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The Silent Repeal of the Sixth Amendment: The Indigent Defense Crisis in the United States *By David C. Adkins, Senior, Political Science*

Perhaps there is no right more fundamental to the proper assertion of justice in this country than the accused' right to counsel. While, obviously, all the procedural guarantees of the Bill of Rights work collectively to assure fair justice for all citizens of this nation, it is fair to conclude that an individual's liberty is most placed in jeopardy when facing the complex and daunting legal machinery without the assistance of counsel. Judges over the course of American history have come to agree that; "a tribunal cannot even call itself a court of justice until it is completed by the presence of counsel for the accused." If for no other reason, this holds true because "[t]he most innocent man, pressed by the awful solemnities of public accusation and trial, may be incapable of supporting his own cause." In that light, the Supreme Court has come to solidify the right to counsel for all persons accused of a crime serious enough to warrant jail time through landmark decisions like *Powell v. Alabama* [287 U.S. 45 91932)], *Johnson v. Zerbst* [304 U.S. 458 (1938)], *Argersinger v. Hamlin* [407 U.S. 25 (1972)], and, of course, *Gideon v. Wainwright* [372 U.S. 335 (1963)]. While the road towards effective application of the Sixth Amendment was not an easy one, it was undoubtedly a noble and worthy journey, which is why the present state of right to counsel guarantees in this nation is no less than a crime.

In *Gideon v. Wainwright*, Justice Hugo Black asserted that because the, "government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not

luxuries.” Unfortunately though, the steadfast belief in that axiom asserted by Justice Black nearly 40 years ago has waned in recent years as evidenced by the state of indigent defense in the U.S. The United States is currently in the midst of an indigent defense crisis. In the wake of the *Gideon* decision, and those that followed it serving to solidify its rule of law, state governments across the nation established various ways to assure counsel for the accused in their respective judicial systems. Some chose to fund public defender offices, while others opted to contract indigent work out to private firms. Whatever the case, the inherent systemic problems with most indigent defense programs coupled with the disparity in the level of funding between law enforcement and indigent defense created a situation in which the quality of state prosecution versus the quality of indigent defense is far from equal. As such, current public defenders are forced to work under circumstances in which their caseloads are, in some cases, 5-10 times larger than that of their opponents and their budgets are hardly suitable to pay their legal fees much less to compensate expert witnesses or fund necessary legal research. Essentially, what this amounts to is a system of indigent defense that is inadequate and an overall justice system that is unfairly biased towards prosecutors across the 50 states of this country.

Following the mandate from the Supreme Court for states to provide counsel to all persons accused of a crime serious enough to warrant jail time [*Gideon v. Wainwright* [372 U.S. 335 (1963)]], state governments bore the responsibility of determining the best way to assure the equal administration of justice. From that mandate three primary systems emerged: the assigned counsel system, the contract system, and the public defenders office system. It is impossible for a state or locality to use exclusively one type of system because of conflict of interests that can arise in indigent defense cases. However, while combinations are implemented, generally one type of system will predominate, usually the assigned counsel system, which is used in roughly half of all indigent defense systems nationwide. Public defenders offices are used nearly as frequently, in 37% of indigent defense systems nationwide, but cannot be implemented in localities and jurisdictions that are not large enough to support them, thus accounting for the disparity between the frequencies of assigned counsel and public defender systems. Finally, contract systems are only applied in roughly 10 % of localities and jurisdictions, primarily as an alternative method to indigent defense when a conflict of interest arises in a case handled by either assigned counsel or public defender systems.

Government funding for indigent defense in the United States is woefully disparate compared to the other side of the judicial process: prosecution and law enforcement. Whether rightly or wrongly, there is a tendency in the United States to unabashedly support increases in funding for prosecutors’ offices and law enforcement. And while few will argue that catching, prosecuting, and incarcerating criminals is a good thing, it can potentially become a problem when the same vigilance is not invested in assuring equal justice for all by supporting the same funding for defending the nation’s poor. Without question, vigilant law enforcement coupled with well-funded prosecutors can severely threaten our system of equal justice for all if indigent defense resources are not on par. Unfortunately, we are approaching, or have already reached, the day in which that very situation has sadly become a reality. While some might argue that funding levels for indigent defense systems should not be equivalent to those of prosecutors simply because not all defendants utilize indigent resources, in reality the trend has been towards an increased dependence on indigent defenders by the accused in this nation. As of 1993, 80% of

