract autonomous individuality and an objectivity characterized as an externality over which the authority of the written word is therefore exercised. As shown throughout our (written) history, men have held the pen whereby women have been penned. Man pens woman. As author, man is engendered by the logic of the written word into the role of subject; woman is engendered into the role of object. Hence the linguistic construction of gender difference.

But what makes this linguistic construction of gender difference sexually oppressive? The written word *pens* reality: fixes it, marks it, lays it out, and articulates it. By virtue of this *pene*tration, the text exercises its authority and thereby engenders an objectivity in apposition to a consequently suppressed subjectivity. The written word absents its author through the imposition of its authority. Yet it is precisely through the imposition of this authority of the written that the absent author ostensibly imposes his word upon reality. The absent author thereby presents himself: a presence effected through the authority of the written word. As Mary Daly so remarkably notes: "[i]t is important to remember that in patriarchy women are vehicles that incarnate the male presence."[129] This is the governing structure of sexual oppression engendered by the linguistic construction of gender difference: "male omnipresence is in reality an omniabsence that depends upon women for its incarnations . . . ."[130] As subject, man imposes himself upon woman as object. In effect, the logic of the written word generates a narrative mythology of the suppressed self seeking to realize itself through embracing the other than itself.[131]

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129 DALY, PURE LUST, *supra* note 38, at 143. She otherwise refers to this as manifestation of male absence. DALY, PURE LUST, *supra* note 38, at 146. (The term "manifested" was suggested to Mary Daly by Eleanor Mullaley in a 1980 conversation. DALY, PURE LUST, *supra* note 38, at 146 n.44).

130 DALY, PURE LUST, *supra* note 38, at 146. Note the implicit theological overtones.

131 "Every story that begins with original innocence and privileges the return to wholeness imagines the drama of life to be individuation, separation, the birth of self, the tragedy of autonomy, the fall into writing, alienation; i.e., war, tempered by imaginary respite in the bosom of the Other." Donna Haraway, *A Manifesto for Cyborgs:*

My contention, then, is that the logic of the written word—the ocular epistemology of the pen—linguistically constructs gender difference in terms of sexual oppression by virtue of the fact that distinctively masculine interests are engendered by the logic of subjectivity and distinctively feminine interests are engendered by the logic of objectivity.[132] Textual authority is consequently exercised over women by those who ostensibly author the text, namely men. Hence, the epistemological structure of the penile code.

However, the penile code conduces to a grand illusion. Textual authority is exercised by the logic of the written word, not by those who author its text. Subjectivity is as much a construction of the logic of the written word as is objectivity. The subject does not dictate the logic of the written word. Rather, the logic of the written word dictates the character of the subject vis-à-vis the dictated character of the object. The author of a text does not author its authority. Although the author seems epistemologically derivative, an illusion is invariably created to the contrary. Those holding the pen always claim the authority of the words penned. Inasmuch as the pen has historically been held by those wielding a penis, men have arrogated this authority to themselves. "Having assumed authorship, [men] claim authority, using the divine . . . authority legitimating their atrocities."[133] This claim constitutes the crux of the feminist critique of language in general, and of legal language in particular; for it is by exposing the illusory character of this claim that the penile code may be broken.

## V. CONCLUSION

*Is my own understanding only blindness to my own lack of understanding?*[134]

The sum and substance of the above discussion is that because men have authored the law, they arrogate to themselves the authority of the law. This arrogation, moreover, is an illusion propagated by the logic of the written word. Men do not dictate this logic. Rather, it dictates us. It linguistically constructs the charac-

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*Science, Technology, and Socialist Feminism in the 1980's*, *in* COMING TO TERMS: FEMINISM, THEORY, POLITICS 173, 200 (Elizabeth Weed ed. 1989).

132 Hence Daly's contention that the governing agenda of "phallocracy" is to expose women, to render the mystery that woman is (to man) safe and unthreatening. DALY, PURE LUST, *supra* note 38, at 62.

133 DALY, PURE LUST, *supra* note 38, at 121.

134 LUDWIG WITTGENSTEIN, ON CERTAINTY ¶ 418, at 54e (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Harper & Row 1972) (emphasis added).

ter of subjectivity as well as the character of objectivity. Men have been scripted in terms of subjectivity, women in terms of objectivity. Given the epistemological dynamic of the relationship between these linguistic constructs, language structures a gender difference articulated in terms of sexual oppression. The authority of legal language is exercised accordingly—the penile code.

Perhaps the most disturbing consequence of this ocular epistemology of the pen is that it is essentially necrophilial. The logic of the written word is a logic of death. Entombed within the order of the written word, the linguistic construction of reality becomes permanently fixed, still, lifeless. Language is a corpus, executed in the spill of ink, monumentalized through its texts.

The sexual oppression engendered by the penile code is accordingly necrophilial: "death [becomes] the ultimate sexual act, the ultimate making of a person into a thing."[135] In ultima, the logic of the written word dictates death. This is as much true, however, for the elided subject of the written word as it is for its *penetrated* object. Through the imposition of his illusory textual authority, the absented author becomes unequally incarnate in the lifelessness of his objectified victim.

So where is it written that man must exercise authority over women? Nowhere, really. It is rather the logic of the written word that ostensibly dictates such an exercise of authority. Nevertheless, this dual sentence of death imposed by the penile code upon both its subject and object is neither inevitable nor inviolate. Its dictation of authority devolves from a grand illusion—an illusion of authority exercised by men over women. Illusions can be broken—must be broken, if we are ever to live together equally as men and women.

The illusion of authority ostensibly dictated by the penile code may be broken, however, only if both its subject and object dis-illusion themselves of its authority: women, through dis-illusioning themselves of the exercise of authority over them; men, through dis-illusioning themselves of the exercise of authority by them. Because the one dis-illusion is a function of the other, the penile code may not adequately be broken independently by either women or men.

For their part, women have already made significant in-roads against the penile code. They have done so, ironically enough, by writing. As authors, women violate the logic of sexual oppression

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135 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 80, at 140.

historically endemic to the written word—not so much by virtue of writing about women, but by virtue of writing *as women.* Women voice themselves as women. To the extent that women voice themselves as women, they resist elision into the universally abstract autonomous individuality of the absented author to which the logic of the written word would otherwise subject them. If women are to dis-illusion themselves of the authority ostensibly exercised over them by the penile code, they must speak in a different voice—their own voice.[136] Women must hold the pen in their own hand, and write *as* women. Only then may women be heard to speak with the authority of women. Thus, by assuming the mantle of their own authority as women, women dismantle the authority ostensibly exercised over them by men.

For their part, men have made few inroads against the penile code. This is not surprising, given the fact that men occupy the more comfortable role in its exercise of authority over women. Men would seem to have little incentive to break the penile code. However, men are as much subjected to the oppressive logic of the written word as women are objectified by it. As dictated by the penile code, the exercise of male authority over the female elides the identity of men. The logic of the written word engenders in men the universally abstract autonomous individuality of the absent author. We are consequently alienated from ourselves as men. We speak not with the authority of men, but with the authority of authority—an authority exercised by the logic of the written word. We will break the penile code only by writing as men. To the extent that we write as men, we eschew the universally abstract autonomous individuality to which we have historically been subjected. In order to dis-illusion ourselves of the abstract authority ostensibly exercised by us, we must speak with our own authority *as* men. By thus assuming the mantle of our own authority as men, we dismantle the authority apparently exercised by us over women.

The penile code may be broken, then, by women writing *as* women, and men writing *as* men. This is historically difficult for women and conceptually difficult for men. Women must raise their voice against the illusion imposed upon them that they have no authority to speak. Men must lower their voice against the illusion that they speak with the universal and autonomous authority of the abstract author. Most importantly, both women and men must hear each other speak. Only then will women and men speak

136 *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1993).

respectively as women and men, break the penile code, and help end the sexual oppression of women by men.

# BEACH EROSION AND HURRICANE PROTECTION IN THE SECOND CIRCUIT: THE STATUTE OF LIMITATIONS AS A GOVERNMENT NEMESIS

*Barbara Affeldt* †

*One of the world's most spectacular sand beaches runs from New England down the Atlantic coast, winding around Florida to reach along the northern edge of the Gulf of Mexico. Much of the 2,700-mile beach lies on the 295 "barrier islands" that stand between the sea and the mainland along the two coasts. Both the mainland beaches and the islands are under constant attack from the sea, which sometimes builds them up, sometimes tears them down[,] and continuously reshapes them.*

*The early inhabitants of the shore zone, recognizing that the coast has always been a hazardous place for people, settled on the bay side of the barrier islands, as far inland from the beach as possible. Construction was also kept well back of the mainland beaches. Over the past several decades that pattern has been reversed. Construction now takes place as close as possible to the shoreline. Today such resorts as Atlantic City, Ocean City, Virginia Beach, Hilton Head, Jekyll Island, Miami Beach[,] and Galveston Island occupy barrier islands, and summer homes crowd many of the beaches. Naturally pressure for public works to protect the islands and beaches is strong.*[1]

## I. INTRODUCTION

A vigorous debate over the government's proper role in beach erosion and hurricane protection exists. There are those who believe that men and women can never win the battle against nature, and any attempts to inhibit the natural process of erosion of our nation's shorelines are economically illogical.[2] If shore restoration

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1 Robert Dolan & Harry Lins, *Beaches and Barrier Islands*, 257 SCIENTIFIC AMERICAN 68 (July 1987).

2 *See, e.g.*, BARRIER BEACH PRESERVATION ASSOCIATION, THE WESTHAMPTON BEACH EROSION PROBLEM: NATURE VS[.] SHORTSIGHTED MAN (July 1984); Joe Demma, *Ban on Building at Shore Asked, Klein Seeks to Halt Construction That Causes Erosion Along the Ocean and L.I. Sound*, NEWSDAY (Long Island), Mar. 28, 1973, at 3; Mitchell R. Freedman & Donald Meyers, *Beach Erosion Danger, Klein Blasts 'Houses in Teeth of Atlantic,'* LONG ISLAND PRESS, Mar. 28, 1973, at 1; Robert Fresco, *Klein Expands Beach-Control*

projects are initiated, a related issue is whether the direct beneficiaries of these projects should contribute their fair and appropriate share of the overall costs. This issue may be the primary underlying factor that stimulates criticism of many projects.[3] Indeed, because beachfront property is coveted and usually expensive to own, there is a perception that beach nourishment[4] projects are government "gifts" to the wealthy.[5] But there are those who assert that government intervention is critical in preserving United States shorelines for the beneficial use and enjoyment of all its citizens.[6] As the debate over shore restoration projects continues, a principal public policy issue is the appropriate cost shares for federal and nonfederal (i.e., state and local) contributions to these projects.[7]

This article proposes one explanation for the decreased support for federal participation in shore restoration—the continually

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*Plan*, NEWSDAY (Long Island), Mar. 29, 1973, at 7; Jane Snider, *Groins Unwanted, Klein Tells Army*, NEWSDAY (Long Island), Oct. 25, 1974, at 7; Hope Spencer & Jim Scovel, *Waves Leave Ruin, Controversy*, NEWSDAY (Long Island), Mar. 24, 1973, at 3.

[3] COMMITTEE ON BEACH NOURISHMENT AND PROTECTION, NATIONAL RESEARCH COUNCIL, BEACH NOURISHMENT AND PROTECTION 43 (1995) [hereinafter BEACH NOURISHMENT AND PROTECTION].

[4] Beachfill or nourishment is the process by which beach-compatible sand is dredged from the bed of a waterbody and pumped onto the beach to provide hurricane protection and beach erosion-control.

[5] BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 43.

[6] *See generally* American Shore and Beach Preservation Association, Position Paper, *On a Federal Policy for Shore Protection*, 64 SHORE & BEACH 3 (Oct. 1996).

Congress concluded that beach erosion and hurricane protection was important when it charged the United States Army Corps of Engineers (the "Corps") with primary responsibility in this area, Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401, 403, 404, 406-09, 411-16, 418, 502, 549, 686, 687 (1993), which necessarily included the allocation of government funds. R. Anne Sudar et. al., *Shore Protection Projects of the U.S. Army Corps of Engineers*, 63 Shore & Beach 3 (Apr. 1995). In the public's perception as well, beach preservation is of importance, and worth the allocation of resources. *See* BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 14. "Living at or near a coastline, particularly one with a sandy beach, is highly prized. [Indeed, there has been] a marked escalation in coastal population growth and in the value of land in many coastal areas." BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 14. A 1994 report by the U.S. Army Institute for Water Resources shows that federal spending on erosion control has been small, and has been cost-effective. SHORELINE PROTECTION AND BEACH EROSION CONTROL TASK FORCE, U.S. ARMY CORPS OF ENGINEERS, SHORELINE PROTECTION AND BEACH EROSION CONTROL STUDY: PHASE I: COST COMPARISON OF SHORELINE PROTECTION PROJECTS OF THE U.S. ARMY CORPS OF ENGINEERS, IWR Report 94-PS-1 (Jan. 1994) [hereinafter SHORELINE PROTECTION AND BEACH EROSION CONTROL TASK FORCE] (the results of this report were published in R. Anne Sudar et. al., *supra* at Ch. 3). In addition, "some beaches are recognized as having significant environmental value as habitats for a wide range of marine life, including threatened or endangered species." BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 14.

[7] BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 43.

rising costs of litigation over government–sponsored projects. The focus of this article is an analysis of recent litigation concerning beach restoration in the Second Circuit, particularly on Long Island's south shore. The Second Circuit labeled construction and maintenance of one particular government project in this area a continuing tort, tolling the statute of limitations. This ruling exposes the government to litigation concerning this project indefinitely. As a result, the government will be forced to abandon future shore protection projects and spend those funds on perpetual litigation. The practical effect is that government intervention to protect this nation's shorelines will cease.

## II. BACKGROUND

The mission of the United States Army Corps of Engineers (the "Corps") is to "provid[e] quality, responsive engineering services to the nation."[8] To carry out this mission, the Corps presently employs nearly 37,000 Americans worldwide.[9] The Corps' New York District is one of five districts within its North Atlantic Division.[10] The New York District oversees projects in an eight state region (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) as well as Greenland.[11] The area within the boundaries of the New York District has the largest civilian population of any of the other districts,[12] and nearly twenty percent of all congressional members have constituents within this area.[13]

The Corps provides engineering and related services in four areas: water and natural resource management (civil works), military construction and support, engineering research and development, and support to other government agencies.[14] One of the

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[8] N.Y. DISTRICT, U.S. ARMY CORPS OF ENGINEERS, COMMAND BRIEFING 1 (1995) [hereinafter COMMAND BRIEFING] (available from the U.S. Army Corps of Engineers, N.Y. District, Executive Office, Room 2100, 26 Federal Plaza, New York, N.Y. 10278).

[9] U.S. ARMY CORPS OF ENGINEERS, SERVICE TO THE NATION: THE SPIRIT OF THE CORPS (n.d.).

[10] Recently, Congress directed the Corps to reduce the number of its divisions to no more than eight and no fewer than six. Energy and Water Development Appropriations Act, 1997, Pub. L. No. 104-206, 1996 U.S.C.C.A.N. (110 Stat. 2984) 2989. *See Divisions Restructure*, ENGINEER UPDATE, Apr. 1997, at 1.

[11] N.Y. DISTRICT, U.S. ARMY CORPS OF ENGINEERS, A GUIDE TO SERVICES 13 (1989) [hereinafter A GUIDE TO SERVICES] (available from the U.S. Army Corps of Engineers, N.Y. District, Office of Public Affairs, Room 2108, 26 Federal Plaza, New York, N.Y. 10278).

[12] *Id.* at 1.

[13] COMMAND BRIEFING, *supra* note 8, at 2-3.

[14] U.S. ARMY CORPS OF ENGINEERS, NATION-BUILDERS 2 (n.d.) (available from the

Corps' primary civil works missions is the control of beach erosion and hurricane protection.[15] Corps projects protect the nation's sea and lake shores from storm damage, but also reduce, or in some cases replace, losses from coastal erosion.[16] In the civil works area, the New York District is responsible for activities in the watershed areas of the Hudson River Basin and Lake Champlain, the Atlantic coasts of New Jersey and New York, the Hackensack, Passaic, and Raritan River Basins in New Jersey, and New York Harbor.[17]

One project undertaken by the New York District, designed to control beach erosion and hurricane damage on the south shore of Long Island, is the *Fire Island Inlet to Montauk Point, Long Island, New York Beach Erosion and Hurricane Project.*[18] Increasing erosion in this area has long been of particular concern due to occurrences of major hurricanes and severe storms.[19] In 1955, Congress authorized the Secretary of the Army, in cooperation with the Secretary of Commerce and other federal agencies, to survey hurricanes and hurricane damage in the eastern and southern United States, and to examine methods for minimizing the damage caused by erosion and storms.[20] One of the purposes of the survey was to determine "possible means of preventing loss of human lives and damages to property, with due consideration of the economics of proposed breakwaters, seawalls, dikes, dams, and other structures, warning services, or other measures which might be required."[21] The findings of this survey were eventually documented in a final report to

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U.S. Army Corps of Engineers, N.Y. District, Office of Public Affairs, Room 2108, 26 Federal Plaza, New York, N.Y. 10278).

15 A GUIDE TO SERVICES, *supra* note 11, at 9.

16 A GUIDE TO SERVICES, *supra* note 11, at 9.

17 COMMAND BRIEFING, *supra* note 8, at 2.

18 N.Y. DISTRICT, U.S. ARMY CORPS OF ENGINEERS, GENERAL DESIGN MEMORANDUM No. 1, MORICHES TO SHINNECOCK REACH (1963 & Supp. 1969, 1980) [hereinafter GENERAL DESIGN MEMORANDUM No. 1] (documents may be obtained through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1966), by request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

19 *See, e.g.*, Laura Durkin, *Cohalan Sees Storm Threat to Shellfish*, NEWSDAY (Long Island), Apr. 24, 1984, at 19; Susan Gilbert, *America Washing Away*, SCIENCE DIGEST, Aug. 1986, at 28; Sarah Lyall, *Man vs. Nature in L.I. Beach Restoration*, N.Y. TIMES, May 10, 1991, at B1; John Rather, *Beach Homes Imperiled Anew*, N.Y. TIMES, Apr. 8, 1984, § 21, at 1; John Rather, *How Much More Erosion Can Beaches Take?*, N.Y. TIMES, Mar. 21, 1993, § 13, at 1; Steve Wick & Sidney C. Schaer, *A Way of Life Washed Away, Long Island Community Being Swallowed by Ocean*, NEWSDAY (New York), Mar. 21, 1993, at 50; Steve Wick & Sidney C. Schaer, *All Fall Down, The Disappearance of Dune Road*, NEWSDAY (Long Island), Mar. 21, 1993, at 4.

20 Coastal and Tidal Areas—Survey—Damages, Pub. L. No. 84-71, 1955 U.S.C.C.A.N. (69 Stat. 132) 152.

21 *Id.*

Congress (the "Final Report").[22] The section of the study concerning the Atlantic coast of Long Island from Fire Island Inlet to Montauk Point appeared as House Document No. 425.[23] The Final Report concluded that one of the primary ill-effects of hurricanes and storms was the erosion of beaches and dunes along the shoreline.[24]

In the Final Report, the Corps proposed an ambitious project to reshape eighty-three miles of coastline, or approximately seventy percent of Long Island's total ocean frontage.[25] The plan provided for beach and dune fill, including periodic nourishment to maintain shore stability, "grass planting on the dunes, relocation or raising of existing buildings which are located in the dune area, [and] interior drainage structures . . . ."[26] The Corps also recognized that construction of a series of protective jetties along the beach, technically known as "groins," could interrupt the flow of sand along

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22 CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY, SOUTH SHORE OF LONG ISLAND FROM FIRE ISLAND INLET TO MONTAUK POINT, NEW YORK, BEACH EROSION CONTROL STUDY AND HURRICANE SURVEY, H.R. DOC. NO. 86-425 (1960).

23 At that time, the U.S. Army Chief of Engineers reported to the Secretary of the Army that:

> 12. The shores of the area are exposed to waves of the Atlantic Ocean. For winds from the east and southeast the fetch is unlimited, but for those from the west and southwest the fetch is limited by the mainland of New Jersey. Thus, the resulting energy components produce a dominant westward littoral transport of beach material. Reversals in direction of transport of materials is greater in the eastern part of the area than in the western part, resulting in less net transport in the eastern part. Intermittent surveys of the shore and offshore depths since 1834 indicate alternate erosion and accretion with a net accumulating loss of beaches. Since 1940[,] the net loss westward of Mecox Bay is estimated at about 300,000 cubic yards annually, resulting in recession of the beaches in certain areas ranging from a maximum of 500 feet . . . to 70 feet . . . . The value of land lost by erosion is estimated at $593,000 annually.
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> 13. Hurricane losses in the area result chiefly from hurricane tides, action of storm waves, inundation caused by hurricane-induced rain, and wind action. Records indicate that since 1635 the area was affected by 126 storms, of which 9 were unusually severe; 17, severe; 41, moderate; and 59, threats only. A recurrence of the maximum hurricane tide of record, that of September 1938 when 45 lives were lost, under 1958 conditions would cause inundation and wave damages in the area estimated at $52,600,000. The average annual ocean tidal damages in the area are estimated at $3,667,000, including $338,000 on the mainland along the inner bays.

*Id.* ¶¶ 12-13, at 4-5.

24 *Id.* ¶ 148, at 76.

25 *Id.* ¶ 3, at 1.

26 *Id.* ¶ 123, at 61.

the shoreline and inhibit ongoing erosion.[27]

Groins are solid structures, sometimes made out of stone, which are constructed perpendicular to the shoreline in groups to prevent storm damage, but especially to reduce and even replace sand loss from coastal erosion.[28] The function of groins is to trap sand deposited by the littoral drift[29] on their updrift side (i.e., on the side facing the current), and replace sand lost due to erosion.[30] However, groins may also cause downdrift beach starvation.[31] Since groins extend out perpendicular from the shoreline up to 500 yards in some cases, the stretch of beach on the downdrift side (i.e., the side facing away from the flow of the littoral drift) becomes vulnerable to erosion by the current.[32] Some studies indicate that erosion in these areas is actually increased—until a point further downdrift when the next groin begins to trap sand.[33] At least one of these studies indicates that, when erosion becomes severe enough, construction of a subsequent groin is necessary to protect the affected downdrift side.[34] This causes further erosion, requiring construction of yet another groin.[35] Conceivably, construction of an initial groin might lead to an entire coastline pro-

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[27] *Id.* ¶ 14, at 5, ¶ 5, at 18, ¶ 12, at 21, ¶ 102(d), at 54, ¶¶ 113-14, at 58-59, ¶ 130, at 63, ¶ 148, at 76, ¶ 151, at 77.

[28] 1 COASTAL ENGINEERING RESEARCH CTR., DEP'T OF THE ARMY, SHORE PROTECTION MANUAL 5-35 (4th ed. 1984) [hereinafter SHORE PROTECTION MANUAL VOL. 1]; 2 COASTAL ENGINEERING RESEARCH CTR., DEP'T OF THE ARMY, SHORE PROTECTION MANUAL 6-76 (4th ed. 1984) [hereinafter SHORE PROTECTION MANUAL VOL. 2] (documents may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

[29] "The beach and nearshore zone of a coast is the region where the forces of the sea react against the land. The physical system within this region is composed primarily of the motion of the sea, which supplies energy to the system, and the shore, which absorbs this energy." SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 1-4. A "dynamic feature of the beach and nearshore physical system is *littoral transport*, defined as the movement of sediments in the nearshore zone by waves and currents. . . . The material that is transported is called *littoral drift*." SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 1-13.