all felony defendants nationwide were represented by indigent defenders, a percentage that has increased to as high as 90% in some jurisdictions in response to the war on crime and crackdown on drugs in recent government administrations. Across the nation indigent defenders are forced to not only deal with the inherent problems with their application systems, but also a myriad of other problems caused by disparate funding that only serve to make the playing field of justice more and more unequal. Effectively, the quality of indigent representation is being sabotaged, and “when the result is less effective representation, the fault is not necessarily with the model, but with the lack of adequate resources.”

According to Department of Justice statistics, on average, prosecution appropriations are three times that of indigent defense appropriations nationwide. Actual funding disparities are even greater though when one takes into account the countless resources that prosecutors have at their disposal free of charge that defenders must pay for like: law enforcement investigators, crime labs, government employees mental health experts, etc. Jurisdictions that utilize a public defenders office are especially affected by such a disparity in funding, which for them translates into a disparity in support staff. In some states, public defenders offices are forced to work with only 1/3 the staff of their adversaries in justice. This inequality in funding basically leads to a snowball effect which eventually strikes at the core of indigent defense in this system by lessening the quality of defense provided to those who cannot afford their own counsel through inflated caseloads. Indigent defenders, on average nationwide, deal with caseloads five to ten times that of prosecutors, with reports of indigent defense providers handling upwards of 350 cases a month; a number that meets nationwide guidelines for a *year*.

This list of inequalities goes on and on, including disparities ranging from salary levels to technology and research resources made available to indigent defenders. For example, although prosecuting attorneys qualify as “among the class of law enforcement officers eligible for benefits under the Federal Perkins Loan cancellation program,” indigent defenders do not, despite their equally important role as “law enforcement officers who play an integral role in our Nation’s adversarial legal process.” And while the United States Congress recently built a prosecutor training center at an expense of 26 million dollars to taxpayers nationwide and appropriates 5 million dollars annually for prosecutor training services, the comparable expenses on indigent defense training centers and services remains at zero. As recently as February of 2002 the Chief Justice of the United States William Rehnquist denied a request from House Minority Leader Richard Gephardt to address the “disparity between training provided for prosecutors and public defenders,” via a “study by the Administrative Office [of the Judiciary] of the most effective design of a national defender training center...comparable to the National Advocacy Center’s services for federal and state/local prosecutors.” In response, the Chief Justice wrote that while he had long been a “proponent of making a wide range of continuing education available to lawyers and judges alike,” he could not comply with Rep. Gephardt’s request because he did not feel the Committee on **Defender Services**, “**was in a position to undertake [a study on defender training].**”

Unfortunately, the attitude of complacency regarding indigent defense exhibited by Chief Justice Rehnquist seems to be the norm among a majority of those in the position to make decisions in government. The pressure on lawmakers to fight crime and “make our streets safe,” far overshadow the meek calls by some to “ensure that poor Americans accused of crimes have a

fair defense.” Yet, this is not an excuse to let the quality of indigent defense fall by the wayside in the United States. We live in a society of law and justice, that if not applied equally to all persons, becomes a farce, thus rendering justice for every American useless. Take for example the case of Bentley Grant, a homeless man who confessed to the near-fatal beating of an innocent victim amidst a setting of police and media pressure to find the culprit. Many would not have thought twice about locking Grant in jail and throwing away the key, thus making the streets of New York City safer for all “law-abiding” citizens. Yet, thanks to an indigent defender, his coerced confession was thrown out when it was realized that Grant was not even at the scene of the crime when the assault took place. Similarly, the case of Alexander Goffe reminds us all that without indigent defense, innocent people would be robbed of their freedom everyday because of class constraints. Goffe, a young, African-American male living in poverty with a criminal background found himself accused of being party to a gang war that erupted outside his apartment building one night. At first glance the case seemed to be open and shut, with Goffe being identified by police as fleeing from the scene upon their arrival and then later being picked up after having discarded a handgun. Yet, thanks to an indigent defender it was revealed that not only did the gang violence in question occur between youths nearly 10 years his junior, or that Goffe had someone to corroborate his alibi, but also that the police had mistakenly forgotten to hand over some evidence regarding a subsequent investigation that proved to be vital to his defense. Ultimately, Goffe was acquitted by a jury of his peers after limited deliberation.