[30] Dolan & Lins, *supra* note 1, at 73, 76; Omar J. Lillevang, *Groins and Effects - Minimizing Liabilities, in* COASTAL ENGINEERING, SANTA BARBARA SPECIALTY CONFERENCE 749, 749 (AM. SOC'Y OF CIVIL ENG'RS, 1965). The *General Design Memorandum No. 1* for the project stated, "[t]he function of the groin is to provide, to build and to widen the protective beach by trapping littoral drift, or to retard the loss of sand fill with minimum interference with littoral movement." GENERAL DESIGN MEMORANDUM NO. 1, *supra* note 18, at 23.

[31] *See* Douglas L. Inman & Birchard M. Brush, *The Coastal Challenge*, SCIENCE, July 6, 1973, at 20, 29; *see also* Lillevang, *supra* note 30, at 749.

[32] SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 5-35, 5-43.

[33] *See, e.g.*, Inman & Brush, *supra* note 31, at 29; Lillevang, *supra* note 30, at 750.

[34] *See* Inman & Brush, *supra* note 31, at 29.

[35] *See* Inman & Brush, *supra* note 31, at 29.

tected by groins.[36] To combat this problem, sand fill is often pumped onto the shore, into the "compartments" between the groins.[37]

The precise construction method to be employed, and the number of groins to be erected, is left within the discretion of the Corps, based upon experience and need.[38] The Corps recognizes, however, that if groins are to be employed, one of two alternative methods of construction may be necessary.[39] The littoral drift on the south shore of Long Island flows from east to west. If groins were constructed without beach fill between the groin compartments, construction should begin at the west end of a particular parcel and proceed in an easterly direction.[40] This method would not cause erosion west of the last groin if there were no beach at that point. If construction begins at the east end of a parcel, sand fill should be placed in the groin compartments as they are constructed.[41] This would prevent erosion since the groin would trap very little sand as it flowed from east to west because the area between the groins would already be filled.

Congress approved the beach erosion and hurricane protection project recommended for Long Island's south shore in the Rivers and Harbors Act of 1960.[42] The Rivers and Harbors Act of 1960[43] and the Final Report[44] required New York State and Suffolk County to agree to certain conditions of local cooperation as a prerequisite for federal participation in the project. Specifically, New

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36 One study suggests:

> The real "need" for a second or third structure may have been only temporary . . . . However, if additional structures are built, the downcoast erosion becomes more severe with each succeeding structure, until finally a "point of no return" is reached where the need for additional protection from erosion becomes so urgent that the only choices are: (i) to continue to build protective works, (ii) to find a new source of beach sand, or (iii) possibly a combination of both.

Inman & Brush, *supra* note 31, at 29.

37 SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 5-43.

38 H.R. DOC. NO. 86-425, ¶ 130, at 63, ¶ 151, at 77 (1960). No precise recommendations were set forth in the Final Report relating to construction of, or number of, groins, although the report recognized that "[s]ome limited groin construction might be found warranted initially in the most vulnerable locations." *Id.* ¶ 114, at 59.

39 *Id.* ¶ 122, at 61.

40 *Id.*; SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 106-08.

41 H.R. DOC. NO. 86-425, ¶ 122, at 61; SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 106-08.

42 Land Acquisition Policy Act of 1960, Pub. L. No. 86-645, § 101, 74 Stat. 480, 546-50 (1960).

43 *Id.* at 551.

44 H.R. DOC. NO. 86-425, ¶ 18, at 7.

York State was to submit specific assurances of local cooperation, and was obligated to provide funding.[45] Suffolk County was to contribute a portion of the funding required for the project, obtain easements from landowners, and maintain the project after completion (i.e., pump sand fill into the groin compartments).[46]

The project authorized up to fifty groins, apportioned between three sections ("reaches"); thirteen groins were to be located in the reach between Fire Island Inlet and Moriches Inlet, twenty-three on the Westhampton Barrier Beach, and fourteen in the Southampton to Beachampton Reach.[47] In 1963, New York State and the Corps executed an Assurance of Local Cooperation (the "Assurance") for the Westhampton Barrier Beach portion of the project.[48] This Assurance provided for the construction of thirteen groins starting at the east end of the barrier beach with extensive sand fill in the compartments.[49] New York State agreed to maintain all the works, to undertake periodic beach nourishment, and to adopt laws to preserve and restore beaches and dunes.[50] However, Suffolk County's Board of Supervisors refused to participate in the project as defined by the Assurance, objecting to the placement of sand fill in the compartments.[51] Suffolk County approved a limited project which included construction of eleven groins, beginning at the east end of the barrier beach, without the placement

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45 § 101, 74 Stat. at 551, 553-54.

46 *Id.* at 553-54.

47 GENERAL DESIGN MEMORANDUM No. 1, *supra* note 18, app. A.

48 The specific terms of participation were set forth in an Assurance of Local Cooperation, signed by the State Superintendent of Public Works on August 14, 1963. U.S. Army Corps of Engineers, Assurance of Local Cooperation (1963) (amended 1964, 1968) [hereinafter Assurance of Local Cooperation] (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

49 Letter from Col. M.M. Miletich, District Engineer, U.S. Army Corps of Engineers, to J. Burch McMorran, Superintendent, New York State Department of Public Works, advising of the inclusion of thirteen groins in the initial project construction (Aug. 1, 1963) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

50 Assurance of Local Cooperation, *supra* note 48, at 2-3.

51 *See Beach Erosion Vote Delayed by Suffolk in Fiscal Dispute*, N.Y. TIMES, Aug. 6, 1963, at 33; Ronald Maiorana, *Suffolk Hedges on Erosion Work: Board Approves Army Plan for Beach Control, but Imposes Conditions*, N.Y. TIMES, Aug. 13, 1963, at 33. Suffolk County's concerns were summarized in Rapf v. Suffolk, 755 F.2d 282 (2d Cir. 1985). "[S]ince [Suffolk] County was to be responsible for maintenance of the groins, it would have the [financial] burden of maintaining any sand fill which was added; and [Suffolk] County showed preference for the wealthier and more politically influential homeowners in the East end." *Id.* at 286 n.5.

of sand fill.[52]

Work on the project began in 1965 with construction of two groins at Georgica Pond in East Hampton.[53] No fill was added to this groin compartment. Between January 1965 and October 1966, eleven groins were installed on the Westhampton Barrier Beach, beginning on the east end. Historically, this section is most vulnerable to storms.[54] Clearly, at the time of design, the Corps contemplated that these groin compartments would be filled.[55] However, the compartments between these groins were not filled at the insistence of local interests.[56] Since natural filling did not occur, storms damaged the area immediately west of the eleven groins.[57] Due to this subsequent depletion of sand from the western beach, the Corps wrote to New York State urging that "dune and beach fill [was] critically required" between the groins.[58] New York State re-

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52 Suffolk County, N.Y., Resolution No. 74-64, Relating to Erosion on the Atlantic Shore Front in Suffolk County and the Construction of Groins (Feb. 3, 1964).

53 GENERAL DESIGN MEMORANDUM NO. 1, *supra* note 18, app. A.

54 *Id.* at app. D9

55 The *General Design Memorandum No. 1* for this project states:

> Because the shore is being reinforced with sand fill immediately after the construction of groins, the groins will serve to retard the loss of sand. Because the shore in which the groins will be placed is subject to severe erosion and storm breakthrough[ ] of the narrow barrier beach, the groins will serve to protect the width of the reinforced beach by retarding loss of sand, and interrupt the lateral currents that are caused by the breaks through the off-shore-bar and that cause heavy cut back of the shore.

*Id.*

56 *See supra* notes 51-52 and accompanying text.

57 *See* Letter from Col. R.T. Batson, District Engineer, U.S. Army Corps of Engineers, to Division Engineer, North Atlantic Division, reporting the results of an inspection of the groin field to determine whether the dune and beach fill phase of the work should be initiated in accordance with the agreement between New York State and the federal government that artificial fill would be added when and to the extent found necessary by the Chief of Engineers (May 8, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278); Letter from Col. R.T. Batson, District Engineer, U.S. Army Corps of Engineers, to Division Engineer, North Atlantic Division, reporting the results of a field reconnaissance made of Fire Island and the area east of Moriches Inlet to determine existing beach conditions (Feb. 20, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

58 Letter from Brig. Gen. H.G. Woodbury, Jr., Director of Civil Works, United States Department of the Army, to J. Burch McMorran, Superintendent, New York State Department of Public Works, reporting that groins alone would not provide the beach erosion control and hurricane protection authorized, and that dune and beach fill was critically required (June 1, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

plied requesting the placement of beach fill in the existing groin field, and the construction of four additional groins with dune and beach fill on Westhampton Beach.[59] Once again, Suffolk County objected to the placement of fill. Between August 1969 and November 1970, however, four additional groins were built to the west, and the four westernmost compartments were filled, to alleviate damage.[60] Due to funding limitations, Suffolk County could not support the subsequent artificial filling of the compartments between the first eleven groins.[61] Additionally, Suffolk County would not support a proposal by the Corps to undertake further groin construction.[62] To date, no further construction of groins on the beach has taken place.[63]

## III. THE PROBLEM

As a result of these and similar projects, landowners have brought suit for erosion allegedly caused by inadequate construction and/or maintenance of projects.[64] Since the New York Dis-

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59 Letter from J. Burch McMorran, Superintendent, New York State Department of Public Works, to Brig. Gen. H.G. Woodbury, Jr., Director of Civil Works, United States Department of the Army, requesting construction of four additional groins and the placement of dune and beach fill in all groin compartments (June 16, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

60 The westernmost portion of the 15 groins is located 3.2 miles east of Moriches Inlet. *See* GENERAL DESIGN MEMORANDUM No. 1, *supra* note 18, app. A, D.

61 *See* David A. Andelman, *U.S. Plan on Beaches Disputed*, N.Y. TIMES (BQLI), Apr. 1, 1973, at 87; Demma, *supra* note 2, at 3; Freedman & Meyers, *supra* note 2, at 1; Fresco, *supra* note 2, at 7; Ed Lowe, *Gilgo Beach Washed Out by Storm*, NEWSDAY (Long Island), Mar. 27, 1973, at 5; Donna Petrozzello, *Dispute Snags Funds to Plug Inlet*, HAMPTON CHRON., Mar. 11, 1993, at 1; John Rather, *Plan Gains to Monitor and Predict Changes in Beach Erosion*, N.Y. TIMES (L.I.), July 5, 1992, at 7; Snider, *supra* note 2, at 7; Spencer & Scovel, *supra* note 2, at 3; Bob Wacker, et. al., *A Barrier Beach Is Breached . . . and Now Its Doom Is Predicted*, NEWSDAY (Long Island), Apr. 4, 1973, at 3.

62 *See* newspaper articles cited *supra* note 61.

63 However, the New York District has begun pumping beach fill into the compartments between the first eleven groins as part of a settlement agreement stemming from recent litigation concerning the construction. *See Erosion Suit Settled*, THE EASTHAMPTON STAR, Mar. 27, 1986, at 1.

64 *See, e.g.*, Applegate v. United States, 28 Fed. Cl. 554 (1993), *rev'd*, 25 F.3d 1579 (Fed. Cir. 1994) (suit by 217 owners of beachfront property near Port Canaveral and Sebastian Inlet in Brevard County, Florida, seeking recovery of compensation for erosion and flood damage to their properties allegedly caused by the Corps in constructing and maintaining the Canaveral Harbor Project, designed to provide a deepwater harbor on the east coast of Florida); Pitman v. United States, 457 F.2d 975 (Ct. Cl. 1972) (suit to recover just compensation for an alleged taking of beachfront property in Brevard County, Florida. Plaintiff alleged he had sustained harm to his property as a result of construction and operation of the Canaveral Harbor Project. The essence of plaintiff's claim was that the project had interrupted southerly littoral drift and

trict first commenced work on Long Island's south shore, several suits have been filed in the Second Circuit against the United States pursuant to the Federal Tort Claims Act (the "FTCA"), and requesting a total of nearly $300 million in damages.[65] Generally, these plaintiffs sued the federal government alleging that their properties, located to the west of the groins, suffered catastrophic damage.[66] They further alleged that this damage occurred as a result of improper design, construction, and maintenance of the groins presently in place and the failure to complete the beach erosion and hurricane protection project in this area.[67] These plaintiffs asserted that erosion along Long Island's south shore was minimal prior to the beginning of groin construction.[68] However, the area to the west of the groins eroded much faster after construction was completed.[69] In addition, most of the sand was

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thereby caused the loss of about four acres of his property.); Miramar Co. v. Santa Barbara, 143 P.2d 1 (Cal. 1943) (owner of a large resort hotel sued seeking compensation because the hotel's beach property had been reduced in size by erosion allegedly caused by the Santa Barbara Breakwater); Katenkamp v. Union Realty Co., 59 P.2d 473 (Cal. 1936) (owners of oceanfront land east of the defendant's two groins brought a series of suits seeking an injunction to remove them for allegedly causing erosion of the plaintiffs' property).

65 In 1973, Thomas O'Grady and Dorothy Patton brought suit against the United States and Suffolk County in the United States District Court for the Eastern District of New York. Complaint, O'Grady v. United States, No. 73 Civ. 1182 (E.D.N.Y. filed Nov. 2, 1973). *O'Grady* was brought on behalf of all property owners living immediately west (i.e., on the downdrift side) of the 15th groin, and alleged that the partially completed groin field caused rapid erosion of the plaintiffs' property. *Id.*

*O'Grady* was superseded in 1984 when a complaint was filed by individual homeowners on the west end of the Westhampton Barrier Beach. Complaint, Rapf v. Suffolk, No. CV-84-1478 (E.D.N.Y. filed Apr. 11, 1984). The plaintiffs sought injunctive relief against Suffolk County, alleging that the County "constructed or caused to be constructed" groins along the barrier beach, and that the County's failure to maintain the groins constituted a continuing nuisance that threatened to destroy their homes and those of their neighbors. *Id.*

While the *Rapf* suit was pending, Michael Kennedy, a prominent Manhattan attorney, brought an action against the United States alleging that construction and supervision of the groins at Georgica Pond was performed negligently, blocking the normal replenishment of sand on his property and causing a constant and swift loss of beachfront. Complaint, Kennedy v. United States, No. CV-85-0581 (E.D.N.Y. filed Feb. 25, 1985).

66 *See, e.g.*, Complaint at 3, Kennedy v. United States, 643 F. Supp. 1072 (E.D.N.Y. 1986) (No. CV-85-0581); Complaint at 7, Rapf v. Suffolk, 755 F.2d 282 (2d Cir. 1985) (CV-84-1478). An alarming photograph of a 1992 breach of the barrier island at Westhampton Beach, just west of the 15th groin, which led to catastrophic damage, is reprinted on the cover of U.S. Army Corps of Engineers, NEW YORK DISTRICT TIMES, May, 1996, at 1.

67 *See, e.g.*, Complaint at 3, *Kennedy* (No. CV-85-0581); Complaint at 7, *Rapf* (CV-84-1478).

68 *See, e.g.*, Complaint at 7, *Rapf* (CV-84-1478).

69 *Id.*

trapped by the groins in the first few years after their construction was completed, causing a majority of the erosion to plaintiffs' properties over the last four decades.[70]

One of the government's preliminary procedural defenses was an assertion that these suits were time barred by the FTCA's two-year statute of limitations.[71] However, the Second Circuit consistently rejected the government's argument, holding that the plaintiffs stated a claim "for a continuing tort for which the cause of action accrues anew each day."[72] Thus, it is possible that numerous other plaintiffs could bring suit against the United States, since the practical effect of this ruling creates a new cause of action every day. It is conceivable that the government will continue to assert the statute of limitations defense in its answers, and argue that the Second Circuit erred in its decision. To date, the United States Supreme Court has not ruled on the issue of whether construction of shore restoration projects may constitute continuing torts under the FTCA, thereby exposing the government to liability years after projects are completed.[73]

## IV. THE FEDERAL TORT CLAIMS ACT AND ITS STATUTE OF LIMITATIONS

The FTCA and its provisions[74] represent a limited waiver of the United States' sovereign immunity from liability arising out of the tortious conduct of its employees.[75] As such, the FTCA is a

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70 *Id.*

71 *See, e.g.*, Rapf v. Suffolk, 755 F.2d 282, 288 (2d Cir. 1985); Kennedy v. United States, 643 F. Supp. 1072, 1079 (E.D.N.Y. 1986).

72 *Rapf*, 755 F.2d at 292.

73 The Supreme Court did, however, address this issue with regard to a claim for a taking under the Tucker Act, 28 U.S.C. §§ 507, 1346(a), 1402(a), 1491, 1496, 1497, 1501, 1503, 2071, 2072, 2411, 2501, 2512 (1993). *See* United States v. Dickinson, 331 U.S. 745 (1947).

74 The provisions of the FTCA, originally enacted as the Legislative Reorganization Act of 1946, are now scattered throughout various sections of the United States Code. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified as amended at 28 U.S.C. §§ 1291, 1346(b), (c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-2680 (1993)).

75 LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 1.03, at 1-13 (1997).

> An immunity is a freedom from suit or liability. . . . The traditional governmental immunity protects governments at all levels from legal actions. At the level of the state and national governments, this immunity is usually referred to as sovereign immunity . . . . Though the notion of sovereign immunity might seem best suited to a government of royal power, the doctrine was nevertheless accepted by American judges in the early days of the republic, and the law of the United States has

critical remedial provision because it allows citizens to bring suit against the federal government for its tortious conduct. Indeed, it constitutes the most comprehensive remedy in terms of coverage.[76] The explicit language of the FTCA assures that it was designed to address any tort actionable under state law in the jurisdiction where the conduct occurs.[77] Most scenarios, such as an automobile accident, leave no doubt that a tort has been committed.[78] There is no conceptual difficulty as to when this tort was committed and by whom, and whether there was resultant damage. However, some scenarios comprise more complex, attenuated, and unperceived conduct. Such cases may include medical malpractice, toxic tort, and environmental tort claims. Particularly in these situations, the accrual dates are difficult to determine. The operation of the statute's two-year limitations period is therefore problematic. Such is the case when the tort appears to be ongoing, for which the plaintiff defers bringing suit. The availability of an FTCA remedy, then, often turns on the operation of the statute's limitations period.

In the original Legislative Reorganization Act of 1946, the statute of limitations period was established at one year.[79] In 1949, this Act was amended, increasing the limitations period to two years.[80] The provisions were modified again in 1966, requiring the filing of

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> ever since been that, except to the extent the government consents to suit, it is immune. . . . [The FTCA] gave a general consent of the government to be sued in tort . . . .

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1032-34 (5th ed. 1984).

[76] JAYSON, *supra* note 75.

[77] 28 U.S.C. § 1346(b) provides that "district courts . . . shall have exclusive jurisdiction of civil actions [in all cases] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[78] *See* S. REP. No. 89-1327, at 2519 (1966).

[79] § 420, 60 Stat. 812, at 845.

[80] Federal Tort Claims Act—Time for Bringing Suit, Pub. L. No. 81-55, 1949 U.S.C.C.S. (62 Stat. 971) 62, 66 (codified as amended at 28 U.S.C. § 2401(b) (1994)).

> The committee feel[s] that, in comparison to analogous [s]tate and [f]ederal statutes of limitation, the existing [one]-year period is too short and tends toward injustice in many instances. For example, an analysis of the statutes of limitation of the 48 [s]tates and the District of Columbia reveals that the average limitation provided for personal injury cases is 2.96 years, for property damage cases it is 3.90 years, and for cases of death by wrongful act it is 1.90 years. The over[ ]all combined average is the one to which the Tort Claims Act limitation should be compared, since the Tort Claims Act covers all three types of torts under one inclusive period of limitation.

H.R. REP. No. 81-276, at 1227 (1949).

an administrative claim, and the claim's denial by a federal agency, as a prerequisite to bring suit.[81] The modifications regarding claims accruing on or after January 18, 1967 appear in the FTCA's current statute of limitations, codified at 28 U.S.C. § 2401(b).[82]

The language of the FTCA limitations period has generated many questions. Particularly critical for our purpose is this question: At what point does an FTCA cause of action accrue and the statutory period begin to run? The answer is inherently difficult to determine.

It is clear from the language of the statute that state law determines whether the defendant's action gives rise to a cause of action at all. Actions may be maintained against the government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the [state] where the . . . [negligence] occurred."[83] Stated another way, state law controls the question of *whether* a cause of action accrues. However, issues arose early in the judicial interpretation of § 2401(b) over whether state or federal law controls the determination of *when* a claim accrues under the FTCA. The legislative history of § 2401(b) does not aid in resolving this point. No language in the reports specifically refers to what is meant by the term "accrues."[84] Statements in the reports address the length of the period in which to bring a claim once that claim is actionable.[85]

Before 1980, some courts held that state law controlled when a claim accrued.[86] However, subsequent courts have concluded that

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81 Tort Claims—Agency Consideration, Pub. L. No. 89-506, § 7, 1966 U.S.C.C.A.N. (80 Stat. 306) 346, 348.

82 28 U.S.C. § 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate [f]ederal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1994).

Also important is a provision in 28 U.S.C. § 2675 which states: "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." 28 U.S.C. § 2675 (1994).

83 28 U.S.C. § 1346(b) (1994).

84 *See, e.g.*, H.R. REP. No. 81-276 (1949). The 1966 Amendment made the time of filing the administrative claim the critical date for limitations purposes, but although the reports indicate this change in detail, they do not further explain when a claim "accrues" within the meaning of 28 U.S.C. § 2401(b). S. REP. No. 89-1327 (1966).

85 *See, e.g.*, S. REP. No. 89-1327, at 2518; H.R. REP. No. 81-276, at 1227.

86 For example, until the 1980s, the First Circuit held that state law governed when a claim accrues for purposes of the FTCA. *See, e.g.*, Hau v. United States, 575 F.2d

federal law controls this determination.[87] There was great debate on this question in the early 1960s.[88] Now federal law is uniformly held to control when a claim accrues under the two-year statute applying to tort claims against the United States.[89] Courts have held that the FTCA prescribes its own limitations. Where the time allowed for an action against a private party under local law is less than that prescribed in the FTCA, the more generous time prescribed in the FTCA is allowed for suit against the United States.[90] At the same time, where local law allows a more generous time than that set forth in the FTCA, the time prescribed in the FTCA controls.[91] The rationale for these rules is stated in *Quinton v.*

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1000, 1002 (1st Cir. 1978); *see also* Caron v. United States, 548 F.2d 366, 367-68 (1st Cir. 1976); Tessier,v. United States, 269 F.2d 305, 309 (1st Cir. 1959). Although the First Circuit has not expressly reversed itself on this issue, in more recent cases it has referred exclusively to federal law for the definition of accrual. *See* Nicolazzo v. United States, 786 F.2d 454, 455 (1st Cir. 1986). Lower courts within the First Circuit have interpreted *Nicolazzo* as holding that federal law controls. *See* Attallah v. United States, 758 F. Supp. 81, 83 (D.P.R. 1991); Santana v. United States, 693 F. Supp. 1309, 1312 n.2 (D.P.R. 1988).