Nor is the necessity to provide competent indigent defense systems in the United States simply an idealistic mission to assure the guarantee of those principles upon which this country was founded. Our adversarial system of justice relies on the equality in counsel on both sides of the courtroom and is able to claim the legitimacy necessary for public support because of this equality. The proper maintenance of indigent defense is also essential to ensuring those who commit crimes are punished by the system. While this might seem counterintuitive at first, as discussed earlier the primary effect of disparate funding for indigent defense is inflated case loads by indigent defenders across the nation. In fact, states like Connecticut and Montana, among others, have filed lawsuits in the past decade and as recently as February of this year because the immense size of the indigent defenders caseloads in their states has “impede[d] the ability of indigent clients to receive adequate representation from the...public defender system.” In an even more drastic measure, just months ago, Baltimore public defenders effectively went on strike, declaring that “no public defender carrying more than 60 active felony cases will accept new clients for representation.” Since courts are constitutionally mandated to both provide the accused with counsel but also to provide them with a quick and speedy trial, if public defenders start to refuse service then those accused of crimes could potentially walk out of jail without so much as a hearing. This scary hypothetical was actually realized in Baltimore only a few years ago when accused murderers walked out of jail because of a breakdown in the system stemming from overworked public defenders.

There is no excuse for the present strain on indigent defense to exist in a country that is both as wealthy and dependent on the proper administration of justice as the United States. The axiom asserted in *Gideon* some 40 years ago remains as true today as then: “the right to counsel is far from an indulgence – it represents what we stand for.” The American people understand this fact. Nearly all those asked in a recent poll agreed that we should provide help to those

Americans accused of crimes that cannot afford counsel, and 64% of those polled felt so strongly about assuring such a right that they favored using taxpayer dollars to do so. In that light changes must be made in the way this country supports indigent defense. The American Bar Association (ABA) has adopted “10 Principles of A Public Defense Delivery System” in order to provide some guidelines of reference in order to ascertain an indigent defense system that assures equal, effective representation for our nation’s poor. The list is inclusive and addresses not only the political problems of disparate funding but also some of the systemic problems that are inherent in indigent defense programs. Included in these principles are: guarantees for timely appointment of counsel for the indigent accused, controlled caseload levels to assure representation is effective, coordinated assignment of counsel so ability, experience, and expertise match the respective case, parity in resources provided for prosecution and indigent defenders offices, and provisions for continuing legal education for public defenders. Additionally, Congressional action to help remedy problems with the indigent defense system in the United States is essential. Although indigent defense is a state responsibility, increased congressional funding for nation- and statewide indigent systems would prove to be beneficial. The passage of Senate Bill 1112, which proposes amending the Higher Education Act to include public defenders in the class of law enforcement agents eligible for Federal Perkins Loan cancellation, would be a step in the right direction.

To be sure, public defenders are doing their part to help alleviate the indigent defense crisis as well through implementation of a system of *community defense* that tries to lessen the load of public defenders by stopping crime proactively and reducing rates of recidivism. In reaching out to the family members of those who have been brought into the legal system, some public defenders are trying to assure a sibling or relative does not suffer the same fate and thus create more of a strain on the system. Additionally, this system of community defense tries to ensure that a client does not “walk out [of jail], back into violence, back into drug use,” by utilizing drug counselors, social workers, and the like to get those entrenched in the system out of it and on the path to self-sufficiency and crime-free living.

The mandate to provide counsel to all accused is an ideal that all democratic nations should proscribe to; the proper application of the ideal though should not be an unattainable vision. One need not look any further than our neighbor to the north, Canada, and the system of indigent defense in Ontario to see that, while costly, indigent defendants can not only be provided with effective counsel, but the counsel of their choice, in order to uphold the ideal of equal justice for all. Using a system of legal vouchers, or certificates, indigent defendants in the Canadian province are able to select competent and sought-after lawyers to represent them in court even if they could not normally afford to do so on their own means. Furthermore, this system ensures “duty counsels” are present at every criminal intake court to provide summary advice. Granted, were the same system applied to New York’s caseload it would double the city’s legal aid expenditures. Still though, per capita, Ontarians pay roughly 33 dollars per year in order to fund this system, a paltry fee to incur in order to ensure equal justice for all; an even smaller monetary inconvenience when the prospect of becoming personally and helplessly caught in the criminal justice system someday is taken into consideration.

The fact is that government can provide effective representation to all of America’s accused. Granted Canada’s socialist tilt towards governance makes such a system much easier to

administrate, yet when one examines the spending done by state governments it is less than difficult to place indigent defense funding high on the priority list. Sadly though the reality is, whether intentional or not, state governments in the United States have effectively impounded funds for indigent defenders in an attempt to veto the mandate handed down 40 years ago in *Gideon*. The past 20 years have definitely been marked by the repeated calls for a return to law and order, a crackdown on crime, and bringing justice back into the streets. Undoubtedly, these are all noble and worthy societal goals, yet the means by which so many are attempting to achieve them are questionable at best and strike at the heart at our system of equal and blind justice for all. Disparate levels of funding have created an inherent imbalance in our system of justice where the scales of justice are heavily tipped in favor of the law enforcement authorities and the classes of Americans wealthy enough to pay the lofty legal fees charged by the best defense attorneys. Because “innocent until proven guilty” and “equal justice for all” were never qualified by statements of wealth and class standing, it should be the paramount duty of this nation to ensure that *ALL* accused persons in the United States have the resources available to them for an impartial trial. Otherwise, the bastardization of justice in this country will continue, thus undermining the freedom and liberties of all Americans. As Justice Burger wrote in *Argersinger v. Hamlin*, “society’s goal of providing the counsel and the facilities for the defense should be as good as the system that society provides for the prosecution.” Truer words have never been written, and in order to comply with such a mandate indigent defense systems in the United States must be improved. The effective deliverance of justice for *ALL* Americans depends on it.

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Post Partum Psychosis: A Valid Defense? *By Kellie Gombeski, Senior, LWAC*

In March of 2002, a twelve-member jury unanimously found Andrea Yates guilty of two capital murder charges, resulting from the murder of her five young children, despite her claim of being not-guilty-by-reason-of-insanity. The cause of her insanity, she asserted, was Post Partum Psychosis. The use of Post Partum Psychosis as an insanity defense is both contemporary and controversial. But the question remains, notwithstanding the outcome of the Yates trial, is it a valid defense?

Post Partum Psychosis or Puerperal Psychosis is the rarest form of the Post Partum illness and most severe form of Post Partum Depression. While about 10-15% of women will suffer from Post Partum Depression after childbirth, only 1-3 cases of the Psychosis form appear in every 1,000 births. Amazingly, 70% of those who suffer from Psychosis have no prior history of psychiatric illness. The illness can cause the mother to suffer anxiety, panic, fatigue, confusion, agitation, and can cause a sudden break from reality. The illness can develop overnight, without warning, and the onset usually occurs within the first few weeks of the delivery. However, it is possible for the illness to occur up to a year after the baby is born. The mother can harbor suspicions that may develop into a distrust and aversion to friends and family.

More importantly, there are recurring themes of disturbing repetitive thoughts of drowning, suffocating, or inflicting pain upon the newborn. The risk factors for the mother and baby in these cases are enormous, and hospitalization and anti-psychotic medications are necessities. Even though Post Partum Psychosis is more likely to occur in women who have bi-polar disorders or schizophrenia, the highest-risk stage of the illness, including suicide and infanticide, can result from any of the following untreated symptoms: severe depression, insomnia, anxiety, obsessive behavior, hallucinations, panic attacks, loss of hope and a fear of being alone. The diagnosis of Psychosis is often overlooked by the medical community due to its regression and inconsistent nature. The early physical symptoms reported by the mother often distract health care providers from the real problem, especially since the symptoms seem to come and go without explanation. Even more astonishing is the fact that the chances of reoccurrence of the illness in a mother increase from one to five in every subsequent pregnancy.