87 *See, e.g.*, Slaaten v. United States, 990 F.2d 1038, 1041 (8th Cir. 1993); Gould v. United States Dep't of Health & Human Servs., 905 F.2d 738, 742 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991); Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980); Ware v. United States, 626 F.2d 1278, 1283-84 (5th Cir. 1980); Tyminski v. United States, 481 F.2d 257, 262-63 (3d Cir. 1973).

88 *See* Recent Developments, *Federal Law Held to Govern Accrual of Cause of Action Under Federal Tort Claims Act*, 63 COLUM. L. REV. 536 (1963).

> [B]ecause suits under the [FTCA] possess elements of diversity actions although they are brought under a federal statute that contains a limitation on the time of suit, the problem is presented of determining which law governs the commencement of the litigation. This question has previously been decided by two district courts and two courts of appeals. Both district courts held that federal law governs as to the time at which the statute of limitations begins to run. The courts of appeals have divided, the First Circuit holding that state law governs, and the Fifth Circuit holding to the contrary.

*Id.* at 538-39 (citations omitted).

89 *See* United States v. Kubrick, 444 U.S. 111 (1979). The Supreme Court did not expressly address the issue, but the accrual rule that emerged was in large part based on the Court's opinion in Urie v. Thompson, 337 U.S. 163, 168-71 (1949), where the Court held that federal law controls. *Kubrick*, 444 U.S. at 120 n.7. The Court analyzed congressional intent, and did not refer to or address state law in any way. *Id.* at 119-21. As such, the Court implied that federal law controls.

90 *See, e.g.*, Young v. United States, 184 F.2d 587, 589 (D.C. Cir. 1950) (FTCA's two-year period, rather than the District of Columbia's one-year period, applied to a claim for "death occasioned by negligence"); Maryland *ex rel.* Burkhardt v. United States, 165 F.2d 869, 875 (4th Cir. 1947) (FTCA's two-year period applied rather than Maryland's one-year period for wrongful death claims).

91 *See, e.g.*, Magruder v. Smithsonian Inst., 758 F.2d 591, 593-94 (11th Cir. 1985) (FTCA's two-year period, rather than Florida's four-year period, applied to a claim for alleged conversion by the Smithsonian Institute); Wollman v. Gross, 637 F.2d 544,

*United States*:[92]

> Obviously, if the various states' rules could severally determine when a claim accrued against the [g]overnment under [s]ection 2401(b), the uniformity which Congress sought by enacting that section would be, for all practical purposes, a goal impossible of attainment. Differing state rules as to when a particular tort claim accrues would necessarily produce diverse decisions as to the effect of [s]ection 2401(b).[93]

As such, federal courts have been free to develop their own law with respect to *when* a claim accrues under § 2401(b).

## V. The FTCA's Statute of Limitations in Second Circuit Negligence Claims for Erosion

In its most recent decision concerning a negligence claim under the FTCA for coastal erosion, the Second Circuit held, in *Rapf v. Suffolk*,[94] that the statute of limitations was tolled because the government's actions amounted to a continuing tort. This decision and the United States District Court's decision from the Eastern District of New York in *Kennedy v. United States*[95] were not favorable to the government. In *Rapf*, individual homeowners of oceanfront property west of the fifteenth groin brought an action seeking injunctive relief against Suffolk County. They alleged that the County "constructed or caused to be constructed" the groins on the Westhampton Barrier Beach, and failed to maintain them, constituting a continuous nuisance that threatened to destroy their homes.[96] The Second Circuit explicitly rejected Suffolk County's position that the suit was time barred by the statute of limitations. The court held that the plaintiffs stated a claim for a continuing tort (i.e., where there is a series of continuing harms to the plaintiff) "for which the cause of action accrues anew each day."[97] However, the *Rapf* court decided an issue solely on New York law because, at the time, Suffolk County was the only defendant. *Rapf* held, in essence, that inaction may constitute a continuing tort.[98]

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549-50 (8th Cir. 1980) (FTCA's limitations period rather than South Dakota's three-year period applied to a negligence claim).

92 304 F.2d 234 (5th Cir. 1962).

93 *Id.* at 236.

94 755 F.2d 282 (2d Cir. 1985).

95 643 F. Supp. 1072 (E.D.N.Y. 1986).

96 *Rapf*, 755 F.2d at 284.

97 *Id.* at 290.

98 The *Rapf* holding is explicitly based on three New York cases. *See* Kearney v. Atlantic Cement Co., 306 N.Y.S.2d 45 (App. Div. 1969); Amax, Inc. v. Sohio Indus. Prods. Co., 469 N.Y.S.2d 282 (Sup. Ct. 1983); State v. Schenectady Chems., Inc., 459

In *Kennedy*, where the United States was the defendant, property owners alleged that government construction and supervision of the two stone groins at Georgica Pond were performed negligently and in reckless disregard of the duty of care owed to property owners.[99] Furthermore, they alleged that the action constituted a continuing nuisance and a continuing trespass.[100] Citing *Rapf*, the court held that the Kennedy's made out a claim for a continuing tort "for which the cause of action accrues anew each day."[101] Therefore, the statute of limitations for tort claims against the United States did not bar the action.[102]

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N.Y.S.2d 971 (Sup. Ct. 1983, *modified*, 479 N.Y.S.2d 1010 (App. Div. 1984)). Each of these cases involved the allegedly tortious contamination of land from a single act, followed by the failure to remove the contamination. *Kearney*, 306 N.Y.S.2d at 46; *Amax*, 469 N.Y.S.2d at 283-84; *Schenectady*, 459 N.Y.S.2d at 974. At the time the suits were filed, the contamination had continued for many years. *Kearney*, 306 N.Y.S.2d at 46 (six years); *Amax*, 469 N.Y.S.2d at 284 (approximately twenty years); *Schenectady*, 459 N.Y.S.2d at 974 (approximately thirty years). Under New York law, as derived from these cases, the failure to repair the original condition may constitute a continuing tort even when the last active transgression occurred many years before. *Kearney*, 306 N.Y.S.2d at 46-47; *Amax*, 469 N.Y.S.2d at 284-85; *Schenectady*, 459 N.Y.S.2d at 977-78.

99 Kennedy v. United States, 643 F. Supp. 1072, 1075 (E.D.N.Y. 1986). For a profile of the plaintiffs in this case, *see* Michael Gross, *Ivana's Avenger*, N.Y. MAG., Feb. 18, 1991, at 33.

100 *Kennedy*, 643 F. Supp. at 1075.

101 *Id.* at 1079 (citing Rapf v. Suffolk, 755 F.2d 282, 292 (2d Cir. 1985)).

102 Judge Wexler ultimately ruled in favor of the United States in *Kennedy*, finding that no causation was established between construction of the groins and the eroded property. In deciding the statute of limitations issue, Judge Wexler concluded that the construction constituted a continuing tort. *Id.* (citing *Rapf*, 755 F.2d at 292). However, in his decision following trial on the merits, Judge Wexler stated that the United States' "alleged negligence ceased" in 1972. Findings of Fact and Conclusions of Law at 5, *Kennedy* (No. CV-85-0581). These statements are inconsistent. If the government's acts or omissions constituted a continuing tort for which a cause of action accrues anew each day, how can it be that the United States' negligence suddenly ceased in 1972, some seven years after the groins were constructed in 1964–1965?

In his decision on the merits, Judge Wexler found several facts:

> The solution to this [downdrift] beach starvation is to introduce new sand into the [groin] system or otherwise build up the starved areas downdrift of the groin fields. In theory, once the groin compartments are filled, the sand can resume its unrestricted movement downdrift but, until the groins have been filled either through artificially filling them or naturally being filled by the downward drift, there is beach erosion downdrift of the last groin. . . .
>
> The groins were substantially filled by trapping sand since 1972 and the downdrift has been mitigated extensively.
>
> The Corps failed to introduce new sand into the groin system after 1972.

*Id.* ¶ 4, at 3-4, ¶ 9, at 4, ¶ 10, at 4.

Judge Wexler concluded:

> Here, plaintiffs failed to meet their burden of proof that the de-

> fendant's alleged negligence was the proximate cause of their injuries. Plaintiffs have not established that the erosion damage resulting from the downward drift of defendant's groins severely weakened the shoreline, nor have they established that any damage resulting from defendant's negligence prior to 1972, when starvation of the downward drift ceased, has continued to the present.
>
> Since plaintiffs purchased [the property] in 1976, four years after *defendant's alleged negligence ceased*, plaintiffs cannot now establish that the Corps of Engineers' construction of or failure to maintain the two groins substantially caused the injuries complained of.

*Id.* ¶ 5, at 5, ¶ 6, at 5-6 (emphasis added).

Unfortunately, in this decision there is no application which might shed light on the reasoning behind Judge Wexler's conclusions. This leaves a burning question: Why did the United States' alleged negligence cease in 1972? The answer to this question might have serious implications for the resolution of issues in future cases since this conclusion leads to an ultimate finding of no causation. If adopted in future decisions, Judge Wexler's reasoning might prove favorable to the government.

It is clear that Judge Wexler ultimately found no causation between construction and maintenance of the groins and erosion of the plaintiffs' property because the United States' alleged negligence ceased in 1972, and the plaintiffs did not purchase the property until 1976. However, regardless of when the plaintiffs purchased the property, the fact still remains that the alleged negligence ceased.

There were several references to causation in briefs submitted by both sides. *See* Defendants' Post-Trial Reply Memorandum of Law, Kennedy v. United States, No. CV-85-0581 (E.D.N.Y. June 30, 1988) [hereinafter Defendants' Post-Trial Reply]; Plaintiffs' Reply Memorandum of Law, Kennedy v. United States, No. CV-85-0581 (E.D.N.Y. June 29, 1988) [hereinafter Plaintiffs' Reply]; Defendants' Post-Trial Memorandum of Law, Kennedy v. United States, No. CV-85-0581 (E.D.N.Y. June 6, 1988) [hereinafter Defendants' Post-Trial Memorandum]; Plaintiffs' Post-Trial Memorandum of Law, Kennedy v. United States, No. CV-85-0581 (E.D.N.Y. June 6, 1988) [hereinafter Plaintiffs' Post-Trial Memorandum]. Four main points continually recurred:

(1) In theory, once groin compartments become filled, either artificially or naturally, the sand can resume its unrestricted movement downdrift. The time period required for the entire system to naturally fill and the material to resume its unrestricted movement downdrift may be so long that severe downdrift damage may result. Nevertheless, the Georgica Pond groin compartments completely filled in 1972. The United States alleged that the normal downdrift patterns were re-established, and the groins became a neutral factor in any later erosion at the plaintiffs' home. *See* Defendants' Post-Trial Reply, at 5-6, 10; Plaintiffs' Reply, at 12; Plaintiffs' Post-Trial Memorandum, at 7-10.

(2) *See* Inman & Brush, *supra* note 31; SHORE PROTECTION MANUAL VOL. 1, *supra* note 28; SHORE PROTECTION MANUAL VOL. 2, *supra* note 28. Expert opinion indicates that even after the groins are filled, an area immediately downdrift of the groins may continue to be adversely affected. Transport patterns of sand are never fully re-established. There is a "shadow effect" downdrift of the groins; sediment that rounds the tip of a groin and finds itself in deeper water is not going to be transported suddenly shoreward. The transported offshore sand does not suddenly make a right angle turn and return to shore. Thus, sediment leaves the beach at its normal rate due to wave and tidal action, but the groins interfere with the deposit of sediment from upshore that would otherwise compensate for that loss. Although the transport patterns may re-establish themselves further down the beach, the area within the shadow of the groins (1000–1500 feet according to the government expert and up to 3000 meters according to the plaintiffs' expert) continues to be starved for sand even after the groins are filled. The Kennedy property is located some 3300 feet from the nearest

The *Kennedy* court's reliance on *Rapf* was erroneous. The Second Circuit held, in *Rapf*, that under New York law a continuous tort may be the result of continuous inaction. However, when determining when a cause of action accrues under the FTCA, federal law applies. Under federal law, an alleged tortfeasor's inaction is insufficient to support a finding of continuous tort[103] except in

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federal groin. *See* Defendants' Post-Trial Reply, at 8-9; Plaintiffs' Reply, at 12, 15; Defendants' Post-Trial Memorandum, at 18.

(3) Erosion to the plaintiffs' property may have been caused by other factors. These include the opening of the Georgica Pond "gut" just east of the plaintiffs' home, *see* Defendants' Post-Trial Reply, at 9, and natural forces such as the rising sea level, storms, and tides. *See* Defendants' Post-Trial Reply, at 21, 23, 26-27; Plaintiffs' Reply, at 12-13.

(4) The trimline (i.e., the line of vegetation and grasses landward of dunes which: (1) measures the stable protective border between the beach and the land; and (2) anchors the sand, acting as a buffer against natural forces) in front of the plaintiffs' property had not been affected since 1972. According to expert testimony, movement of the trimline is a more reliable measure of erosion since a grass and vegetation line is a stronger protective barrier than sand against the effects of wind and water. *See* Defendants' Post-Trial Reply, at 5, 22-23.

Applying these principles to the Westhampton groin field:

(1) The Corps did not add any artificial fill to the compartments of the first eleven groins in the field when they were constructed. These compartments are naturally filling. The Corps did add artificial fill to the compartments of the last four groins in the field during their construction, and they are also naturally filling. The definition of "full" is difficult to articulate. It is not clear that any of the compartments have reached their full capacity. In addition, the Corps recently began to add fill to the compartments of the initial groins as part of an interim project. Therefore, it is not likely that the normal downward littoral drift pattern (from east to west) has been re-established.

(2) It is likely that the Westhampton groins have a "shadow effect" similar to the Georgica Pond groins. This is a function of, among other things, the length of the groins. The two groins at Georgica Pond are 475 feet long. The "shadow effect" is 1000–1500 feet according to the government expert or up to 3000 meters according to the plaintiffs' expert. Similarly, the Westhampton groins are approximately 500 feet long. The length of their "shadow effect" might be significant depending on the distance between the groins and the easternmost plaintiffs in future cases.

(3) Natural forces such as rising sea levels, storms, and tides may have caused erosion to the plaintiffs' property. Severe storms in the spring of 1984 and in December 1986, and a "syzygy" storm (i.e., when the full moon and high tides coincide with a severe northeastern storm) in January 1987, had a dramatic impact along much of Long Island's south shore. Additionally, December 1992 storms seriously damaged Dune Road, Westhampton Beach, New York, and the property of many of its residents. The damage was so bad that Judge Bartels issued a decision stating that a settlement conference should be held. Memorandum-Decision at 1-2, Rapf v. Suffolk, No. CV-84-1478 (E.D.N.Y. 1993).

[103] For purposes of the limitations period, courts generally distinguish between continuing acts and singular acts that bring continuing consequences. A continuing ill effect arising from earlier misconduct does not constitute a continuing tort in and of itself. *See, e.g.*, Batiste v. Boston, 23 F.3d 394, 1994 WL 164568, at *2 (1st Cir. May 2, 1994) (unpublished); Aiello v. Browning Ferris, Inc., 1993 WL 463701, at *7 (N.D. Cal. Nov. 2, 1993); Chudzik v. Wilmington, 809 F. Supp. 1142 (D. Del. 1992).

those distinguishable cases alleging continuous trespass resulting from a mistaken deed.[104] Continuing violations under federal law require ongoing tortious conduct, or a chain of tortious activity.[105] This is significant since the Second Circuit held, in *Kossick v. United States,*[106] that a rationale which might allow an action to toll the statute of limitations under New York State law was not effective to toll the statute under the FTCA.[107]

The federal government's position is made more tenuous by the Federal Circuit's decision in *Applegate v. United States*[108] because that court's decision is consistent with the Second Circuit's decision in *Rapf. Applegate* is likely to be relied on by future plaintiffs, even in the Second Circuit. In *Applegate,* 271 Florida beachfront landowners claimed a taking of their properties by erosion caused by the Corps' Canaveral Harbor Project.[109] The United States Court of Federal Claims granted the government's motion to dismiss for the plaintiffs' failure to file suit within the six-year statute of limitations under the Tucker Act.[110] "Plaintiffs could foresee, beginning in 1966, if not earlier, that the [Canaveral Harbor] Project would cause serious damage to their properties,"[111] but plaintiffs did not file suit until December, 1992.[112] The Federal Circuit reversed, relying on *United States v. Dickinson.*[113] The *Dickinson*

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104 *See, e.g.*, Nieman v. NLO, Inc., 108 F.3d 1546, 1559 (6th Cir. 1997).

105 *See, e.g.*, Page v. United States, 729 F.2d 818, 821 (D.C. Cir. 1984); Leonhard v. United States, 633 F.2d 599, 613 (2d Cir. 1980), *cert. denied,* 451 U.S. 908 (1981); Donaldson v. O'Conner, 493 F.2d 507, 529 (5th Cir. 1974), *vacated on other grounds,* 422 U.S. 563 (1975). Even the existence of an ongoing relationship does not insure that a cause of action will be deemed continuous for purposes of computing the statute of limitations period. *See, e.g.*, Cooper v. United States, 442 F.2d 908 (7th Cir. 1971) (holding that inaction was not a continuing violation under the FTCA where the government repeatedly refused to provide medical treatment to a plaintiff for injuries received in jail).

106 330 F.2d 933 (2d Cir. 1964), *cert. denied,* 379 U.S. 837 (1964).

107 *Id.* at 934-36.

108 25 F.3d 1579 (Fed. Cir. 1994).

109 The *Applegate* plaintiffs claimed a Fifth Amendment taking, rather than negligence under the FTCA. However, the court utilized applicable reasoning in concluding that the erosion amounted to a continuous taking. Indeed, a suit based on identical facts as *Rapf* was filed in the Court of Federal Claims alleging a Fifth Amendment taking. Complaint, DeVito v. United States, No. 96-78L (Fed. Cl. Feb. 9, 1996). Subsequently, the parties in that case stipulated to its dismissal. Stipulation and Notice of Dismissal Without Prejudice, DeVito v. United States, No. 96-69L (Fed. Cl. Oct. 3, 1996).

110 Applegate v. United States, 28 Fed. Cl. 554, 563-65 (1993), *rev'd,* 25 F.3d 1579 (Fed. Cir. 1994).

111 *Id.* at 563.

112 *Id.* at 557.

113 331 U.S. 745 (1947).

Court held that where the government "[leaves] the taking to physical events,"[114] the claimant can postpone filing suit until the situation becomes "stabilized."[115] The Federal Circuit Court found that the Corps set in motion a very gradual and perpetual physical taking, and further complicated ascertaining the extent and nature of the damage by proposing to install a sand transfer plant.[116] Thus, the taking situation had not been stabilized.[117] The court in *Applegate* concluded that these landowners, who suffered an ongoing, gradual, and physical taking, need not have risked premature litigation. "Under the *Dickinson* rule, the statute of limitations did not bar [the] suit in 1992."[118]

The Second Circuit should adopt the Court of Federal Claims' reasoning in *Applegate.* This, of course, would be favorable to the federal defendants, and in accord with the tenet that the FTCA's statute of limitations "should be liberally construed in favor of repose for the United States."[119] Certainty, definiteness, or foreseeability of flooding or erosion, and not the complete erosion of the "last grain of sand," should define the taking and trigger the limitations period.[120]

*Rapf, Kennedy,* and *Applegate* would be distinguishable from future litigation concerning the Westhampton groin field. For example, in *Applegate,* the Federal Circuit heavily relied on the Corps' promises to repair the damage as evidence that the situation in that case had not stabilized.[121] Here, the Corps has made no promises to repair the damage by modifying permits, or removing the groin field. The court in *Rapf* interpreted New York law where all parties were New York litigants.[122] In determining when a cause of action arises under the FTCA, federal law applies.[123] Thus, federal law would apply in any future suit concerning the Westhampton groin field brought against the United States as defendant. *Kennedy* was decided in favor of the government at the district court level, and

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114 *Id.* at 748.

115 *Id.* at 749.

116 Applegate v. United States, 25 F.3d 1579, 1582 (Fed. Cir. 1994).

117 *Id.* at 1583-84.

118 *Id.* at 1584.

119 Cooper v. United States, 442 F.2d 908, 912 (7th Cir. 1971).

120 Applegate v. United States, 28 Fed. Cl. 554, 562 (1993), *rev'd,* 25 F.3d 1579 (Fed. Cir. 1994).

121 *Applegate,* 25 F.3d at 1582-84.

122 Rapf v. Suffolk, 755 F.2d 282, 284 (2d Cir. 1985). Subsequently, the United States was impleaded as a third party defendant. However, the statute of limitations issue was never revisited as it might have applied to this defendant.

123 *See supra* notes 86-89 and accompanying text.

overlooked the proper interpretation of a "continuing violation" under federal law.[124]

## VI. The Related Issue of Damages

If the Second Circuit remains steadfast in its decision to label the project a continuing tort, then the quantum of damages would become a critical issue. The general rule in cases of continuing torts is that the plaintiff is permitted to recover damages only for harm up to the time of trial.[125] To recover for harm caused by future invasions (i.e., after the time of trial), the injured person must bring successive actions for the invasions or series of invasions.[126] Only when the invasion is "substantial and relatively enduring in character and not readily alterable," can the injured party request an injunction or elect to sue for future damages "once and for all."[127] Thus, damages may be categorized as those for past harms and those for future harms, with the time of trial being the divider. Here, because a jurisdictional prerequisite exists to sue under the FTCA, the filing of an administrative claim may be considered the critical date for limitations purposes.[128]

Federal law on damages for past invasions is much less clear. The *Restatement (Second) of Torts* section 899 comment d suggests the general rule is:

> the statute [of limitations] *does not run from the time of the first harm except* [*as to*] *the harm then caused.* Thus, for example, when there has been the tortious emission of fumes from a factory, the plaintiff is not required to treat the harm as a unit and is entitled to recover . . . damages *for harm that has accrued within the period provided by statute* for that type of tort.[129]

This implies that when the first wave hit Long Island's south shore after groin completion in 1960, the statute of limitations began to run *as to the harm caused by that wave,* and continued for two years. At the end of that two year period, the opportunity to sue for harm *caused by that wave* was lost. When the next wave hit the

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124 *See, e.g.*, cases cited *supra* note 105.

125 Jayson, *supra* note 75, § 14.03[4] (citing Restatement (Second) of Torts § 899 cmt. d (1977)).

126 Restatement (Second) of Torts § 930 cmt. a (1977). Federal law supports the proposition that plaintiffs must sue in successive actions. *See* Reynolds Metals Co. v. I.B. Wand, 308 F.2d 504, 508 (9th Cir. 1962).

127 Restatement (Second) of Torts § 930 cmt. b (1977). *See id* § 161 cmt. b (1963-1964).

128 *See* Tort Claims—Agency Consideration, Pub. L. No. 89-506, § 7, 1966 U.S.C.C.A.N. (80 Stat. 306) 346, 348.

129 Restatement (Second) of Torts § 899 cmt. d (1977) (emphasis added).

shore, the statute began to run *as to the harm caused by that particular wave*, and continued for two years. At the end of that two year period, the opportunity to sue for harm *caused by that particular wave* was lost, and so on.