Since the mid 1980's, Post Partum Depression and Psychosis have been introduced as insanity defenses in murder cases nationwide, according to Michelle Oberman, a law professor at DePaul University in Chicago. The insanity plea is a defense that can be used when there is evidence that a defendant is guilty of a serious offense, but not responsible because severe mental illness impaired their judgment and impulse control at the time of the offense. "Insane" is a legal term because mental illness has varying severities and many mentally ill people would be judged 'sane' if the current tests for insanity were applied to them. The legal test for insanity varies from state to state in the United States. In fact, the states of Idaho and Montana have abolished the insanity defense and mentally ill defendants are found "guilty, but mentally ill, then are incarcerated in correctional facilities.

The insanity defense is rarely used today and is seldom successful. Although uncommon, insanity defense cases have been disproportionately publicized to make it seem as if the defense is commonly utilized. According to an eight-state study, funded by the National Institute of Mental Health and reported in the *Bulletin of the American Academy of Psychiatry and the Law*, Vol. 19, No. 4, 1991, the insanity defense was used in less than one percent of the cases before the states' county courts. Only 26 percent of those insanity pleas were argued successfully, and 90 percent of those who employed the defense were diagnosed with a mental illness. Furthermore, in 80 percent of the cases where the defendant was acquitted on a not-guilty-by-reason-of-insanity finding, the prosecution and defense attorneys agreed upon the appropriateness of the plea and the defendant's mental state before the trial.

Those who are determined to be legally insane are not subject to the same punishment as people who are not, and cannot be jailed regardless of whether or not they committed the crime. Freda Adler in, *Criminal Justice: The Core*, explains that there are two criteria for a person to be subject to the "not-guilty-by-reason-of-insanity-plea." She explains that the person must be unaware of the nature and quality of his or her actions and of the fact that their act was wrong.

There are numerous arguments for and against the insanity defense. Thomas Szasz, Professor of Psychiatry at the State University of New York, feels that the insanity defense has no place in the law and that it is a "self-serving political game." He considers the defense obsolete because it allows dangerous criminals to go free and bypass the court system. The reality is that even if the insanity defense were eliminated tomorrow, it would not eradicate the issues under consideration. Prosecutors and defense attorneys would still have to address

culpable mental state.

But is the Post Partum Psychosis defense valid? Andrea Yates, who was diagnosed with Psychosis in 1994, had an extensive and elaborate medical record since the birth of her first child. After the birth of Noah in 1994, Yates claimed she suffered from hallucinations and delusions, which she ignored and eventually disappeared. In June of 1999, her situation had reached its climax when she told her doctor that she had seen at least ten visions in the course of several days after the birth of her fourth child. Frustrated and overwhelmed, Andrea Yates took a steak knife to her throat in search of her carotid artery. Weeks before her suicide attempt, Andrea ingested 40-50 of her father's Alzheimer's medication, had etched 666 for Satan into her scalp, and thought that cartoons on the television could talk back to her. While in session with a psychiatrist immediately following the episode, she exclaimed, "I had a fear that I would hurt somebody. I thought it better to end my own life and prevent it... There was a voice, then an image of the knife... I had a vision in my mind, get a knife, get a knife... I had a vision of this person being stabbed ... the aftereffects."

Clearly, Yates suffered from mental illness in her past and when questioned as to why she had killed her children she explained that she believed she had damaged her children irreparably.

This belief, which constitutes a form of delusion, is consistent and with the effects of Post Partum Psychosis. When a twelve-member jury found Yates guilty of two capital murder charges, they declared that their most compelling evidence was her videotaped confession to police and the photographs of her five children. After deliberating for less than four hours, one juror explained, "She was able to describe what she did... I felt like she knew what she was doing and she knew it was wrong, or she would not have called the police." In their first secretive vote, the jury voted 10-2 guilty, and in the second, the vote was unanimous. Some of the jurors even considered the death penalty, but eventually rejected the idea because they weren't convinced that she posed a future threat to society. Interestingly enough, two of the jurors were psychiatrists.