The above analysis, coupled with the rule that an injured party must generally sue for future damages in successive actions, implies that damages are limited to those sustained during the period of limitations immediately prior to the filing of an administrative suit. Although there is no federal case law that specifically interprets the statement that "the statute does not run from the time of the first harm except [as to] the harm then caused,"[130] federal cases imply that damages are limited.[131] Additionally, several recent federal cases rely on state law for the proposition that damages are limited.[132]

New York law is clear that damages are limited. The statute of limitations in New York "for injury to property" is three years.[133] In *Amax, Inc. v. Sohio*,[134] a suit to recover damages for radioactive contamination, the Supreme Court, New York County held that the storage and disposal of waste was a continuing nuisance.[135] The court noted, with respect to future damages, that the plaintiff could sue in successive actions or once and for all. However, "damages [were] limited to such as were sustained within three years prior to the commencement of suit."[136] In *Kearney v. Atlantic Cement Co.*,[137] another continuing nuisance case, the Appellate Divi-

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130 *Id.*

131 For example, in Urie v. Thompson, 337 U.S. 163 (1949), the Supreme Court rejected the notion that the injured plaintiff had a continuing cause of action with "each intake of dusty breath." *Id.* at 170. "[A]pplication of such a rule would, arguably, limit petitioner's damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment." *Id.*

132 *See, e.g.*, Nieman v. NLO, Inc., No. 95-3677, 1997 WL 119768, at *14 (6th Cir. March 19, 1997) (holding, under Ohio law, that plaintiff could recover damages for continuing trespass, but could "only claim damages incurred within the four years prior to filing the lawsuit"); Huffman v. United States, 82 F.3d 703, 705 (6th Cir. 1996) (holding, under Kentucky law, that although a temporary nuisance claim was not barred by the statute of limitations, "recovery would be limited to damages caused within the limitations period immediately preceding the initiation of the action." (citation omitted)); *In re* Tutu Wells Contamination Litigation, 909 F. Supp. 980, 989 (D.C. Virgin Islands 1995) ("the plaintiff will ordinarily be limited to only those past . . . injuries which have occurred within the applicable statute of limitations period immediately before the plaintiff filed his suit").

133 N.Y. C.P.L.R. 214 (McKinney 1990).

134 469 N.Y.S.2d 282 (Sup. Ct. 1983).

135 *Id.* at 284-85.

136 *Id.* at 284 (citing 36 N.Y. JUR., LIMITATIONS AND LACHES § 88).

137 306 N.Y.S.2d 45 (App. Div. 1969).

sion, Third Department stated, "damages are recoverable only to the extent that they were sustained during the three years immediately prior to the commencement of the respective actions, plaintiffs are not precluded by the statute of limitations from seeking a permanent injunction or damages in the instant actions."[138]

*Amax* and *Kearney* were relied on by the *Rapf* court,[139] although this reliance was concededly to determine when the plaintiffs' cause of action accrued.[140] The *Rapf* court did not reach the issue of a limitation of damages. However, equity demands that the Second Circuit should follow the lead of other circuits and rely on state law to limit damages. The United States District Court for the Eastern District of New York relied on *Rapf* on the issue of when a cause of action accrues,[141] although federal law applied. Even so, it would seem appropriate for the Eastern District in future actions to limit damages.

A successful argument on this point could have a tremendous impact on the outcome of future cases for the government. For example, a hypothetical storm causes catastrophic damage on Long Island's south shore in January, 1994. If plaintiffs filed administrative claims[142] for erosion to their properties on January 1, 1996 and tolled the statute of limitations, it would seem that their opportunity to sue for damages for harms that occurred before January 1, 1994 would expire. The plaintiffs would be limited to damages sustained within the two years immediately prior to the filing of administrative claims (i.e., between January 1, 1994 and January 1, 1996). This is significant. If the claims filed were proce-

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138 *Id.* at 47 (citations omitted).

139 Rapf v. Suffolk, 755 F.2d 282, 291 (2d Cir. 1985).

140 *See supra* note 98 and accompanying text.

141 Kennedy v. United States, 643 F. Supp. 1072, 1079 (E.D.N.Y. 1986).

142 The FTCA constitutes a waiver of sovereign immunity, so its terms must be strictly construed. The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate [f]ederal agency . . . ." 28 U.S.C. § 2675(a) (1994). The filing of an administrative claim is a mandatory condition precedent to the filing of a civil action against the United States for damages arising from the negligent act or omission of any government employee acting within the scope of his employment. Melo v. United States, 505 F.2d 1026, 1028 (8th Cir. 1974); Osijo v. United States, 850 F. Supp. 992, 992 (E.D.N.Y. 1993); Kohlbeck v. Kis, 651 F. Supp. 1233, 1236 (D. Mont. 1987). Often plaintiffs file a Standard Form-95 Claim for Damage, Injury, or Death. The "SF-95" claim form is generally used in such instances, although any claim that states a sum certain and gives the government agency enough information to investigate the claim is sufficient. GAF Corp. v. United States, 818 F.2d 901, 917 (D.C. Cir. 1987); Avery v. United States, 680 F.2d 608, 610-11 (9th Cir. 1982); Byrne v. United States, 804 F. Supp. 577, 581 (S.D.N.Y. 1992).

durally defective in some way,[143] and the defects were not corrected until January 1, 1997, this could limit the damages recoverable to only those sustained during the two years immediately preceding this remedial action (i.e., between January 1, 1995 and January 1, 1997), thereby eliminating damages exacerbated by the January, 1994 storm.[144]

The federal courts in the Second Circuit should adopt the State of New York's interpretation on limiting damages because: (1) the timing of the plaintiffs' filing of administrative claims might suggest plaintiffs believe they can only sue for damages sustained within the limitations period; (2) this interpretation of the law on recovery for past harms is consistent with federal law on recovery for future harms; (3) the FTCA sets a two-year limit in all cases,[145] and does not make an exception for continuing torts.

## VII. A PROPOSAL

One commonly litigated accrual question, arising primarily in medical malpractice cases, is whether a claim accrues when the negligent or wrongful acts occur or when the claimant discovers the material facts underlying the claim. In *Kubrick v. United*

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143 The language of the FTCA spells out four specific requirements concerning the submission of administrative claims. *See* 28 U.S.C. §§ 2401(b), 2672, 2675 (1994). These are: (1) the claim must be presented in writing; (2) to the agency out of whose activities the claim arose; (3) in a sum certain; and (4) within two years of its accrual. JAYSON, *supra* note 75, § 17.09[1]. So, for example, a claim would be incomplete if it did not specify damages. F.G.S. Constructors, Inc. v. Carlow, 823 F. Supp. 1508, 1512 (D.S.D. 1993).

Additionally, a claim must bear an authorized signature. A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent, or legal representative. 28 C.F.R. § 14.3(a) (1995). If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing, and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent or other representative. Standard Form-95 Claim for Damage, Injury, or Death, 1995 (available from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278). The claims processing regulation requiring evidence of a legal representative's authorization to present a claim is a jurisdictional prerequisite to institute a court action under the FTCA. Martinez v. United States, 743 F. Supp. 298, 302 (D.N.J. 1990); Pringle v. United States, 419 F. Supp. 289, 292 (D.S.C. 1976).

144 Even if the procedural defects in the administrative claims were overlooked, money damages sought are bound by sum certain limits. Absent new evidence, the amount of suit may not exceed the total money damages initially sought in a claim. 28 U.S.C. § 2675(b) (1994). *See* Colin v. United States, 324 F. Supp. 121 (D. Mo. 1970). Hence, money damages are capped at the total stated in a claim or claims (if there are multiple plaintiffs in a suit).

145 28 U.S.C. § 2401(b).

*States*,[146] a forty-eight year old veteran was treated with the antibiotic neomycin for a leg infection in 1968.[147] Approximately six weeks later, he noticed a ringing in his ears and hearing loss.[148] In 1969, a doctor secured his Veteran's Administration ("VA") hospital records and informed him that it was "highly possible" that his hearing loss was the result of the neomycin treatment.[149] The doctor did *not* say that the treatment was improper.[150] In 1971, a second doctor advised Kubrick that the neomycin should not have been administered.[151] Kubrick filed suit in 1972, alleging that the VA hospital negligently treated his ailment.[152] The Third Circuit held that Kubrick's claim did not accrue until 1971.[153] Even though Kubrick was aware of his injury and the government's responsibility for it in 1969, his claim did not accrue until he had reason to know that the VA hospital had breached its duty to him.[154] In other words, it was not until 1971 that Kubrick discovered that the acts causing the injury may have constituted medical malpractice.[155] In so holding, the Third Circuit found plaintiff's claim to accrue upon his discovery that he was injured, his discovery of the cause of the injury, *and* his discovery that the injury was caused by negligence.[156]

The Supreme Court reversed. The Court held that Kubrick's claim accrued in 1969, and was thus barred by the two-year statute of limitations for a tort claim.[157] The Court refused to extend the

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146 435 F. Supp. 166 (E.D. Pa. 1977), *aff'd*, 581 F.2d 1092 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

147 *Id.* at 168.

148 *Id.* at 169-70.

149 *Id.* at 172.

150 *Id.*

151 *Id.* at 173.

152 *Id.* at 174.

153 Kubrick v. United States, 581 F.2d 1092, 1097-98 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

154 *Id.* at 1097.

155 The court followed the reasoning in Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977). The Tenth Circuit stated:

> Limitations should not bar a claimant before he has a reasonable basis for believing he has a claim. Therefore[,] until a claimant has had a reasonable opportunity to discover *all* of the essential elements of a possible cause of action for malpractice—damages, duty, breach[,] and causation—his claim against the [g]overnment does not accrue. And where a claimant is given a "credible explanation" of his condition not pointing to malpractice, he may not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim.

*Id.* at 420-21 (citations omitted).

156 *Kubrick*, 581 F.2d at 1097.

157 Kubrick v. United States, 444 U.S. 111, 122-23 (1979).

"blameless ignorance"[158] doctrine to a point where it would protect the plaintiff until he was aware not only of the injury and its cause, but also that his legal rights were invaded.[159] In other words, the Court did not require Kubrick to demonstrate his knowledge that the action constituted government negligence. Under *Kubrick*, a claim for medical malpractice accrues within the meaning of the FTCA, at the latest, on the date when the plaintiff knows of, or in the exercise of reasonable diligence should have known of, just the existence and the cause of his injury.[160] *Kubrick* effectively narrowed the broader holdings of cases similar to that of the Third Circuit. To the extent that these cases fix accrual at a point later than the discovery of injury and cause,[161] they are no longer good law.

Many circuits interpret *Kubrick* as applying an objective standard.[162] A determination of when the statute begins to run turns

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158 The "blameless ignorance" rule was announced in Urie v. Thompson, 337 U.S. 163 (1949). It provides that a cause of action does not accrue until the plaintiff's injury manifests itself. *Id.* at 170-71. In *Urie*, the plaintiff contracted silicosis while working as a fireman, *id.* at 165-66, but his condition was not diagnosed until after he became too ill to work. *Id.* at 170. Reluctant to charge Urie with the "unknown and inherently unknowable," *id.* at 169, the Court held that because of his "blameless ignorance" of the fact of his injury, his cause of action did not accrue until the disease became apparent. *Id.* at 170-71.

159 *Kubrick*, 444 U.S. at 122-23. The Court stated:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

*Id.* at 122.

160 *Id.* at 120.

161 *See* Stoleson v. United States, 629 F.2d 1265, 1268-69 (7th Cir. 1980). The court stated:

> Several courts of appeals, including this one, have recently expanded the discovery rule to prevent accrual of a claim until a patient has had a reasonable opportunity to discover each of the elements of a cause of action—duty, breach, causation, and damages. This expansion was cut short and back by the Supreme Court in *Kubrick*. A claim accrues when a patient acquires possession of the critical facts of injury and cause.

*Id.* at 1268 n.3 (citations omitted); Dessi v. United States, 489 F. Supp. 722, 724 (E.D. Va. 1980) (discussing *Kubrick*, the court stated: "This decision signifies a retreat from the expansive view of 'accrual' previously adopted by a number of the circuits . . . .").

162 *See, e.g.*, Herrera-Diaz v. United States Dep't of Navy, 845 F.2d 1534, 1537 (9th

not on when the plaintiff actually knew of the injury and its cause, but rather on when "a reasonable person would know enough to prompt a deeper inquiry into a potential cause . . . ."[163] The implementation of an objective standard would be critical if the Second Circuit were to adopt the *Kubrick* discovery rule in FTCA claims for erosion.

Indeed, many courts have applied the *Kubrick* discovery rule to FTCA claims other than malpractice claims.[164] Some courts have even held that *Kubrick* is not limited to FTCA or medical malpractice cases.[165] Only a few courts have declined to apply *Kubrick* outside of the medical malpractice context.[166] The Second Circuit could apply a modified discovery rule fashioned from *Kubrick* in FTCA negligence claims for erosion.[167] Under the FTCA, "[p]laintiff may not, in effect, hide its head in the sand, ignoring the accrual of a cause of action until the two-year limitation[s] period has expired and then attempt to circumvent the limitation by alleging a combination of tortious acts or a continuing tort."[168]

The press often writes about the Westhampton groin field

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Cir. 1988), *cert. denied*, 488 U.S. 924 (1988); Barren v. United States, 839 F.2d 987, 990 (3d Cir.), *cert. denied*, 488 U.S. 827 (1988); Nemmers v. United States, 795 F.2d 628, 631 (7th Cir. 1986), *on remand*, 681 F. Supp. 567 (C.D. Ill. 1988), *aff'd*, 870 F.2d 426 (7th Cir. 1989); Arvayo v. United States, 766 F.2d 1416, 1421-22 (10th Cir. 1985).

> Relying on *Kubrick*, we have developed an objective standard to determine when a medical malpractice action accrues under the FTCA. The action accrues, and the statute of limitation starts to run, when a "plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, both his injury and its cause."

*Herrera-Diaz*, 845 F.2d at 1537 (quoting Davis v. United States, 642 F.2d 328, 331 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982)).

163 *Nemmers*, 795 F.2d at 632. "Our question, then, is whether the running of the statute of limitations depends on the plaintiffs' personal knowledge and reactions or whether it depends on the reactions of the objective, 'reasonable' man. The answer is the latter, an answer reflected in the formula 'knew or should have known.'" *Id.* at 631.

164 *See, e.g.*, Ware v. United States, 626 F.2d 1278 (5th Cir. 1980); Korgel v. United States, 619 F.2d 16 (8th Cir. 1980); Alaska Pacific, Inc. v. United States, 650 F. Supp. 29 (D. Nev. 1986), *cert. denied*, 493 U.S. 846 (1989).

165 *See, e.g.*, Dubose v. Kansas City S. Ry. Co., 729 F.2d 1026, 1031 (5th Cir. 1984) (applying the *Kubrick* discovery rule to a case under the Federal Employers' Liability Act, 45 U.S.C.A. § 56).

166 *See, e.g.*, Steele v. United States, 599 F.2d 823 (7th Cir. 1979).

167 Kent Sinclair and Charles A. Szypszak have proposed that a simple discovery and reasonable diligence standard, such as that employed in medical malpractice cases under the FTCA, should govern in all troublesome situations, including continuous course of conduct cases. Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 39 (1991).

168 Lynch v. United States Army, 474 F. Supp. 545, 549 (D.C. Md. 1978) (citing United Missouri Bank South v. United States, 423 F. Supp. 571, 577 (W.D. Mo. 1976)).

problems.[169] Presumably a reasonably diligent Long Island resident would occasionally read the newspaper.[170] A potential plaintiff would know of the existence of his/her injury (i.e., the erosion of his property). A potential plaintiff should also know of its cause (i.e., allegedly, the Westhampton groin field).

## VIII. CONCLUSION

The continually rising costs of litigation over government-sponsored projects is one likely explanation for the decrease in federal participation in beach erosion and hurricane protection projects. In the Second Circuit alone, the government is still involved in litigation stemming from its work on one project completed in the early 1960s.[171] Because the Second Circuit has labeled erosion allegedly caused by this project "a continuing tort for which the cause of action accrues anew each day,"[172] the end to litigation is nowhere in sight.

As an equitable matter, it is important for the Second Circuit to limit its holding in *Rapf* to cases involving New York litigants. The court should also clarify its statement that erosion allegedly caused by the Westhampton groin field is "a continuing tort for which the cause of action accrues anew each day."[173] Taken to its extreme, this statement might mean that if the government has interfered with a wave in any way a new cause of action would consequently accrue each time that wave hits the shore. This interpretation would expose the government to claims for erosion associated with projects decades after their completion. The government maintains nearly 100 coastal harbor projects.[174] The above interpretation of the Second Circuit's holding would create a tremendous burden for the government and the Corps as it relates to erosion of beachfront property caused by the blockage of

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169 *See, e.g.*, newspaper and magazine articles cited *supra* notes 2, 19, 51, 61; newspaper articles cited *supra* notes 2, 51, 61; *see also* John A. Black and Jeffrey Kassner, *Protecting Westhampton Beaches*, NEWSDAY (Long Island), Apr. 3, 1984, at 50; Jeffrey Kassner and John A. Black, *Offering a Solution for Westhampton Beach Erosion*, N.Y. TIMES (L.I.), June 10, 1984, at 30.

170 The fact that the Supreme Court has held that service of process may be effected through publication can be interpreted as supportive evidence that the Court assumes that people read the newspaper for at least certain purposes. Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

171 Rapf v. Suffolk, 755 F.2d 282 (2d Cir. 1985).

172 *Id.* at 292.

173 *Id.*

174 SHORELINE PROTECTION AND BEACH EROSION CONTROL TASK FORCE, *supra* note 6, at i-ii.

littoral drift. Plaintiffs in the most recent Second Circuit cases claimed nearly $300 million in damages.[175] Claims could be filed years after a project was constructed. The magnitude for potential budgetary drain is enormous. As such, government-sponsored shore protection projects will be eliminated. Those who build on the beach will be left to fend for themselves when their homes are swallowed by the ocean. The American public's primary recreation areas will be reduced to ruins.

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[175] *See supra* note 65.

# (REACT): REMOTE ELECTRONICALLY ACTIVATED TECHNOLOGY STUN BELT

*Kevin C. Pyle*†

† Kevin C. Pyle is an illustrator and comix artist whose work has appeared in THE NEW YORKER, the N.Y. TIMES, and THE VILLAGE VOICE.

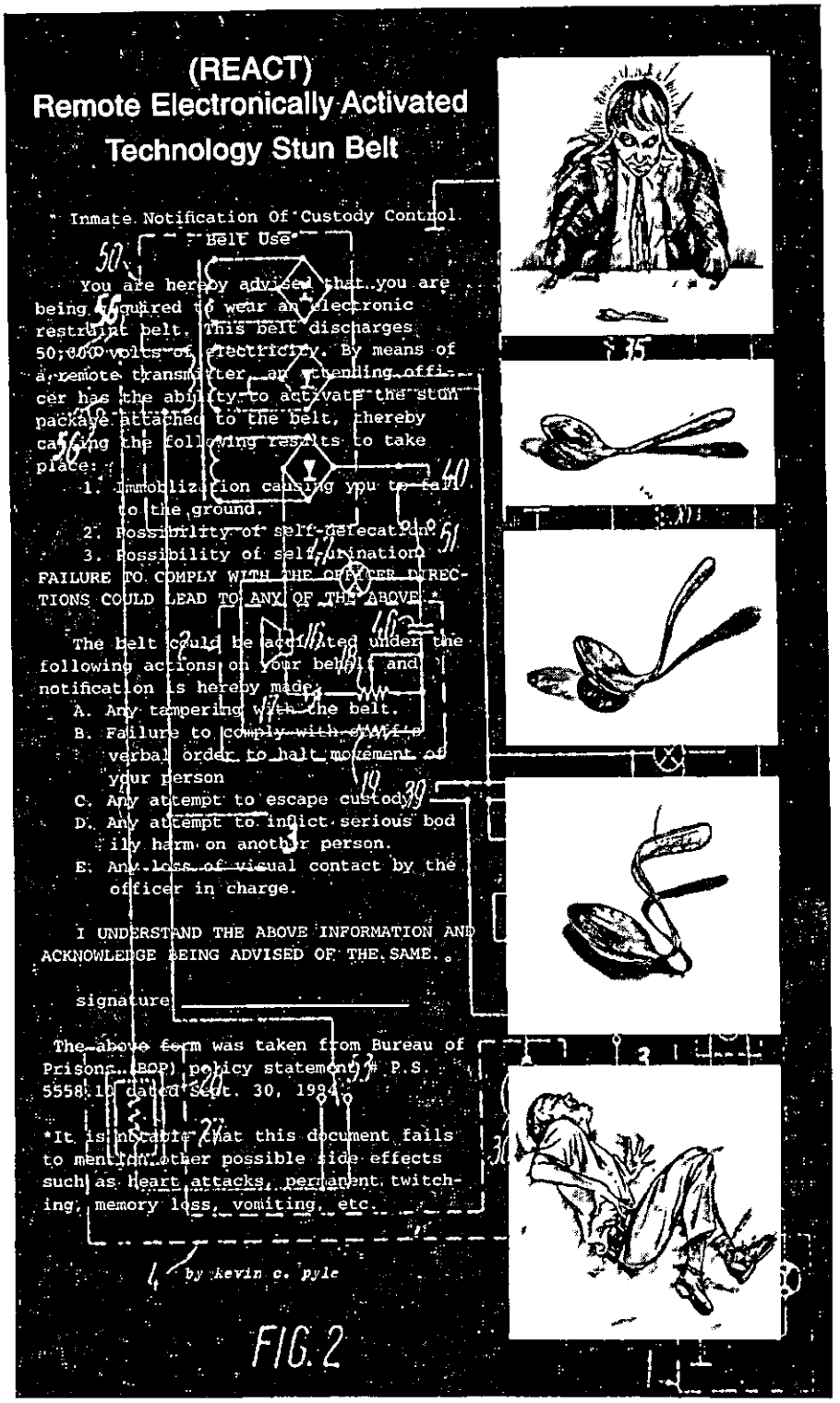
(REACT)
Remote Electronically Activated
Technology Stun Belt
* Inmate Notification Of Custody Control Belt Use
You are hereby advised that you are being required to wear an electronic restraint belt. This belt discharges 50,000 volts of electricity. By means of a remote transmitter an attending officer has the ability to activate the stun package attached to the belt, thereby causing the following results to take place:
1. Immobilization causing you to fall to the ground.
2. Possibility of self-defecation.
3. Possibility of self-urination.
FAILURE TO COMPLY WITH THE OFFICER DIRECTIONS COULD LEAD TO ANY OF THE ABOVE.
The belt could be activated under the following actions on your behalf and notification is hereby made.
A. Any tampering with the belt.
B. Failure to comply with staff's verbal order to halt movement of your person
C. Any attempt to escape custody.
D. Any attempt to inflict serious bodily harm on another person.
E. Any loss of visual contact by the officer in charge.
I UNDERSTAND THE ABOVE INFORMATION AND ACKNOWLEDGE BEING ADVISED OF THE SAME.
signature _____
The above form was taken from Bureau of Prisons (BOP) policy statement # P.S. 5558.1C dated Sept. 30, 1994.
*It is notable that this document fails to mention other possible side effects such as heart attacks, permanent twitching, memory loss, vomiting, etc.
by Kevin C. Pyle

FIG. 2

# THE CURRENT SCOPE OF THE PUBLIC SAFETY EXCEPTION TO *MIRANDA* UNDER *NEW YORK V. QUARLES*

*Alan Raphael*†

In *New York v. Quarles*[1] the United States Supreme Court announced an exception to the rule established in *Miranda v. Arizona*.[2] *Miranda* bars the use of any statement in the prosecution's case in chief obtained during custodial interrogation unless the suspect has first been advised of his or her constitutional right against self-incrimination[3] and has voluntarily waived that right.[4]

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1 467 U.S. 649 (1984).

2 384 U.S. 436 (1966).

3 U.S. CONST. amend. V.

4 *Miranda*, 384 U.S. at 444-45. Prior to interrogation, a person in custody must be clearly informed that: (1) he has the right to remain silent; (2) anything he says can be used against him in court; (3) he has the right to the presence of an attorney at the questioning; and (4) if he cannot afford an attorney, one will be provided for him by the court. *Id.* at 444. There must be a voluntary, knowing, and intelligent waiver of these rights for the interrogation to continue. *Id.* at 479. If these criteria are not met, any statements made by the defendant are inadmissible at trial in the prosecution's case in chief. *Id.*

When a person is not in custody, the police may question him/her as part of their investigation and may introduce elicited answers into evidence if that person is subsequently charged with a crime. *See* Minnesota v. Murphy, 465 U.S. 420, 433 (1984). Questioning of a suspect in custody, however, must conform to the guidelines set forth in *Miranda* outlined above.

A suspect is considered to be in custody when "a 'formal arrest or restraint or freedom of movement' of the degree associated with a formal arrest" has taken place. *Quarles*, 467 U.S. at 655 (citation omitted). Express questioning or its functional equivalent constitutes an interrogation. Rhode Island v. Innis, 446 U.S. 291, 301 (1980). A "custodial interrogation [therefore is] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444 (citations omitted). The test is whether the police should have known that their statements to the suspect or from the suspect "were reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301 (citation omitted).

The *Innis* court determined that an arrestee's response to a conversation he overheard between two police officers regarding the dangers of a gun previously held by the suspect toward handicapped children did not constitute an interrogation. *Id.* at 302. *Miranda* requirements therefore did not apply, and the arrestee's statement about the gun's location was admissible as evidence. *Id.* at 302-03. By contrast, in *Quarles*, the police directly questioned the defendant regarding the location of a gun. *Quarles*, 467 U.S. at 652. Under *Innis*, this would constitute express questioning. *Innis*, 446 U.S. at 300-01.

*Quarles* established a public safety exception to *Miranda* (the "exception") which allows the admission of otherwise barred statements where police questioning is "necessary to secure their own safety or the safety of the public . . . ."[5] This article will discuss the application of the exception in the thirteen years since the Supreme Court decided *Quarles*. It will point out the limited degree to which courts have extended the exception beyond the bounds set forth by the Supreme Court. This article will also discuss a related exception for questioning in emergency situations involving hostages and other persons at risk.

## I. BACKGROUND

Familiarity with the facts of *Quarles* are essential to understanding the scope of the exception. Shortly after midnight, a young woman approached a police patrol car and informed the officers that a man armed with a gun had just raped her.[6] She further informed the police that the suspect had entered a nearby supermarket.[7] The police entered the supermarket, spotted a man who matched the woman's description, and apprehended him after a brief pursuit.[8] The police handcuffed and frisked the suspect, Benjamin Quarles, who wore an empty holster but did not possess a gun.[9] One of the officers inquired as to the location of the gun, and Quarles told him where to find it, saying "the gun is over there."[10] The police recovered the loaded gun where *Quarles* indicated it would be.[11] Quarles was subsequently charged with crimi-

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The use of collateral statements made in violation of *Miranda* has been held to be permissible at trial. Harris v. New York, 401 U.S. 222, 224 (1971). Specifically, statements obtained in violation of *Miranda* may be used for impeachment purposes (i.e., such statements may not be used substantively in the prosecution's case in chief, but may be used by the prosecution to impeach statements made by the defendant during direct examination). *Id.* at 224. In addition, the prosecution may use otherwise inadmissible statements to impeach statements made in response to proper cross examination. United States v. Havens, 446 U.S. 620, 627-28 (1980).

Statements in violation of the *Miranda* rule may also be used in grand jury proceedings, United States v. Calandra, 414 U.S. 338 (1974); in sentencing proceedings, United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y. 1970), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); parole revocation hearings, United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970); and warrant applications, United States v. Patterson, 812 F.2d 1188 (9th Cir. 1987).

5 *Quarles*, 467 U.S. at 659.

6 *Id.* at 651-52.

7 *Id.*

8 *Id.* at 652.

9 *Id.*

10 *Id.*

11 *Id.*

nal possession of a weapon.[12] The defendant sought to have his statement indicating the location of the gun, and the gun itself, suppressed.[13] The motion to suppress was granted by the trial court and upheld by the appellate courts of New York.[14]

The Fifth Amendment to the United States Constitution prohibits the use of any statement obtained by compulsion against a defendant in a criminal case.[15] *Miranda* warnings serve to dispel a suspect's inherent compulsion to respond to police questioning while in custody. *Miranda* warnings must be given before a suspect answers questions during a custodial interrogation in order to admit his/her response into evidence at trial.[16] Under *Miranda*, Quarles' statement and the recovered gun were properly suppressed because the statement was obtained during a custodial interrogation conducted in violation of *Miranda* requirements.[17]

The United States Supreme Court, however, granted New York State's petition for certiorari in *Quarles* and overturned the Court of Appeals' decision.[18] The statement and gun were deemed admissible under the public safety exception.[19] The Court indicated that the exception to *Miranda* would apply to police questions objectively necessary to protect either the police or the public from immediate danger.[20] After the police obtain the information

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12 *Id.*

13 *Id.* at 649, 656.

14 People v. Quarles, 447 N.Y.S.2d 84 (N.Y. App. Div. 2d Dep't 1981), *aff'd*, 444 N.E.2d 984 (N.Y. 1982), *rev'd*, 467 U.S. 649 (1984).

15 U.S. CONST. amend. V.

16 *Quarles*, 467 U.S. at 655.

17 *Id.* Justice O'Connor, in her concurring opinion in *Quarles*, agreed with the majority in admitting the gun. She argued, however, that the defendant's statement as to where the gun was located should have been suppressed because "[t]he harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule." *Id.* at 669 (O'Connor, J., concurring). Furthermore, when an interrogation provides leads to other evidence it "does not offend the values underlying the Fifth Amendment privilege any more than the compulsory taking of blood samples, fingerprints, or voice exemplars, all of which may be compelled in an 'attempt to discover evidence that might be used to prosecute [a defendant] for a criminal offense.'" *Id.* at 671 (quoting Schmerber v. California, 384 U.S. 757, 761 (1966)).

The United States Supreme Court has not ruled on the question of whether physical evidence obtained as a result of a statement taken in violation of *Miranda* should be admitted into evidence, although the issue has been presented to the Court. *See* United States v. Patterson, 812 F.2d 1188 (9th Cir. 1987), *cert. denied*, 485 U.S. 922 (1988) (holding that unwarned voluntary statements made after coerced statements were properly used in an affidavit for a search warrant).

18 *Quarles*, 467 U.S. at 660.

19 *Id.* at 657.

20 The Court explained that *Miranda* would not penalize officers for "asking the

needed to neutralize the threat to public safety, they must then give the suspect *Miranda* warnings before engaging in further questioning.[21] The *Quarles* majority indicated that the exception is to be applied in emergency situations only.[22] Whether the exception is applicable depends upon a court's objective assessment of the facts facing the police officer at the moment of questioning. The analysis does not turn upon the officer's subjective motivation.[23]

In dissent, Justice Marshall, joined by Justices Brennan and Stevens, found the majority's departure from *Miranda* "troubling" for several reasons.[24] First, Justice Marshall stated, "the majority proposes to protect the public's safety without jeopardizing the prosecution of criminal defendants. I find in this reasoning an unwise and unprincipled departure from our Fifth Amendment precedents."[25] He asserted that police, as a result of *Quarles*, could

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very questions which are the most crucial to their efforts to protect themselves and the public." *Id.* at 658 n.7. The *Quarles* Court distinguished the facts before it from those in Orozco v. Texas, 394 U.S. 324, 324-25 (1969). *Quarles*, 467 U.S. at 659 n.8. In *Orozco*, the Court suppressed statements made by a suspect concerning a gun used in a murder four hours earlier. *Orozco*, 394 U.S. at 324-25. Police surrounded the suspect and questioned him at length in his boardinghouse room in the middle of the night. *Id.* at 325.

According to Justice Rehnquist, *Orozco* and *Quarles* were consistently decided because:

> In *Orozco* . . . the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime.

*Quarles*, 467 U.S. at 659 n.8.

[21] Berkemer v. McCarty, 468 U.S. 420, 429 n.10 (1984) (citing *Quarles*, 467 U.S. at 649). The *Quarles* Court referred to *Miranda* warnings as prophylactic and "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Quarles*, 467 U.S. at 654 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)). Holding that *Miranda* warnings were not constitutionally mandated, the *Quarles* Court found "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Quarles*, 467 U.S. at 657.

[22] *Quarles*, 467 U.S. at 456. "In a kaleidoscopic situation such as the one confronting these officers, where spontaneity . . . is necessarily the order of the day . . . we do not believe that . . . *Miranda* [should] . . . be applied in all its rigor. . . ." *Id.* at 656.

[23] *Id.* at 655-56. *But see* Marc Schuyler Reiner, Note, *The Public Safety Exception to* Miranda: *Analyzing Subjective Motivation*, 93 MICH. L. REV. 2377 (1995) (arguing that the *Quarles* test requires analysis of the officer's subjective motivation). Justice Marshall referred to the New York Court of Appeals finding that the officers who arrested Quarles were not concerned about any threat to either their own safety or to the safety of the public. *Id.* at 675-76 (Marshall, J., dissenting).

[24] *Id.* at 677 (Marshall, J., dissenting).

[25] *Id.* at 678.

no longer apply *Miranda* with clarity.[26] Moreover, he found that the decision "invites the government to prosecute through the use of what necessarily are coerced statements."[27]

Second, the dissent indicated that *Miranda*, in interpreting the United States Constitution's Fifth Amendment Self-Incrimination Clause,[28] established a constitutional presumption that statements made during custodial interrogations are compelled.[29] As such, they violate the Fifth Amendment and are inadmissible in criminal prosecution.[30] Under *Miranda*, the prosecution may rebut this presumption after demonstrating that the police informed the suspect of his *Miranda* rights and the suspect "knowingly and intelligently" waived them.[31] According to Justice Marshall, the *Quarles* majority never addressed this presumption, and it failed to establish that public safety interrogations are less likely to be coerced than other interrogation.[32]

Third, the dissent asserted that the *Quarles* holding would allow law enforcement officers to deliberately withhold *Miranda* warnings in an effort to obtain information from suspects who, if so advised, would otherwise refuse to respond to interrogation.[33] The dissent argued that law enforcement officers were not required to choose between public safety and admissibility. "The prosecution does not always lose the use of incriminating information revealed in these situations. After consulting with counsel, a suspect may well volunteer to repeat his statement in hopes of gaining a favorable plea bargain or more lenient sentence."[34] In the dissent's view, a calculation of the costs of the public should not override the Fifth Amendment's absolute protection against self-incrimination. "Indeed, were constitutional adjudication always conducted in such an ad hoc manner, the Bill of Rights would be a most unreliable protector of individual liberties."[35]

Essentially, *Quarles* holds that answers to questions posed while under custodial interrogation may be admitted into evidence when made without the benefit of *Miranda* warnings where there is a threat to the safety of a crime victim, the public, or the police.

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26 *Id.* at 679.
27 *Id.* at 681.
28 U.S. CONST. amend. V.
29 *Quarles*, 467 U.S. at 683 (Marshall, J., dissenting).
30 *Id.*
31 *Id.*
32 *Id.* at 684.
33 *Id.* at 685.
34 *Id.* at 687.
35 *Id.* at 688.

Such a threat may arise when a weapon is inexplicably absent and police have substantial reason to believe it is in a place where it may be used by an innocent third party, or more importantly, where it may be used by a confederate of the suspect.[36] If the exception is applicable, police may inquire as to the location of weapons even after they arrest and handcuff the suspect.[37]

Numerous questions were left unanswered by *Quarles*: should the exception apply to weapons other than guns? Should it apply to dangerous substances other than weapons? Should it apply if a substantial gap in time exists between the use or disposition of the weapon and the questioning? Should it apply to protect potential victims of crime or hostages involved in ongoing crimes? How great must the danger be to trigger applications of the exception? Must the weapon be in a public place or may the exception be applied in private homes? Have the concerns of the *Quarles* dissent become reality?

## II. THE UNANSWERED *QUARLES* QUESTIONS

### A. *Can Police Routinely Ask a Suspect if He or She Is Armed With a Gun?*

In *Quarles*, the police arrested a suspect alleged to have been armed while committing a rape.[38] When arrested, Quarles wore an empty holster but had no gun.[39] It was reasonable for the police to believe that he had disposed of the weapon in the brief time between the rape and his apprehension. It was also reasonable for police to inquire as to the location of the gun. Other jurisdictions have denied motions to suppress statements based on equally compelling facts (e.g., a likelihood that a person was armed or a weapon was nearby).[40]

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[36] The *Quarles* Court indicated that "[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." *Id.* at 657.

[37] People v. Sims, 853 P.2d 992, 1000 (Cal. 1993), *cert. denied*, 114 S. Ct. 2782 (1994); State v. Duncan, 866 S.W.2d 510 (Mo. Ct. App. 1993); State v. Dempsey, 514 N.W.2d 56 (Wis. Ct. App. 1993) (unpublished opinion). Of course, other factual circumstances not mentioned here may also produce the required danger to safety which permits questioning without the benefit of *Miranda* warnings.

[38] *Quarles*, 467 U.S. at 651-52.

[39] *Id.* at 652.

[40] *See, e.g.*, United States v. Watkins, 12 F.3d 1110 (9th Cir. 1993) (unpublished opinion) (responding to a report of gunfire in a mobile home park and finding a mobile home with windows shot out and wounded man inside, police were justified in asking the suspect about the presence of a gun); United States v. Kelly, 991 F.2d 1308

Some courts, however, have expanded the reach of *Quarles*. For example, courts have admitted into evidence responses to police questions regarding the location of a weapon where no facts indicated that the suspect was armed.[41] In *United States v. Ronayne*,[42] the police arrested and handcuffed Ronayne after he made a cocaine sale.[43] Upon police inquiry, he directed them to his gun located in the pocket of his jacket which had come off during a struggle with the police.[44] The police clearly had the right to search Ronayne pursuant to a lawful arrest, including his jacket. In *Ronayne* the court failed to articulate the precise circumstances where the public's safety was compromised, but then permitted the pre-*Miranda* questioning. Was it objectively reasonable for the court to assume that all alleged drug dealers may be armed? The court in *United States v. Edwards*[45] suggests that it was.

In *Edwards*, the Seventh Circuit held that the exception allowed police to ask a suspect arrested for selling drugs if he was armed.[46] The court reasoned that drug dealers pose a danger to arresting officers because they "are known to arm themselves, particularly when making a sale . . . ."[47]

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(7th Cir. 1993) (person stopped for speeding had ammunition in his pocket); United States v. Lawrence, 952 F.2d 1034 (8th Cir. ), *cert. denied*, 503 U.S. 1011 (1992) (gun thrown away while suspect was being pursued); United States v. Knox, 950 F.2d 516 (8th Cir. 1991) (suspect's jacket contained a loaded magazine for a .38 caliber pistol); People v. Melvin, 591 N.Y.S.2d 454 (App. Div. 2d Dep't 1992) (numerous people were present at scene of shooting where man admitted to shooting the deceased and police asked the location of the gun).

In *United States v. Johnson*, No. 90-50676, 1993 WL 114861 (9th Cir. Apr. 14, 1993) (unpublished opinion), *cert. denied*, 510 U.S. 882 (1993), police questions about weapons were held to fall within the exception. Although the police had no indication that Johnson was armed or had recently been armed, the court found *Quarles* applicable on the grounds that Johnson was in a high crime area, at a late hour, near an open liquor store, and appeared as if he was about to be involved in a robbery. *Id.* at *1-*2. *See* Stauffer v. Zavaris, 37 F.3d 1495 (10th Cir. 1994) (unpublished opinion) (holding that pre-*Miranda* questions regarding weapons were deemed proper under *Quarles* where suspect fled from a car containing two holsters and one handgun on the front seat); State v. Lopez, 652 A.2d 696, 698 (N.H. 1994) (the exception applied where suspect in two shootings, which occurred within a short time of arrest, was wearing an empty shoulder holster when arrested).

41 *See* United States v. Ronayne, No. 94-1374-78, 1995 WL 258137 (6th Cir. May 2, 1995), *aff'd*, 53 F.3d 332 (6th Cir. 1970) (unpublished opinion), *cert. denied*, 115 S. Ct. 2631 (1995); United States v. Edwards, 885 F.2d 377 (7th Cir. 1989); United States v. DeSantis, 870 F.2d 536 (9th Cir. 1989).

42 *Ronayne*, No. 94-1373-78.

43 *Id.* at *1-*2.

44 *Id.*

45 885 F.2d 377 (7th Cir. 1989).

46 *Id.* at 384.

47 *Id.* *See* State v. Harris, 384 S.E.2d 50, 54 (N.C. Ct. App. 1989), *aff'd*, 391 S.E.2d

*United States v. Brutzman*[48] provides the clearest example of the exception's expansion. In *Brutzman*, ten police officers executed a search warrant of the home and office of Warren Brutzman, a convicted felon, who was suspected of mail and wire fraud arising from a telemarketing business.[49] One of the ten officers asked Brutzman if there was a weapon on the premises.[50] Brutzman disclosed that there was a shotgun in the closet.[51]

In essence, because Brutzman was a convicted felon, the statement and shotgun were admitted at trial and the questioning at the scene was proper. Despite the overwhelming presence of police at the scene, the fact that the police had no reason to believe Brutzman was armed and that the purpose of the search was to locate evidence of mail and wire fraud, not weapons, the appellate court found the question permissible under *Quarles*.[52] The statement made in response to pre-*Mirandized* questioning was instrumental in convicting Brutzman of felonious possession of a firearm.[53] Similarly, in *United States v. DeSantis*,[54] the Ninth Circuit explicitly stated that "[t]he fact that [police] had no reason to believe that [the suspect] was armed and dangerous . . . is of no consequence."[55]

Initially, *Quarles* was limited to situations where particular facts led officers to believe that a threat to public safety existed. *Ronayne, Brutzman*, and *DeSantis* encourage police to routinely ask suspects whether they are armed. Such routine questioning represents a clear expansion of the exception. These decisions, in effect, have labeled virtually any situation a threat to public safety.

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187 (N.C. 1990) (court, under *Quarles*, permitted question about existence and location of weapons because officer testified that, in his experience, people are armed in at least 85% of drug transactions).

48 No. 93-50839, 1994 WL 721798 (9th Cir. Dec. 28, 1994) (unpublished opinion), *cert. denied*, 514 U.S. 1077 (1995).

49 *Id.* at *1.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 870 F.2d 536 (9th Cir. 1989).

55 *Id.* at 539. Similarly, in *Fleming v. Collins*, 954 F.2d 1109 (5th Cir. 1992), the police responded to a bank's silent alarm. *Id.* at 1110. Prior to confirming that a robbery had taken place, the police observed two men in a field, one holding a pistol, and the other bent over on the ground holding his wounded arm. *Id.* at 1110-11. The police did not know how the wounded man had been shot, whether he was a crime victim or suspect, or about the nearby bank robbery at which a robber was shot and had escaped. *Id.* at 1111, 1114. Yet the court concluded it was proper to ask the wounded man about the location of his gun. *Id.* at 1114.

Thus, it is always reasonable for police to inquire as to the location of weapons.

### B. *Does the Exception Apply to Questions Concerning Other Weapons, Drugs, Needles, and Other Suspects?*

Courts have extended the exception to allow questioning about weapons other than guns, drugs, and hypodermic needles. For example, although *Quarles* involved an officer's inquiry as to the location of a gun, the courts have found pre-*Miranda* questions appropriate that seek to procure the location of a knife.[56]

In *United States v. Carrillo*,[57] the police asked a suspected drug seller, before conducting an inventory search, whether "he had any drugs or needles on his person."[58] The trial court found his response, "[n]o, I don't use drugs, I sell them," admissible.[59] The appellate court affirmed, finding an objectively reasonable need to protect officers from needle pricks or skin irritations resulting from drug contact.[60] Thus *Carillo* justifies a routine pre-search, pre-*Miranda*, inquiry as to possession of drugs or drug paraphernalia. Such questioning is appropriate regardless of the existence of facts suggesting that the suspect used drugs or was carrying them. This ruling should be narrowed to apply only to instances involving arrested drug sellers or to instances where police reasonably fear that the suspect has drugs or needles on his person.

However, in *United States v. Cox*,[61] the Fourth Circuit applied an even broader rule, permitting questions as to drug use. The court in *Cox* stated that the exception permitted police to ask a suspect if he was a heroin user after a search uncovered drug resi-

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56 People v. Cole, 211 Cal. Rptr. 3d 242 (Cal. Ct. App. 1985) (*Quarles* applicable where, following report that a man attempted a kidnapping by holding a knife to a victim's throat, police chased and caught the suspect and immediately asked him the location of his knife); Ohio v. Jergens, No. 13294, 1993 WL 333649 (Ohio Ct. App. Sept. 3, 1993) (the exception applies where, the day after his wife's death, a suspect in the stalking murder was asked, upon arrest, about the location of the knife used in the murder); *see also* State v. Deases, 518 N.W.2d 784 (Iowa 1994) (the court found *Quarles* inapplicable to police questioning of stabbing suspect as to where he obtained the knife used because officers were already in possession of the knife, not because the weapon was something other than a gun).

57 16 F.3d 1046 (9th Cir. 1994).

58 *Id.* at 1049.

59 *Id.* In fact, the officer in *Carrillo* testified that it was his policy to ask such a question before conducting any search, regardless of the existence of any facts suggesting that the suspect used or was carrying drugs. *Id.*

60 *Id.*

61 No. 90-5853, 1992 WL 29136 (4th Cir. Feb. 20, 1992) (unpublished opinion), *cert. denied*, 504 U.S. 928 (1992).

due and paraphernalia in the suspect's car.[62] The *Cox* court found the inquiry reasonable because drug users often act irrationally, and, therefore, pose a threat to police officers' safety.[63]

Questioning to secure public safety may also refer to matters other than weapons or drugs. For example, in *State v. Leone*,[64] the court permitted questions as to the location of a wounded police officer,[65] and the person whom Leone claimed had shot the officer.[66] Leone's statements were deemed voluntary since police did not draw their guns and did not apply physical force.[67] The trial court found that Leone exercised his rational intellect and free will in making these statements.[68] The court further noted that Leone made unsolicited statements that someone else had shot a police officer, and that he stated to one officer "go ahead and pull the trigger if you're man enough."[69]

In sum, *Quarles* has been extended to pre-*Miranda* questions involving drugs,[70] drug paraphernalia,[71] drug use,[72] and the location of a wounded officer and the shooter of that officer.[73]

### C. *Does* Quarles *Apply Only to Public Places?*

Although the exception applies to threats to safety in a public place,[74] the *Quarles* rationale logically allows questioning any time

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62 *Id.* at *4.

63 *Id.* at *9.

64 581 A.2d 394 (Me. 1990).

65 *Id.* at 396. The trial court suppressed these answers as being involuntary products of police coercion, in violation of the Fifth Amendment because the arresting officers obtained these statements after pounding Leone's head on the ground several times, aiming a gun at his head, and threatening to kill him. *Id.*

66 *Id.* at 397. The court reasoned that the circumstances of an armed man threatening police, an officer's telephone message that he had been shot, and the inability of the officers to find their wounded fellow officer in dense woods made it "reasonable . . . to ask Leone if he was alone and about the gun. . . . After Leone's later statement that another person had shot Officer Payne, it was also reasonable for the officers to inquire about the identity of that other person." *Id. See, e.g.*, Hill v. State, 598 A.2d 784, 785 (Md. Ct. Spec. App. 1991) (police chased three suspected armed robbers into a museum complex and caught two of them; it was held proper to ask one of the arrested men where the third armed man was).

67 *Leone*, 581 A.2d at 397.

68 *Id.*

69 *Id.* at 396.

70 United States v. Carillo, 16 F.3d 1046, 1049 (9th Cir. 1994).

71 *Id.*

72 United States v. Cox, No. 90-5853, 1992 WL (4th Cir. Feb. 20, 1992), *cert. denied*, 503 U.S. 928 (1992) at *1.

73 *Leone*, 581 A.2d at 394.

74 The Court in a later case indicated that "[i]n *New York v. Quarles*, 467 U.S. 649 (1984), we recognized a public safety exception to the usual Fifth Amendment rights

the requisite safety concern is present regardless of whether the location is public or private. For example, in *United States v. Simpson*,[75] a suspect was alleged to have held a weapon to his stepchild's head.[76] The Seventh Circuit in *Simpson* relied on *Quarles* to allow officers to inquire as to the location of the weapon after the suspect had been arrested in his apartment.[77] Conversely, in *United States v. Mobley*,[78] the court held the exception inapplicable where the police asked a suspect, arrested in his home on drug charges, whether there were any dangerous devices or weapons in the apartment.[79] Mobley told the officers that a weapon was hidden in his bedroom closet and led them to it.[80] The Fourth Circuit concluded that the circumstances did not demonstrate the immediate need for questioning because there was no threat to public safety.[81]

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afforded by *Miranda v. Arizona*, 384 U.S. 436 (1966) so that police could recover a firearm which otherwise would have remained *in a public area*." Baltimore Dep't of Soc. Serv. v. Bouknight, 488 U.S. 1301, 1305 (1988) (emphasis added).

75 974 F.2d 845 (7th Cir. 1992).

76 *Id.* at 846.

77 *Id.* at 847.

78 40 F.3d 688 (4th Cir. 1994).

79 *Id.* at 691, 693. *But see* United States v. DeSantis, 870 F.2d 536 (9th Cir. 1989) (suspect's home); People v. Childs, 651 N.E.2d 252 (Ill. 1995), *cert. denied sub nom.* Childs v. Illinois, 516 U.S. 1134 (1996) (apartment of another person); People v. Sims, 853 P.2d 992 (Cal. 1993), *cert. denied*, 114 S. Ct. 2782 (1994) (motel room); Missouri v. Duncan, 866 S.W.2d 510 (Mo. Ct. App. 1993) (home); State v. Harris, 384 S.E.2d 50 (N.C. Ct. App. 1989) (outside motel room); State v. Leone, 581 A.2d 394 (Me. 1990) (wooded rural area).

80 *Mobley*, 40 F.3d at 691.

81 *Id.* at 693. Police arrested a naked Mobley when he responded to a knock at his door. *Id.* at 690. He clearly was not armed. *Id.* Police made an initial survey of the apartment to be sure that no one else was present. *Id.* Police asked Mobley about the existence of a weapon after he got dressed and was being led away from the apartment. *Id.* at 691. Despite the *Quarles* violation, the *Mobley* court affirmed his conviction because the error was harmless. *Id.* at 694.

In *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989), the Fifth Circuit explained its reasoning for finding *Quarles* inapplicable. In *Raborn*, police conducting a drug surveillance of a building in an isolated rural area engaged in a car chase of a truck leaving the building. *Id.* at 592. Seven officers stopped the vehicle. *Id.* One of the occupants wore a holster with a gun in it. *Id.* He removed the gun and placed it somewhere in the vehicle. *Id.* The police required all of the occupants to exit. *Id.* The occupants were arrested and the police searched for the gun but did not find it. *Id.* The police asked the man with the empty holster where the gun was located and he told them. *Id.* The appellate court concluded that the exception did not justify the question asked because "the gun was [not] hidden in a place to which the public had access. Raborn's truck, where the police officers believed the gun to be, had already been seized and only the police officers had access to the truck." *Id.* at 595. *Quarles* was inapplicable, not because the truck was in a place inaccessible to the public, but rather, because the gun presented no danger to anyone—public or police. *Id.* The gun was properly admitted because it would inevitably have been discovered during the police inventory search of the truck. *Id.*

Several courts have stressed that the exception requires questioning related to a danger occurring in a place accessible to the public.[82] Although there is language in *Quarles* that supports this argument,[83] it is not consistent with the reasoning of *Quarles*, which should logically allow questioning to protect police officers or others present at the scene of an arrest regardless of whether it occurs in a public or a private place.

### *D. Does* Quarles *Apply After Giving a Suspect* Miranda *Warnings?*

The exception allows for the introduction at trial of statements and related evidence obtained by inquiring of individuals in police custody despite the failure of police to give *Miranda* warnings before asking questions.[84] In addition, some courts have applied *Quarles* to allow questioning of individuals about public safety who had already received, but had not waived, their *Miranda* rights.[85]

In *Edwards v. Arizona*,[86] the Supreme Court held that an accused who had been *Mirandized* and made a request to speak with counsel "[could] not [be] subject to further interrogation by the authorities until counsel ha[d] been made available to him, unless

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82 In *Edwards v. United States*, 619 A.2d 33 (D.C. Ct. App. 1993), the police arrested a suspect who, moments earlier, threatened several people with a rifle. *Id.* at 34. The suspect, pursued by police, entered a partly occupied, unlocked, somewhat derelict, apartment building. *Id.* at 34-35. After arrest, the suspect responded to a question about the location of the weapon. *Id.* at 35. The court found that the weapon was in a place accessible to the public in accordance with *Quarles*. *Id.* at 36. Some apartments were occupied, the building's front door was unlatched, and vagrants used the building. *Id.* at 37. In *Wisconsin v. Hoag*, No. 92-2523-CR, 1993 WL 245669 (Wisc. Ct. App. May 12, 1993) (unpublished opinion), the court recognized that the exception "would not apply in a situation where there is an area readily accessible to the public and there is no exigency requiring immediate police action." *Id.* at *3 n.3 (citations omitted). Nevertheless, the *Hoag* court held that *Quarles* applied to the questioning of a suspect in an armed bank robbery who no longer had the gun used in the robbery and who had been pursued by a citizen from the bank to a wooded area. *Id.* at *1.

83 In *Quarles*, 467 U.S. at 659 n.8, the Supreme Court distinguished *Orozco v. Texas*, 394 U.S. 324 (1969), in which the questioning of the suspect occurred at his boardinghouse in the middle of the night with armed officers asking numerous questions regarding a murder and whether the arrestee owned a gun. *Quarles*, 467 U.S. at 659 n.8 (1984). *Orozco* is distinguishable from *Quarles* beyond whether the site of the questioning was a public or private place. The questioning in *Orozco* was extended and concerned the crime, not merely the location of the gun. Because Orozco was arrested a mere four hours after the murder, logically, brief questioning of Orozco solely regarding the location of the gun used in the murder would have been proper under *Quarles*.

84 *Id.* at 659.

85 *See, e.g.*, United States v. DeSantis, 870 F.2d 536 (9th Cir. 1989).

86 451 U.S. 477 (1981).

the accused himself initiate[d] further communication . . . with the police."[87] Nevertheless, the exception has, at least in one case, been extended to permit a question otherwise barred by *Edwards*.[88]

In *United States v. DeSantis*, Rocco DeSantis had been arrested at his home, pursuant to a warrant, and requested to speak to counsel.[89] The police accompanied a partially clothed DeSantis to his bedroom so he could dress.[90] An officer asked him if there were any weapons in the bedroom.[91] DeSantis stated that there was a gun and identified its location.[92] The officer seized the weapon. The trial court denied DeSantis' subsequent motion to suppress his statement and the recovered gun.[93] The Ninth Circuit affirmed, reasoning that the officer had an objectively reasonable basis to fear for his safety in DeSantis' bedroom.[94] Thus, the *Quarles* exception was applicable despite DeSantis' invocation of his right to counsel.[95]

By contrast, in *People v. Laliberte*,[96] the Illinois Appellate Court held it was improper for police to ask further questions of an arrestee who repeatedly asked for an attorney.[97] In that case police suspected Laliberte of kidnapping a one-year-old child and abandoning her in the woods.[98] The court rejected the state's argument that the danger to the child justified evidentiary use of the defendant's answers to questions asked after he had been *Mirandized* and then requested to speak to counsel.[99]

### *E. Have Courts Created New Exceptions to* Miranda?

The *Quarles* dissent, as well as numerous critical commentators, expressed concern that *Quarles* created an exception to the previous "bright line" rule of *Miranda*, which banned the use of compelled statements.[100] The exception, it is feared, could lead to

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87 *Id.* at 484-85.

88 United States v. DeSantis, 870 F.2d 536, 538 (9th Cir. 1989).

89 *Id.* at 537-38. There was dispute as to whether DeSantis actually requested to speak to counsel. The court accepted DeSantis' version of the matter. *Id.* at 538 n.1.

90 *Id.* at 537.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.* at 541.

95 *Id.* at 539, 541.

96 615 N.E.2d 813 (Ill. App. Ct. 1993).

97 *Id.* at 821.

98 *Id.* at 816.

99 *Id.* at 819-20, 822-23.

100 New York v. Quarles, 467 U.S. 649, 663-86 (1984). (O'Connor, J., concurring and dissenting in part); *See, e.g.*, Steven Andrew Drizin, *Fifth Amendment—Will the Pub-*

the creation of other exceptions to *Miranda*. However, this concern has not been realized in the thirteen years since *Quarles* was decided. It is true that several courts have utilized a "rescue doctrine"[101] exception to *Miranda* to permit questioning of suspects in situations involving hostages or kidnapped persons. However, these cases logically fall under *Quarles* because they include a substantial threat to someone's safety and involve emergency situations.[102]

Another new exception to *Quarles* may be found where courts have ruled that police are permitted to ask questions in order to "clarify the nature of the situation" they face.[103] For example, in

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*lic Safety Exception Swallow the* Miranda *Exclusionary Rule?*, 75 CRIM. L. & CRIMINOLOGY 692, 712 (1984); Marla Belson, Note "*Public-Safety*" *Exception to* Miranda: *The Supreme Court Writes Away Rights*, 61 CHI.-KENT L. REV. 577, 591 (1985); Daniel Brian Yeager, Note, *The Public Safety Exception to* Miranda *Careening Through the Lower Courts*, 40 U. FLA. L. REV. 989, 992-93 (1988).

101 The "rescue doctrine" was developed primarily by California courts to allow into evidence a suspect's responses to police questioning in situations in which the suspect has not received *Miranda* warnings and the police undertake the interrogation for the purpose of saving a life. The doctrine was first announced pre-*Miranda* in *People v. Modesto*, 398 P.2d 753 (Cal. 1965), *cert. denied sub nom.* Modesto v. Nelson, 389 U.S. 1009 (1967) and continued to be utilized post-*Miranda* in *People v. Riddle*, 83 Cal. App. 3d 563 (Cal. Ct. App. 1978), *cert. denied sub nom.* Riddle v. California, 440 U.S. 937 (1979). The *Riddle* court indicated that the rescue doctrine, also known as the "private safety" doctrine, applied in situations where (1) there was an urgent need for the information which could not be obtained in any other way; (2) the possibility existed of saving a human life by rescuing a person whose life is in danger; and (3) the rescue is the primary purpose and motive behind the interrogation. *Id.* at 576. The doctrine has been adopted by other jurisdictions as well. *See* State v. Kunkel, 404 N.W.2d 69 (Wis. 1987), *cert. denied*, 484 U.S. 929 (1987); State v. Provost, 490 N.W.2d 93 (Minn. 1992), *cert. denied sub nom.* Provost v. Minnesota, 507 U.S. 929 (1993); United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989).

The private safety exception is much more narrow than the *Quarles* exception. The danger must involve a threat to a specific person's life rather than a general threat to public safety. The police, when acting in accordance with the private safety exception, must have a subjective intention to rescue the person in danger, whereas the *Quarles* test is an objective one. The private safety exception requires that the information be unavailable by any other means, whereas the *Quarles* exception does not.

102 The rescue doctrine is necessary only if *Quarles* is limited to situations involving threats to public safety. Given that the basic rationale of *Quarles* does not justify such a limitation, there is probably no need for the rescue doctrine. Regardless of the nature of the threat to safety, whether to a particular individual or to the public in general, the *Quarles* objective approach should be favored in determining whether there was a threat to safety which permitted the questioning of a suspect without receiving *Miranda* warnings, and whether the scope of the questioning was limited to that which was necessary to protect safety interests. Nevertheless, some courts have continued to reject the rescue doctrine. *See, e.g.*, *Laliberte*, 615 N.E.2d at 813.

103 People v. Luna, 559 N.Y.S.2d 377 (App. Div. 2d Dep't 1990) (citing People v. Huffman, 359 N.E.2d 353, 356 (N.Y. 1976)).

*People v. Luna*[104] police responded to a restaurant's burglar alarm, found Luna in the closed restaurant, and caught him after a chase.[105] As they subdued Luna, one of the officers found a bulge in Luna's pocket and asked him what it was.[106] Luna answered that he obtained it in the restaurant and that two other persons had been there with him.[107] The object turned out to be a roll of money.[108] The Appellate Division, Second Department, rejected Luna's argument that admission of his answer violated *Miranda*,[109] and permitted officers at the scene of an arrest to ask questions designed to clarify the situation confronting them.[110]

### *F. Does the Exception Apply if There is a Gap in Time Between the Use of a Weapon and the Arrest?*

In *Quarles*, police inquired as to the weapon's location a few minutes after it was allegedly used.[111] However, the exception has been properly applied to inquiries about weapons where there existed a gap in time between the suspect's alleged possession of the weapon and the police questioning.[112]

A compelling basis for pre-*Mirandized* questioning exists so long as there is a reasonable basis to believe that there is a danger to public safety. In *People v. Sims*,[113] the police arrested a suspect for an armed robbery and murder, which had occurred two weeks earlier.[114] The suspect was believed to possess a handgun and machine gun in his hotel room.[115] The court found that the danger to the police was inherent because the suspect was sought for the commission of violent armed felonies and was believed to be armed at the time of apprehension.[116] The danger did not fail to exist merely because the crimes occurred two weeks earlier.

Likewise, in *United States v. Thurston*[117] the defendant bought a

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104 Luna, 559 N.Y.S.2d at 377.
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.* at 378.
110 *Id.*
111 New York v. Quarles, 467 U.S. 649, 652 (1984).
112 *See* People v. Sims, 853 P.2d 992 (Cal. 1993), *cert. denied sub nom.* Sims v. California, 114 S. Ct. 2782 (1994); United States v. Thurston, 774 F. Supp. 666 (D. Me. 1991).
113 *Sims*, 853 P.2d at 992.
114 *Id.* at 998-1000.
115 *Id.* at 1000.
116 *Id.* at 1019.
117 774 F. Supp. 666.

handgun in the morning and used it to threaten his wife. He then drank heavily during the day and was arrested at night.[118] Although many hours had passed since the gun was used to threaten Thurston's wife, the public safety exception was applicable because the gun could have been dangerous if found by someone else or the defendant upon his release from custody.[119] The danger to the public in that case arose from a possibility of subsequent use of the weapon, regardless of when it might have been discovered, and regardless of the gap in time between the use of weapon and the questioning.

### G. *How Substantial May the Police Questioning Be Under* Quarles?

In *Quarles*, the police officer asked a single question regarding the location of the suspect's gun.[120] After retrieving the gun, the officer then read the defendant his *Miranda* rights.[121] The *Quarles* Court indicated that "Officer Kraft asked only the question necessary to locate the missing gun before advising respondent of his rights."[122] The Court distinguished these events from those in *Orozco v. Texas*,[123] where police officers questioned a suspect at length in his boardinghouse room regarding the location of a gun used in a murder.[124] The *Quarles* Court stated that because the questions in *Orozco* were "clearly investigatory [in that] they did not in any way relate to an objectively reasonable need to protect the police or public from any immediate danger associated with the weapon,"[125] they differed from those in *Quarles* which related to immediate dangers associated with the weapon seized.[126]

The bulk of the cases which followed the *Quarles* exception were instances where the police asked a single question or a small number of questions about a weapon, or other dangers, and then ceased further questioning until *Miranda* rights were read.[127] In

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118 *Id.* at 667.

119 *Id.* at 667-68.

120 467 U.S. at 652.

121 *Id.*

122 *Id.* at 659.

123 394 U.S. 324 (1968).

124 *Id.* at 324-25.

125 467 U.S. at 659 n.8. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Supreme Court, within a month of deciding *Quarles*, explained the public safety exception as allowing "questions essential to elicit information necessary to neutralize the threat to the public. Once such information has been obtained, the suspect must be given the standard warnings." *Id.* at 429 n.1.

126 *Id.*

127 *See, e.g.*, Hill v. State, 598 A.2d 784, 786 (Md. Ct. Spec. App. 1991) (two questions before giving of *Miranda* warnings); People v. Howard, 556 N.Y.S.2d 940 (App.

instances where questioning extended beyond the scope permitted by *Quarles*, the answers were suppressed.[128] For example, in *People v. Roundtree*,[129] where shots were fired during a fight between two men in a car, the court suppressed a defendant's answer to a police question regarding the ownership of a suitcase in the car.[130] The *Roundtree* court reasoned that the police officer "had secured control of the scene before he asked the question. Furthermore . . . [n]either the suitcase [n]or its contents posed a threat to the public safety. . . ."[131]

Similarly, in *State v. McCarthy*[132] the Supreme Court of Nebraska found the exception inapplicable to questions regarding the whereabouts of a separate murder suspect.[133] The court concluded that there was no immediate danger requiring the suspect to be questioned without receiving *Miranda* warnings.[134] Similarly, in *State v. Deases*,[135] the questioning of a prisoner regarding where he obtained a shank (i.e., knife) that he used to stab another inmate was deemed inapplicable because the shank was in the prison officials' possession at the time of questioning.[136] The Supreme Court of Iowa held that there was no immediate threat to public safety, thus, the pre-*Miranda* questioning was not justified.[137]

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Div. 2d Dep't 1990) (limited questions followed by *Miranda* warnings); People v. Luna, 559 N.Y.S.2d 377, 377 (App. Div. 2d Dep't 1990) (one question before *Miranda* warnings).

In many cases, the opinions indicated that one question or a few questions were asked, but no mention was made of the giving of *Miranda* warnings. *See, e.g.*, State v. Duncan, 866 S.W. 2d 510, 511 (Mo. Ct. App. 1993) (one question); People v. Lopez, 652 A.2d 696, 698 (Sup. Ct. N.H. 1994) (one question); State v. Ingram, 596 N.Y.S.2d 352 (App. Div. 2d Dep't 1991) (two questions).

128 In *United States v. Eaton*, 676 F. Supp. 362, 365-66 (D. Me. 1988), the court found the question to a person arrested at a drug sale, regarding the reason for the arrestee's presence at the site of the arrest, outside the scope of questioning permitted by *Quarles*. *Id.* *See* State v. Cross, No. A-93-368, 1993 WL 311554, at *4 (Neb. App. Ct. Aug. 17, 1993) (unpublished opinion) (no immediate need for question about location of a gun when suspect and accomplice were in custody after car chase ended in a snowdrift on a dead end road); United States v. Gonzalez, 864 F. Supp. 375, 382 (S.D.N.Y. 1994) (two questions allowed when suspect in gun battle with police claimed to be a police officer and crime victim; subsequent questions were held not justified under *Quarles*).

129 482 N.E.2d 693 (Ill. App. Ct. 1985).

130 *Id.* at 698.

131 *Id.* at 697-98.

132 353 N.W.2d 14 (Neb. 1984).

133 *Id.* at 16-17.

134 *Id.*

135 518 N.W.2d 784 (Iowa 1994).

136 *Id.* at 790-91.

137 *Id.* at 791. *Accord* People v. Ratliff, 584 N.Y.S.2d 871, 872 (App. Div. 2d Dep't 1992) (police responding to an armed robbery at a private social club asked one sus-

In a limited number of cases, courts have improperly admitted into evidence answers to numerous investigatory questions. The most serious example of such an erroneous application of the exception occurred in *Fleming v. Collins.*[138] In *Fleming,* after responding to a bank alarm, police questioned a man they observed in a field holding a pistol over another man.[139] Police approached, ordered the man to drop his gun, and ordered both men to put their hands up.[140] Fleming, the man on the ground, stated that he could not raise his arm because he had been shot.[141] The officer asked who shot him,[142] and the suspect said it was the man at the bank.[143] At that point, the officers realized that Fleming was a suspect in the bank robbery and that the other man was merely an armed bystander who followed Fleming from the bank and captured him.[144] The officer continued to inquire as to who was with Fleming, the location of the guns and whether anyone at the bank was shot.[145] The trial court admitted Fleming's answers to all the questions and the appellate court affirmed.[146]

The appellate court in *Fleming* found that the *Quarles* exception permitted all of the questions because the officers initially did not know the location of the accomplices or whether Fleming was a victim of a crime or a suspect.[147] The majority opinion asserted that *Quarles* was satisfied because the questioning ended once Fleming stated that he had acted alone.[148] The majority chose to look at the situation as a whole to discover whether the danger permitted pre-*Mirandized* questioning.[149] The dissent, in contrast, concluded that the safety concerns were satisfied once the police

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pect the number and whereabouts of other robbers not yet apprehended); Hill v. State, 598 A.2d 784, 785 (Md. Ct. Spec. App. 1991) (the court allowed a question asked of a suspected armed robber regarding the location of another armed participant in the robbery who had just evaded arrest).

138 954 F.2d 1109 (5th Cir. 1992).

139 *Id.* at 1110.

140 *Id.* at 1110-11.

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 1114. (Williams, J. & Brown, J., dissenting).

147 *Id.* at 1113. The officers had already frisked Fleming so they knew he was no longer armed. *Id.* at 1115.

148 The majority opinion quotes from the officer's suppression hearing testimony, which includes this testimony rather than the trial testimony. *Id.* at 1111, 1114-15. The dissent points out that the suppression hearing testimony was never heard by the trial jury but that, of course, the trial testimony was. *Id.* at 1114.

149 *Id.* at 1113-14.

knew that Fleming was fleeing from a bank robbery, had dropped his gun, and was not armed.[150] Thus, the dissent argued that the officer's continued questioning was improper.[151]

*Quarles* requires that the questioning cease and *Miranda* rights be read as soon as the threat to public safety ends. Therefore, the majority in *Fleming* erred by permitting all five minutes of questioning to be admitted. Once the safety concerns were alleviated, Fleming should have been *Mirandized.* The *Fleming* dissent reasoned consistently with *Quarles* by approving the questioning directed at public safety and disapproving the use of answers to questions no longer necessary to secure the public safety. Accordingly, all of Fleming's statements made after it was clear that no threat to the public safety existed should have been suppressed.

## III. CONCLUSION

In creating an exception to *Miranda,* the *Quarles* Court articulated a narrow set of circumstances in which police officers are permitted to engage in pre-*Miranda* questioning. The exception allows questioning of suspects before they are informed of their *Miranda* rights whenever a court may objectively conclude that officers are faced with a situation endangering the police or the public safety. However, subsequent trial and appellate court decisions have implemented *Quarles* in ways inconsistent with its rationale. Police officers may now question suspects where dangers arise from the presence of guns, or other weapons, drugs or drug paraphernalia, as to the possible presence of other suspects or crime victims and where questioning will result in searches beyond the scope of a valid search warrant. In addition, *Quarles* may be applied regardless of whether the danger exists in a private or public setting.

Questions permitted by *Quarles* have generally been limited to those designed to protect against danger to the public or to police, and no further questioning has been permitted without providing the warnings required by *Miranda.* Perhaps the greatest and most unwarranted expansion of the exception involves court approval of the practice of questioning suspects as to the location of weapons or drugs regardless of whether there exists an objective reason to believe that the particular suspect possessed or used same. These

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150 *Id.* at 1115.

151 *Id.* According to the dissenting judges, *Quarles* never intended to allow police questioning of this type: "How many thousands of unfortunate persons in totalitarian countries have confessed at the end of the loaded barrel of a gun held by police officers, whether or not they were guilty?" *Id.*

departures dilute the Supreme Court's original rationale for creating the exception in *Quarles*.

# WHAT JUSTICE REQUIRES: A CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL

*Mary Ross†*

On September 22, 1982, a probationary fireman was found in his van, shot to death.[1] On September 24, 1982, Sheila DeLuca, a retired police officer, was arrested for his murder.[2] In April 1984, DeLuca was found guilty of murder in the second degree[3] and was given a sentence of twenty years to life.[4] Today, she is a free woman.

The purpose of this note is to provide some hope for those languishing in prisons, convicted of crimes they did not commit, and for those who could have been convicted of a lesser crime had an appropriate and viable affirmative defense been raised on their behalf. This note also contains a warning for attorneys regarding the scope of their responsibility to their clients. To accomplish this purpose, the decisions of the United States District Court for the Southern District of New York and the Second Circuit Court of Appeals which dealt with Sheila DeLuca's case will be examined. The effect of these decisions on later cases will also be explored. The right to effective assistance of counsel,[5] the right to testify,[6] and the affirmative defense of extreme emotional disturbance[7] will be addressed in the context of these decisions.

## I. UNDISPUTED FACTS

On the evening of September 21, 1982, Sheila DeLuca met with friends and family at a bar in the Bronx to celebrate her birthday, her retirement from the police force, and her team's victory in

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1 DeLuca v. Lord, 858 F. Supp. 1330, 1334 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

2 *Id.* at 1335.

3 N.Y. PENAL LAW § 125.25(1) (McKinney 1987) ("A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person . . . .").

4 *DeLuca*, 858 F. Supp. at 1344.

5 U.S. CONST. amend. VI; Reece v. Georgia, 350 U.S. 85 (1955).

6 Rock v. Arkansas, 483 U.S. 44 (1987) (holding that based on the Fifth, Sixth, and Fourteenth Amendments, criminal defendants have a right to testify on their own behalf).

7 N.Y. PENAL LAW § 125.25(1) (McKinney 1987).

a women's softball league.[8] She took her husband home early because he was sick, and upon his insistence she returned to the bar.[9]

Later, she and a friend went to an after-hours club, arriving at approximately 5 a.m.[10] They met Robert Bissett and his friends Eugene Murphy and Robert Barrett, none of whom they knew.[11] Around 7 a.m. they left the club together in Bissett's van.[12] At some point DeLuca and Bissett, being alone in his van, parked in a deserted area along the service road of a highway.[13] At about 2 p.m. on September 22, 1982, DeLuca left the van, called her husband, and went home.[14]

That evening around 7 p.m., DeLuca's husband, a retired police captain, called the police and told them where they could find Bissett's body.[15] Mr. DeLuca called the police again, about an hour later, and asked for the rape squad.[16] When a sergeant returned the call, Sheila DeLuca described her abduction and rape.[17]

DeLuca then hired John Patten, an attorney who had never before tried a case involving homicide.[18] After conferring with the attorney and his partner, DeLuca gave the police the clothes that she wore the previous evening.[19] She then went to a hospital for a medical examination.[20] Upon returning home, she gave the police her service revolvers and her husband turned over the off-duty revolver which had been used to kill Bissett.[21]

## II. The Trial

At trial, the prosecution presented only circumstantial evidence.[22] They attempted to show DeLuca was a "loose" woman trying to satisfy her sexual desires and then killing Bissett in cold blood.[23] There were also apparent discrepancies in the evidence given by prosecution witnesses which were never pursued by the

8 *DeLuca*, 858 F. Supp. at 1333.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at 1334.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 1334 n.2.
19 *Id.* at 1334-35.
20 *Id.* at 1335.
21 *Id.*
22 *Id.* at 1340.
23 *Id.*

defense.[24] Nor was the prosecution able to prove the victim's time of death since the body had been refrigerated, thus altering the progression of signs which could have indicated the approximate time of death.[25]

The defense attempted to call only one witness, an expert on rape trauma syndrome, to rebut the prosecution's theory that DeLuca had lied about being raped. The trial judge refused to allow the testimony.[26] Not only was the defense unsuccessful at its only attempt to call a witness, but they rested without presenting any evidence.[27]

DeLuca was then convicted of second-degree murder.[28]

## III. Subsequent History

DeLuca's conviction was upheld without opinion on April 11, 1985 by the New York Appellate Division, First Department.[29] Subsequently, her leave to appeal to the New York Court of Appeals was denied.[30] The conviction became final on February 24, 1986, when DeLuca's petition for certiorari to the United States Supreme Court was denied.[31] Arguing that she received ineffective assistance of counsel and admitting for the first time that she had killed Bissett, DeLuca made a post conviction motion to vacate the judgment.[32] That motion was denied.[33]

After exhausting all state remedies, DeLuca petitioned for a writ of habeas corpus in the United States District Court for the Southern District of New York.[34] Her contention was that her trial counsel was ineffective in two respects.[35] First, he failed to ade-

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[24] *Id.* at 1341 n.9, 10. Bissett's mother testified that Bissett and a woman had stopped by the house that morning, and the owner of a paint store testified that Bissett had visited. But neither of his friends who had been with him mentioned either stop. *Id.* at n.9.

[25] *Id.* at 1343.

[26] *Id.* at 1344.

[27] *Id.*

[28] *Id.*

[29] People v. DeLuca, 488 N.Y.S.2d 529 (App. Div. 1st Dep't 1985).

[30] People v. DeLuca, 484 N.E.2d 677 (N.Y. 1985).

[31] DeLuca v. New York, 475 U.S. 1012 (1986).

[32] N.Y. Crim. Proc. Law § 440.10(1)(h) (McKinney 1994) (stating that any time after a judgment has been rendered, the court upon which it was entered may vacate the judgment, upon motion of the defendant, on the ground that it was obtained in violation of the constitutional rights of defendant).

[33] *DeLuca*, 484 N.E.2d 677.

[34] 28 U.S.C.A. § 2241(a)(d) (West 1994) (providing that a writ of habeas corpus may be granted by a judge of a circuit court or a district court).

[35] DeLuca v. Lord, 858 F. Supp. 1330, 1344 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

quately explore and use a possible defense based on extreme emotional disturbance.[36] Second, he also failed to advise DeLuca that it was her decision whether or not to testify in her own behalf.[37]

## IV. Testimony at the Magistrate's Hearing

District Court Judge Robert Ward referred the petition to Magistrate Court Judge Roberts in January 1991.[38] An evidentiary hearing was held in July 1992.[39] In 294 pages of testimony, DeLuca gave her version of the facts for the first time.[40] Her attorney and his partner, as well as three other witnesses who testified at the hearing, confirmed that DeLuca's statements were consistent with her account of the events prior to her trial in 1982.[41] Her version of the events had also been recorded in the notes of a forensic psychiatrist with whom her attorney had consulted prior to trial.[42]

At the magistrate's hearing, DeLuca testified that she had been kidnapped by the three men.[43] She stated that after driving around the Bronx for a while and listening to the men talk about their various sexual exploits, she thought that she was going to be raped and killed.[44] Two of the men then left on foot and DeLuca and Bissett drove around in Bissett's van and eventually parked under a highway.[45] DeLuca testified that Bissett punched her several times and forced her to perform oral sex and have vaginal intercourse.[46] DeLuca eventually grabbed a bottle and hit him in the head.[47] She then fled from the van and ran to a gas station, called her husband, and asked him to pick her up.[48] She later realized that she had given her husband the wrong address and, afraid that Bissett might follow her, she walked back to her own car and

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36 N.Y. Penal Law § 125.25(1) (McKinney 1987) (including an affirmative defense of extreme emotional disturbance to the charge of murder in the second degree).

37 *DeLuca*, 858 F. Supp. at 1344.

38 28 U.S.C.A. § 636(b)(1) (granting a judge power to designate a magistrate judge to conduct an evidentiary hearing and submit proposed findings of fact and a recommendation for disposition).

39 *DeLuca*, 858 F. Supp. at 1344.

40 *See* Transcript of Magistrate's Hearing, DeLuca v. Lord, 858 F. Supp. 1330 (S.D.N.Y. 1994) (No. 90 Civ. 4026).

41 *DeLuca*, 858 F. Supp. at 1335 n.4.

42 *Id.*

43 *Id.* at 1336.

44 *Id.*

45 *Id.* at 1337.

46 *Id.*

47 *Id.*

48 *Id.*

drove home.[49] She testified that at that time she did not have her gun with her.[50]

After arriving home, DeLuca broke down and told her husband what had happened.[51] Her husband wanted her to report the incident but DeLuca was embarrassed and in pain and wanted to go to a hospital.[52] Mr. DeLuca insisted that the incident be reported, and he offered to make the report himself.[53] DeLuca could not remember the names of the streets where the van had been parked, but offered to show her husband on the way to the hospital.[54] Before leaving for the hospital, DeLuca got her gun because she felt vulnerable.[55]

When they arrived at the rape site, the van was still parked where DeLuca had left it.[56] DeLuca drew her gun.[57] She and her husband approached the van, one on either side.[58] They opened the front doors simultaneously and saw no one.[59] Suddenly Bissett lunged from inside the van and knocked Mr. DeLuca down.[60] Sheila DeLuca told Bissett not to move.[61] Bissett grabbed her arm, saying he was going to kill her.[62] DeLuca shot him.[63] DeLuca and her husband then immediately drove home, and Mr. DeLuca called the police.[64]

## V. HOLDING AND RATIONALE

Magistrate Judge Roberts issued her report in December 1993 recommending that the petition for habeas corpus be denied upon a finding that DeLuca's counsel had not been ineffective and that the refusal of the trial court to allow evidence of rape trauma syndrome did not deprive DeLuca of her constitutional rights.[65] Peti-

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49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.* at 1338.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.* at 1344.

tioner filed an objection to the report[66] and Judge Ward reviewed the recommendations of the magistrate.[67] After a review of the record de novo, the court rejected the magistrate's recommendations.[68] Judge Ward found that DeLuca's counsel had been ineffective on both the ground of failure to prepare and preserve the affirmative defense of extreme emotional disturbance and on the ground of failure to inform DeLuca that it was ultimately her decision whether or not to testify.[69] After serving ten years in prison, DeLuca's petition for a writ of habeas corpus was granted.[70]

The State of New York appealed the decision of the district court.[71] On February 13, 1996, in a two to one decision, the Court of Appeals for the Second Circuit upheld the district court's finding that failure to prepare and preserve the defense of extreme emotional disturbance had prejudiced DeLuca's case and that defense counsel was ineffective.[72] The Court of Appeals for the Second Circuit did not address the issue of defendant's right to testify.[73] Eight months later, the Supreme Court denied the state's appeal for certiorari.[74]

## VI. INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant in a criminal case is guaranteed the right to effective assistance of counsel.[75] This guarantee is found in the Sixth Amendment to the United States Constitution[76] and in the New York State Constitution.[77] Respect given to the principle of the

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66 28 U.S.C.A. § 636(b)(1) (West 1993); FED. R. CIV. P. 72(a) (providing that within ten days after receiving a copy of a report, a party may file written objections to the findings).

67 28 U.S.C.A. § 636(b)(1) (West 1993) (stating that the judge may accept or reject the recommendations of the magistrate); FED. R. CIV. P. 72(a); *DeLuca*, 858 F. Supp. at 1345.

68 *DeLuca*, 858 F. Supp. at 1347.

69 *Id.* at 1363-64.

70 *Id.* at 1364.

71 DeLuca v. Lord, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

72 *Id.* at 579.

73 *Id.* at 590. *See DeLuca*, 858 F. Supp. at 1353-59 (discussing defendant's right to testify).

74 DeLuca v. Lord, 117 S. Ct. 83 (1996).

75 U.S. CONST. amend. VI; N.Y. CONST. art. 1, § 6.

76 U.S. CONST. amend. VI (providing in part that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial and have the assistance of counsel for his defense). *See* Reece v. Georgia, 350 U.S. 85, 90 (1955) (holding that the right to effective assistance of counsel is required by due process).

77 N.Y. CONST. art. 1, § 6 (providing in part that in any trial the party accused shall be allowed to defend in person and with counsel and be informed of the nature and cause of the accusation and be confronted with witnesses against him).

right to effective assistance of counsel reflects a commitment to provide defendants with the opportunity to be participants in the adversarial process.[78]

In *Strickland v. Washington*,[79] the United States Supreme Court addressed for the first time the standards by which to judge a claim of ineffective counsel.[80] Justice O'Connor stressed that the purpose of the effective assistance guarantee of the Sixth Amendment was not to improve the quality of representation, but rather to ensure a fair trial for criminal defendants.[81] The counsel's role was viewed by Justice O'Connor as critical to the production of just results in the adversarial system.[82] Therefore, in determining a claim of ineffective counsel, the court must decide whether counsel's conduct so undermined the proper functioning of the system as to make the justice of the trial's outcome questionable.[83]

A convicted defendant's claim of ineffective counsel is subject to a two part test.[84] She "must show that counsel's representation fell below an objective standard of reasonableness"[85] and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different."[86] In assessing counsel's conduct, a court must presume that the challenged conduct fell within a "wide range of professional assistance."[87] In making a fair assessment of counsel's conduct, the court must try to view that performance from the perspective of the attorney at the time of the trial and eliminate the effects of hindsight.[88]

## VII. OBJECTIVELY UNREASONABLE PERFORMANCE

The Court in *Strickland* gave only basic guidance to lower courts on how to determine what standard of reasonableness estab-

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78 William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 201 (1984).

79 466 U.S. 668 (1984).

80 *Id.* at 684.

81 *Id.* at 685 (the Court defined a fair trial as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.").

82 *Id.*

83 *Id.* at 686.

84 DeLuca v. Lord, 77 F.3d 578, 584 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996) (citing *Strickland*, 466 U.S. at 687).

85 *Strickland*, 466 U.S. at 688.

86 *Id.* at 694.

87 *Id.* at 689.

88 *Id.*

lishes ineffective counsel.[89] The dissent in *Strickland* points out that "the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes 'professional' representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel."[90] The development of the requirements for reasonable competency came about, for the most part, on a case-by-case basis as courts evaluated what lawyers were or were not doing in individual cases.[91] In regard to counsel's duty to investigate and make strategic choices—an issue in *DeLuca*[92]—the Court held that thoroughly investigated choices were not challengeable, while the decision not to investigate or the choices made without thorough investigation were to be evaluated for reasonableness in light of all the circumstances.[93]

In determining the reasonableness of such choices, a heavy measure of respect should be accorded to the decisions of counsel.[94] The Court did suggest that the standards of the American Bar Association (ABA) would be helpful in determining what is reasonable, but cautioned that the standards were only guides.[95] The ABA Standards for Criminal Justice call for a defense attorney to investigate and explore all avenues leading to facts that are relevant to a case and the sentence in the event that the defendant is found guilty.[96] In the commentary, it is noted that an attorney has an important function in raising such mitigating factors as a defendant's background, employment record, emotional stability, and circumstances surrounding the crime.[97] The commentary also cautions attorneys that inadequate preparation or lack of pretrial investigation could lead to a finding of ineffective assistance.[98]

The Court of Appeals for the Second Circuit has held that "not all strategic choices are sacrosanct. Merely labeling [counsel's] errors 'strategy' does not shield his trial performance from

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89 Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 335 (1993).

90 *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

91 Genego, *supra* note 78, at 190.

92 DeLuca v. Lord, 77 F.3d 578, 588 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

93 *Strickland*, 466 U.S. at 690-91.

94 *Id.* at 691.

95 *Id.* at 688.

96 ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEFENSE FUNCTION § 4-4.1(a) (1993).

97 *Id.* at § 4-4.1 commentary at 183.

98 *Id.*

Sixth Amendment scrutiny."[99] In *Maddox v. Lord*,[100] the court held that after counsel raised a defense of extreme emotional disturbance, his failure to investigate it and pursue it was unreasonable.[101] But, the New York Court of Appeals in *People v. Flores*[102] held that "a simple disagreement with strategies, tactics[,] or the scope of possible cross-examination, weighed long after the trial, does not suffice" to conclude that counsel was ineffective.[103]

However, the dissent in Flores argued that the toleration of professional errors in trial strategy must have some limitations, measured in part by the assumption "that a criminal defense attorney will do whatever is necessary and appropriate . . . to help the client avoid an unfavorable [judgment] . . . ."[104]

In *DeLuca*, the district court judge clearly set out the *Strickland* standard.[105] The court recognized that *Strickland* did not establish mechanical rules, but "instructs examining courts to judge each claim individually by looking to the legal profession's 'prevailing norms of practice' in order to determine whether, under the particular circumstances present, the attorney's actions constitute reasonable assistance."[106]

DeLuca's trial attorney, Patten, believed in her innocence from the very beginning and zealously attempted to secure her acquittal.[107] However, that zeal led to the decision to pursue an objectively unreasonable strategy.[108] According to Patten's testimony at the evidentiary hearing, he believed that there were only two possible defense strategies. The first strategy was to claim the justification defense that DeLuca's actions were in self defense.[109] Patten did not pursue this strategy. The second strategy, the one he did pursue, was to argue that the state could not prove its case beyond a reasonable doubt.[110] Patten was certain that the prosecu-

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99 Quartararo v. Fogg, 679 F. Supp. 212, 247 (E.D.N.Y. 1988), *aff'd*, 849 F.2d 1467 (2d Cir. 1988) (citations omitted).

100 818 F.2d 1058 (2d Cir. 1987).

101 *Id.* at 1061-62.

102 639 N.E.2d 19 (N.Y. 1994).

103 *Id.* at 20 (citation omitted).

104 *Id.* at 23 (Titone, J., dissenting). *See* THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (N.Y. State Bar Ass'n 1994).

105 DeLuca v. Lord, 858 F. Supp. 1330, 1346-52 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

106 *Id.* at 1345.

107 *Id.* at 1346.

108 *Id.*

109 *Id.*

110 *Id.*

tion was wrong about the time of the shooting.[111] Patten thought that a jury could believe that Peter DeLuca, having access to the murder weapon and having a possible motive, had committed the murder.[112] However, at the trial, the defense never attempted to present any evidence that Mr. DeLuca might be implicated or as to the correct time of the shooting.[113] Patten attempted to call only one witness, a rape trauma expert.[114] Because the defense did not present any evidence that DeLuca had been raped, the trial court did not allow the witness.[115]

Testimony at the magistrate's hearing provided insight into some of the evidence that was available to DeLuca's attorney during the eighteen months before the trial began. For example, DeLuca had spoken to a bartender from another establishment who had observed Bissett and his friends snorting cocaine and had asked them to leave the bar that night.[116] DeLuca had a written statement from another woman who had been previously abducted and assaulted by Bissett.[117] She also had found a police report alleging that Bissett had killed someone.[118] Furthermore, Ellen Yaroshefsky, a lawyer who worked for the Center for Constitutional Rights, met with DeLuca and Patten and explained why she thought DeLuca had a justification of self defense.[119] DeLuca's marriage was purely platonic.[120] DeLuca was a lesbian.[121] There were pictures taken of her bruised body with her family physician present.[122] In addition, there were other witnesses to support a defense of extreme emotional disturbance who were available to testify, including a friend who was with Sheila DeLuca the night of the party and the physician who examined her on the night of Bissett's death.[123]

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111 *Id.* at 1344.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 Transcript of Magistrate's Hearing at 70-71, DeLuca v. Lord, 858 F. Supp. 1330 (S.D.N.Y. 1994) (No. 90 Civ. 4026).

117 *Id.* at 64. The woman would also have been available to testify at trial. *Id.* at 65.

118 *Id.* at 68.

119 *Id.* at 309-17.

120 *Id.* at 28-30.

121 *Id.* at 28.

122 *Id.* at 55-56.

123 *DeLuca*, 858 F. Supp. at 1338-39. In fact, the trial had been adjourned several times because Mr. DeLuca had developed cancer and his ability to testify was questionable. He eventually had the nerve endings in his back cut so that he would be able to testify. *Id.* Evidence of prior conduct by the victim could also have been presented. *Id.*

## VIII. THE DEFENSE OF EXTREME EMOTIONAL DISTURBANCE

It is no longer true in modern criminology that "'[a] homicide is a homicide is a homicide.'"[124] The current trend is to lessen criminal accountability when mitigating circumstances are proven which render the defendant less liable.[125]

> [I]t is an affirmative defense that . . . [t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime . . . .[126]

The purpose of this affirmative defense is to allow a defendant to show that a mental infirmity of a lesser degree than insanity caused her actions and, therefore, rendered her less culpable.[127] If the defense is successful, the defendant is found guilty of manslaughter in the first degree rather than murder in the second degree.[128] A conviction of a lesser charge could significantly reduce the sentence.[129]

In deciding whether to submit this defense to the jury, the court must decide if there is enough credible evidence so that a jury may determine whether the elements of the defense are met.[130] In determining the reasonableness of a defendant's reac-

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124 People v. Patterson, 347 N.E.2d 898, 910 (N.Y. 1976) (Breitel, C.J., concurring), *aff'd sub nom.* Patterson v. New York, 432 U.S. 197 (1977).

125 *Id.* at 908.

126 N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1987).

127 *Patterson*, 347 N.E.2d at 907. *See* People v. Owens, 611 N.Y.S.2d 67, 68 (App. Div. 4th Dep't 1994) (mem.) (explaining why evidence showing that defendant suffered from multiple personality disorder entitled her to extreme emotional disturbance defense and reduced her conviction from second degree murder to first degree manslaughter).

128 A person is guilty of manslaughter in the first degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person . . . under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . . The fact that a homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree . . . .

N.Y. PENAL LAW § 125.20(2). *See also* N.Y. PENAL LAW § 125.25(1)(a) ("Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree . . . .").

129 *Patterson*, 347 N.E.2d at 907.

130 People v. Moye, 489 N.E.2d 736, 739 (N.Y. 1985) (mem.).

tion, the appropriate test is whether, by examining the totality of the circumstances, the fact finder can understand how a person could lose control of her reason.[131] This test requires proof of a subjective element, that the defendant acted under the influence of extreme emotional disturbance, and an objective element, that there was a reasonable excuse for the disturbance.[132] Whether an excuse is reasonable is determined "by viewing the subjective, internal situation in which the defendant found [herself] and the external circumstances as [she] perceived them . . . ."[133] The defendant must be able to prove both elements of the affirmative defense by a preponderance of evidence.[134]

While psychiatric testimony may provide objective reasons for a person's conduct,[135] it is not legally necessary in order to raise the defense.[136] Where conflicting expert testimony is presented, a jury may accept whatever opinion it finds more credible.[137] Conduct influenced by extreme emotional disturbance need not be immediate, but may be caused by a trauma which had affected the person's mind for some period of time and then came forward.[138] However, a defendant needs to provide proof that a provoking act affected her at the time of the murder, so that a jury could conclude that she acted under the influence of extreme emotional disturbance.[139]

DeLuca testified at the evidentiary hearing that her attorney, Patten, had discussed an insanity defense with her but not the de-

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131 People v. Casassa, 404 N.E.2d 1310, 1313 (N.Y. 1980).

132 *Id.* at 1316.

133 *Id.*

134 *See Moye*, 489 N.E.2d at 738; *Patterson*, 347 N.E.2d at 901; People v. Drake, 629 N.Y.S.2d 361, 362 (App. Div. 4th Dep't 1995) (mem.) (holding that jury was entitled to find that defendant did not meet the burden of proof required to establish defense); People v. Walker, 473 N.Y.S.2d 460, 461 (App. Div. 1st Dep't 1984) (holding that defendant provided no specific evidence to establish the defense); N.Y. PENAL LAW § 25.00 (McKinney 1987).

135 People v. Feris, 535 N.Y.S.2d 17, 18 (App. Div. 2d Dep't 1988) (holding that defendant's claim of extreme emotional disturbance was not substantiated by expert testimony).

136 *See Moye*, 489 N.E.2d at 738; People v. Harris, 491 N.Y.S.2d 678, 688 (App. Div. 2d Dep't 1985).

137 *See* People v. Ayala, 633 N.Y.S.2d 548, 549 (App. Div. 2d Dep't 1995); People v. Tolbert, 625 N.Y.S.2d 259 (App. Div. 2d Dep't 1995); People v. Owens, 611 N.Y.S.2d 67, 68 (App. Div. 4th Dep't 1994) (Balio, J. and Callahan, J., dissenting in part).

138 *Patterson*, 347 N.E.2d at 908.

139 People v. White, 590 N.E.2d 236, 238 (N.Y. 1992) (holding that victim's repeated humiliation of defendant was sufficient to establish provocation, but the provocation was so remote that, alone, it was not enough to prove that defendant was extremely emotionally disturbed at the time of the murder).

fense of extreme emotional disturbance. In explaining the insanity defense, he told her about a police officer who had pled temporary insanity to the shooting of a child and spent less than a year in a mental institution for the crime.[140] Patten testified that he dropped the defense at an early stage because of his client's aversion to seeing a psychiatrist.[141] However, DeLuca testified that she had agreed to see a psychiatrist, but Patten had canceled the appointment.[142] Although the magistrate judge gave credence to Patten's testimony, the district court found DeLuca's account supported by other witnesses who had been involved in these discussions.[143] Her attorney consulted with a psychiatrist whose notes of the meeting included two possible defenses, but nothing about extreme emotional disturbance.[144] Patten's law partner could not remember any discussions about an extreme emotional disturbance defense.[145] The court was not persuaded that Patten understood the defense of extreme emotional disturbance.[146] All of this may help to explain why DeLuca was not informed of the defense of extreme emotional disturbance.[147]

The court found that the defense attorney's failure to adequately consider the extreme emotional disturbance defense resulted in a breakdown of the process which should "'produce just results.'"[148] Judge Ward reasoned that counsel's disclaimer that he did not know whether the defendant understood the defense was evidence of an insufficient attempt to "'consult with his client on [an] important decision.'"[149] In light of these circumstances, especially considering that counsel consulted with and attempted to call a rape trauma expert, it was unreasonable to have abandoned the one defense about which the expert could testify.[150]

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140 Transcript of Magistrate's Hearing at 73, DeLuca v. Lord, 858 F. Supp. 1330 (S.D.N.Y. 1994) (No. 90 Civ. 4026).

141 DeLuca v. Lord, 858 F. Supp. 1330, 1348 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

142 Transcript of Magistrate's Hearing at 73-74.

143 *DeLuca*, 858 F. Supp. at 1348.

144 *Id.*

145 *Id.*

146 *Id.* at 1347.

147 *Id.*

148 *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 669 (1984)).

149 *Id.* at 1350 (quoting *Strickland*, 466 U.S. at 688).

150 People v. Taylor, 552 N.E.2d 131, 136 (N.Y. 1990) (holding that the patterns of responses of rape victims are not within the understanding of a lay juror).

## IX. PREJUDICE

There is a consensus among the courts that unless counsel's performance prejudices the defense, the criminal defendant's claim of ineffective counsel will not stand.[151] A court is not required to determine the reasonableness of defense counsel's performance unless it first determines that the performance prejudiced the defendant.[152] Prejudice could be found if there was a reasonable probability that counsel's performance undermined confidence in the outcome of the trial.[153] To meet the second prong of this test, the defendant must be able to demonstrate that the fact finder would have reasonable doubt concerning the defendant's guilt, absent counsel's error.[154] It is not enough to show that counsel's unreasonable performance had some possible effect on the outcome of the trial.[155] The burden on the defendant to prove prejudice helps to ensure that the court's standard will rarely result in a reversal.[156]

The district court found that this standard was easily met by DeLuca and concluded that the result of the trial would have been different had an extreme emotional disturbance defense been presented.[157] Judge Ward reasoned from DeLuca's testimony at the evidentiary hearing that she "would have been a very compelling witness."[158] DeLuca could have told the jury that she had been a police officer for fifteen years, a school teacher, a nun, and a

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151 Maddox v. Lord, 818 F.2d 1058, 1061 (2d Cir. 1987); Quartararo v. Fogg, 679 F. Supp. 212, 239 (E.D.N.Y. 1988), *aff'd*, 849 F.2d 1467 (2d Cir. 1988). *See* Winkler v. Keane, 7 F.3d 304, 310 (2d Cir. 1993) (holding that counsel's conflict of interest did not prejudice defense's case); *see also* Tippins v. Walker, 77 F.3d 682, 685-87 (2d Cir. 1996) (holding that defendant suffered prejudice, by presumption, when counsel was asleep for substantial periods of time during the trial); United States v. Malpiedi, 62 F.3d 465, 469 (2d Cir. 1995) (holding that prejudice is presumed where defense counsel has conflict of interest).

152 *Strickland*, 466 U.S. at 697.

153 *Id.* at 694.

154 *Id.* at 695; *Maddox*, 818 F.2d at 1062. *But see* Henry v. Scully, 918 F. Supp. 693, 717-18 (S.D.N.Y. 1995), *aff'd*, 78 F.3d 51 (2d Cir. 1996) (holding that even where evidence was sufficient for jury to find defendant guilty, the court could not be sure that admission of improper hearsay and absence of missing witness charge could have influenced jury to come to a different verdict); People v. Smith, 643 N.Y.S.2d 315, 322 (Sup. Ct. Kings County 1996) (holding that even though attorney's unreasonable representation might not have prejudiced outcome of trial, defendant was still deprived of a fair trial).

155 *Strickland*, 466 U.S. at 693.

156 Genego, *supra* note 78, at 199.

157 DeLuca v. Lord, 858 F. Supp. 1330, 1352 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

158 *Id.* at 1350.

basketball coach.[159] The judge felt that her most convincing argument might have been that she was a homosexual and her relationship with her husband was platonic.[160] Although defense counsel knew of DeLuca's background and employment record, he failed to raise any of these mitigating factors.[161] There were also many people who would have been available to testify as to her reputation for truthfulness.[162] Additionally, her version of the events was supported by physical evidence, medical reports, and other witnesses.[163] In summary:

> DeLuca's account of her abduction and rape would clearly allow the jury to find that she had "been exposed to an extremely unusual and overwhelming stress" and had "an extreme emotional reaction to it, as a result of which, [she suffered] a loss of self-control and [her] reason [was] overborne by intense feelings, such as passion, anger, distress[,] . . . or other similar emotions."[164]

In reviewing the decision of the district court, the Court of Appeals for the Second Circuit noted that DeLuca's counsel's failure to present any defense left the jury with two choices: acquittal or guilty of second degree murder.[165] However, by testifying, DeLuca would have had to admit that she killed Bissett, which had the disadvantage of leaving the jury with no reasonable doubt and precluding a chance of acquittal.[166] But, proof of the influence of extreme emotional disturbance could have reduced the conviction from murder in the second degree to manslaughter in the first degree.[167] The court found that there was a reasonable probability that some of the jurors would have accepted DeLuca's testimony that she had been raped and had acted under the influence of extreme emotional disturbance.[168] Patten's abandonment of the extreme emotional disturbance defense without justification was not within the bounds of "reasonable professional judgment or a reasoned strategic choice."[169] In affirming the district court's deci-

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159 *Id.*

160 *Id.* at 1352.

161 *Id.* at 1350-51.

162 *Id.* These included police officers, former teachers, and members of the religious community of which she had once been a member. *Id.*

163 *Id.* at 1351-52.

164 *Id.* at 1352 (quoting People v. Shelton, 385 N.Y.S.2d 708, 717 (Sup. Ct. N.Y. County 1976)).

165 DeLuca v. Lord, 77 F.3d 578, 586 (2d Cir.), *cert. denied*, 117 S. Ct. 83 (1996).

166 *Id.*

167 *Id.*; N.Y. PENAL LAW §§ 125.25(1)(a), 125.20(2) (McKinney 1987).

168 *DeLuca*, 77 F.3d at 590.

169 *Id.* at 588 (footnote omitted).

sion, the Second Circuit Court of Appeals found that "the *Strickland* test of 'reasonable probability' of a different outcome was easily met."[170] Given the mitigating circumstances surrounding DeLuca's case, her desire to testify, other evidence, and witnesses available at the time of the trial, it seems likely that jurors would have accepted the defense of extreme emotional disturbance and convicted her of manslaughter.[171]

The dissent of Judge Kearse in the Second Circuit Court of Appeals' opinion found that defense counsel's performance did not fall below an objective standard of reasonableness.[172] Judge Kearse argued that faulting counsel for failure to present an extreme emotional disturbance defense, which had been prepared, constituted pure hindsight on the part of the majority.[173]

In the dissent's opinion, counsel's abandonment of the extreme emotional disturbance defense on the belief that psychiatric testimony was required in order to succeed was not defective.[174] The argument was based on *People v. Harris.*[175] That court, however, conceded that psychiatric testimony was not legally required.[176] Additionally, in that case the court found the allegations of faulty advice were unsupported by any evidence or affidavits, were contradicted by a lawyer actually present at the original discussions, and in view of other circumstances of the case, could not reasonably be true.[177] In *DeLuca,* the evidence, lack of contradiction, and testimony of experts pointed toward an extreme emotional disturbance defense and makes it clearly distinguishable from *Harris.*

While finding the majority's view shortsighted, the dissent never addressed the majority's view that DeLuca's attorney did not

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170 *Id.* at 590 (citation omitted). *See also* Maddox v. Lord, 818 F.2d 1058, 1061-62 (2d Cir. 1987) (holding that defendant, who shot her husband because she was afraid of him, was found to have received ineffective assistance of counsel because her attorney raised the defense of extreme emotional disturbance but did not investigate it or pursue it thoroughly. The court found this failure to be unsound trial strategy.).

171 *Ineffective Counsel; Extreme Emotional Disturbance,* 20 Mental & Physical Disability Law Rep. 185 (1996).

172 *DeLuca,* 77 F.3d at 592 (Kearse, J., dissenting).

173 *Id.* at 592-93 (Kearse, J., dissenting) (stating that the trial judge's suggestion of an exit route, in case of a not guilty verdict, was an insufficient reason to not present affirmative defense).

174 *Id.* at 592. The defense attorney testified at the evidentiary hearing that he could not investigate this defense without the defendant agreeing to see a psychiatrist. *Id.* at 586.

175 491 N.Y.S.2d 678 (App. Div. 2d Dep't 1995).

176 *Id.* at 688.

177 *Id.* at 689.

understand or appropriately explain the extreme emotional disturbance defense to his client.[178] When Patten was asked when he decided not to pursue the defense, he admitted that he did not believe he ever decided.[179] With all of the evidence available to Patten at the time of DeLuca's trial, especially his attempt to call a rape trauma expert, it appears clear that Patten did not understand the defense well enough to consider it a viable option to no defense. Counsel's failure to consider this defense in light of the prosecution's case was a breakdown in a process that should lead to just results.[180] It was not hindsight[181] to conclude that the failure to understand the importance of this defense was equivalent to inadequate assistance. It was common sense.[182] Even with strong deference given to counsel's judgment, in light of the circumstances of the case,[183] his abandonment of the extreme emotional disturbance defense at an early stage of the trial[184] cannot be considered reasonable.

## X. The Right to Testify

In *Rock v. Arkansas*,[185] the Supreme Court held that criminal defendants have a right to testify on their own behalf.[186] The defendant has the ultimate authority to make certain basic decisions about her case, including whether or not she wishes to testify.[187] However, "little has been written by the Supreme Court or [the Second] Circuit to explicitly flesh out the implications of *Rock*."[188] The Second Circuit has questioned the proposition that a defendant's failure to object, during a trial, to an attorney's refusal to allow her to testify, constitutes a waiver of the constitutional right of the defendant to testify.[189]

The question addressed in DeLuca's case was "what actions

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178 *DeLuca*, 77 F.3d at 590-93.

179 *Id.* at 587.

180 DeLuca v. Lord, 858 F. Supp. 1330, 1347 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

181 Strickland v. Washington, 466 U.S. 668, 689 (1984) (warning against the distorted effects of hindsight).

182 *DeLuca*, 858 F. Supp. at 1347.

183 *Strickland*, 466 U.S. at 690-91.

184 *DeLuca*, 77 F.3d at 586.

185 483 U.S. 44 (1987).

186 *Id.* at 49. The Court noted that the most important witness in a criminal trial may be the defendant. *Id.* at 52.

187 Jones v. Barnes, 463 U.S. 745, 751 (1983).

188 *DeLuca*, 858 F. Supp. at 1353 (footnote omitted).

189 United States v. Vargas, 920 F.2d 167, 170 (2d Cir. 1990).

must be taken by courts and counsel to protect that right"[190] of the defendant to testify. How does the defendant know that it is ultimately her right to testify? Who has the burden of informing the defendant of this right? The district court set out three methods that have been determined to be viable in deciding whose responsibility it is to ensure that the defendant knows that the decision to exercise this right is hers alone.[191] The first method puts the burden on the attorney,[192] while the second method puts the burden on the trial court to ensure that the defendant knowingly and willingly waived her rights.[193] The third method puts the burden of protecting the right to testify on the defendant.[194] However, as Judge Ward explained, if the defendant is unaware that the right to testify belongs to her, she cannot waive that right knowingly and voluntarily.[195]

The district court went to great lengths to determine if a subsequent holding that an attorney must notify his client of a right to testify should be retroactively applied to DeLuca.[196] After declining to do so because it would be announcing "a new constitutional rule of criminal procedure,"[197] the court established an exception[198] giving defense counsel the responsibility of informing the defendant that the right to testify was ultimately hers.[199]

Evidence was presented that DeLuca wanted to and expected to testify at her trial.[200] The court held that Patten's failure to inform DeLuca that the right to decide whether or not to testify ultimately belonged to her was also evidence of ineffective counsel.[201] Judge Ward's decision in this case became a point of disagreement between courts in the Second Circuit and the New York state courts which eventually led the United States Court of Appeals for the

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190 *DeLuca*, 858 F. Supp. at 1355.

191 *Id.* at 1355-56.

192 United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) (en banc) (holding that defense counsel has the responsibility of advising defendant of the right to testify, but the defendant has the ultimate right to decide).

193 Boykin v. Alabama, 395 U.S. 238, 242 (1969).

194 United States v. Bernloehr, 833 F.2d 749, 752 (8th Cir. 1987).

195 *DeLuca*, 858 F. Supp. at 1356.

196 *Id.* at 1357-59.

197 *Id.* at 1359. *See* Teague v. Lane, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." (citation omitted)).

198 *Id.* The exception is when a new rule implicates the fundamental fairness of a criminal trial. *Id.* at 312; *DeLuca*, 858 F. Supp. at 1359.

199 *DeLuca*, 858 F. Supp. at 1360.

200 *Id.* at 1361.

201 *Id.*

Second Circuit to decide the issue of a criminal defense attorney's responsibility regarding a defendant's right to testify.[202]

## XI. AFTERMATH

Within a few months after *DeLuca*, two districts courts faced the same issue. Using the reasoning in *DeLuca* as part of the basis for its decision, the United States District Court for the Eastern District of New York in *Campos v. United States*[203] held that counsel was ineffective because he never advised his client that it was the client's decision whether or not to testify.[204] In the Southern District of New York, the district court in *Brown v. Artuz*[205] affirmed Judge Ward's decision in *DeLuca* but distinguished the instant case. It was found that the defendant's allegations could not be corroborated, as they had been in *DeLuca*.[206] The court also found that even if the defendant had evidence that he was denied the right to testify, he failed to show that he was prejudiced by that denial.[207]

In upholding the district court decision in *Brown v. Artuz*, the Court of Appeals for the Second Circuit finally addressed and answered the question of what responsibilities the defense counsel has to inform his client of her right to testify.[208] The court held that this right is personal to the defendant and cannot be exercised by the defense counsel.[209] The issue was not whether a defendant knows she has the right to testify, but whether she knows that the right is hers alone.[210] More importantly, the court held that counsel must inform his client that the right to testify belongs entirely to the client.[211] Failure of counsel to do so would be evaluated under the first prong of the ineffective assistance of counsel test as set out

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202 Brown v. Artuz, 124 F.3d 73 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998).

203 930 F. Supp. 787, 792-93 (E.D.N.Y. 1996).

204 *Id.*

205 No. 95 Civ. 2740, 1996 WL 511558 (S.D.N.Y. 1996), *aff'd*, 124 F.3d 73 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998).

206 *Id.* at 6-8. *See* United States v. DeFeo, No. 90 Cr. 250, 1997 WL 3259 (S.D.N.Y. 1997).

207 *Id.* at 7. Interestingly, after these cases were decided, Judge Tonetti, DeLuca's trial judge, disagreed with Judge Ward and held that defense counsel does not have to inform defendant of his right to testify in specific terms. He reasoned that if the defendant does not openly disagree with defense counsel, counsel's waiver is valid and binding on defendant. *See* People v. Roman, 658 N.Y.S.2d 196, 199-200 (Sup. Ct. Bronx County 1997).

208 124 F.3d 73 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998).

209 *Id.* at 78.

210 *Id.* at 80.

211 *Id.* at 79.

in *Strickland*.[212]

## XII. Conclusion

The two part *Strickland* test places a heavy burden on the defendant to prove by a preponderance of the evidence that she has received ineffective counsel which prejudiced the outcome of her case. In DeLuca's case, the defendant's version of the events and the trial proceedings were corroborated by her trial attorney, the records of a forensic psychiatrist, and witnesses who were available twelve years later.

When the Supreme Court enunciated the principles by which lower courts should decide questions of ineffective counsel, Justice O'Connor stated that it was most important that courts remember that those principles were not mechanical rules.[213] "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."[214] Reasonable people can always adamantly disagree on principles.[215] The present case is a prime example. The district court judge disagreed with the magistrate, while the Second Circuit Court of Appeals holding was a split decision.[216]

As seen by the present case and its aftermath, the question of what constitutes ineffective assistance of counsel is not moot. The question of who bears the responsibility for ensuring that a defendant is informed of her right to testify is settled for the moment, at least in the Second Circuit. Sheila DeLuca's case forced that issue.

To some, it may appear that Sheila DeLuca was given a second trial, a second chance. After ten years in prison, she was fortunate enough to be able to present the evidence of a case that told her side of an unfortunate incident. Others may feel that the manner in which DeLuca's original trial was handled was inexcusable. The question that must be answered is whether any trial can be fundamentally fair when an accused does not have the opportunity to defend herself.

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212 *Id.*

213 Strickland v. Washington, 466 U.S. 668, 696 (1984).

214 *Id.*

215 *Id.* at 701-18 (Brennan, J. and Marshall, J., dissenting); Bellamy v. Cogdell, 974 F.2d 302, 309 (2d Cir. 1992) (en banc) (Feinberg, J., dissenting); People v. Flores, 639 N.E.2d 19, 22-24 (N.Y. 1994) (Titone, J., dissenting); People v. Moye, 489 N.E.2d 736, 739-40 (N.Y. 1985) (mem.) (Jason, J., dissenting); People v. Patterson, 347 N.E.2d 898, 911-15 (N.Y. 1976), (Cooke, J., dissenting), *aff'd*, 432 U.S. 197 (1977); People v. Walker, 473 N.Y.S.2d 460, 462-67 (1st Dep't 1984) (Sandler, J., dissenting).

216 Interestingly, both the magistrate judge and the dissenting judge were women.

The need to show that counsel's performance prejudiced the possible outcome of a trial was a heavy burden imposed by the *Strickland* Court. The Court tried to ensure that counsel's errors would not automatically open the floodgates to any prisoner who felt that her attorney could have done a better job. However, when one is sitting in prison sensing that she has been the victim of an injustice, no burden is too heavy.

Sheila DeLuca's case has already had far reaching effects. It clarified the defense of extreme emotional disturbance. More importantly, *DeLuca* ensures that attorneys diligently consult with their clients and thoroughly explain their rights to them.

This is what justice requires.[217]

217 DeLuca eventually pleaded guilty to manslaughter and was sentenced to time already served. When leaving court on the day of her sentencing she met a brother of a man that Bissett had killed. He happened to be serving on a jury, saw her case listed, and wanted to meet her. He explained to her that he had attempted to contact her through the District Attorney's office when he heard of Bissett's death but had been unable to do so. DeLuca said that meeting him was the best thing that happened to her since her arrest.