Cases in which mothers are charged with killing their children are particularly difficult to defend, claims Michael Dowd, a New York defense attorney. "They're very tough cases for two major reasons: One, is the fact that it is children who are dead, and secondly it seems to be clearly it's often beyond people's understanding." He successfully defended Ann Green of New York, who was found not guilty in 1989 of smothering her two newborns. At her trial, she claimed that she had seen hands that she didn't recognize holding pillows over the infants' faces. LaTrena Pixley, of Washington D.C., pleaded guilty to second-degree murder after smothering her 6-week-old-daughter. Her lawyer cited Post Partum Depression as a mitigating factor and she was consequently sentenced to three years of weekends in a halfway house. Brian Shannon, a law professor at Texas Tech University, said that the insanity defense is rarely used because the legal definition of insanity is extremely narrow. "To be found guilty-by-reason-of-insanity, Mrs. Yates would have to convince the court that her mental impairment made her believe circumstances were different from what they were", claimed Mr. Shannon. "For instance, if she believed her children to be devils, she would be entitled to acquittal. Homicide consists of causing the death of another person... If you believe the thing you destroyed was not a person, the verdict is that you're conduct wasn't criminal." A case like that occurred in Houston three years ago, when Evonne Rodriguez was charged with capital murder for strangling her son with a

rosary and throwing him into the Buffalo Bayou because she thought he was possessed by demons. A Texas jury showed leniency, acquitted her, and she was sent to a state mental hospital.

Other women have been less successful in avoiding prison time in Texas for killing children while suffering from Post Partum Depression. Experts estimate that a half-dozen such defendants are now serving prison terms in Texas. Many other Western countries routinely sentence mothers who kill their infants to probation with counseling. Thirty nations, including Great Britain, Canada, and Australia, have passed special infanticide statutes to take into account a woman's mental condition within a year after giving birth. "What all the laws agree upon is that in the first year after the birth they say the balance of the mother's mind has been altered," said Professor Oberman of DePaul University. "That's why they believe these crimes should not be charged as first-degree murder."

With the lack of a national standard, the acceptance of the Post Partum Psychosis defense varies in almost every single case, according to Ryan Rainey, an assistant U.S. district prosecutor in Washington who specializes in child homicides. An attorney must be able to make juries understand their client's state of mind and the nature of the affliction. Michelle Oberman explains that, "the defendants go to trial completely sane and the jury is asked to believe that the sane woman in front of them was absolutely crazy six months before, and that's a hard sell, unless you really understand the process of Post Partum Psychosis." Thus, the juries who have no medical training must agree on a matter in which the psychiatrists, who have medical training, cannot agree upon. If, as in the Yates case, it is widely agreed that a defendant suffers from a severe mental illness, shouldn't such a disability diminish that person's legal responsibility in some manner? Ultimately, the answer will depend upon the state in which the defendant resides.

Because of these inconsistencies, some measures need to be taken to develop a uniform system for trying insanity cases in the United States. The first step is to prompt every state to recognize the insanity plea as a legal defense. The problems within the defense cannot be solved, when, even today those who are diagnosed as insane are tried, treated, and punished as prudent individuals. Once this is accomplished, certainly a standardized insanity test would bring more consistency and continuity to court rulings. Many would claim that this would cause an additional burden on the already overloaded court system. However, since the insanity defense is utilized so rarely, and is even less successful, a standardized test would ultimately decrease the number of cases actually brought to the court. It would serve as a screening mechanism to ensure that those cases that make it to court involve legally insane individuals.

Still, today there are individuals, though few, who have no history of mental illness, and yet with the power and clout of a successful lawyer, can beat the judicial system and can literally at times walk away with murder. On the other hand, and even worse, some individuals with extensive documented histories of mental illness are often diagnosed incorrectly, or due to state laws, are not granted the opportunity to have their case heard under an insanity defense. It is obvious that there are problems and controversy over the insanity defense, especially Post Partum Psychosis, which will not be solved effortlessly or abruptly. Even if they may affect only a few litigants out of a vast population, the results of its use can be both profound and significantly detrimental.

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Online Music Communities: Are They Swapping or Stealing?

By Matt Schaeffer, Junior, Political Science

Over the past several years, a huge debate and much litigation has ensued over whether intellectual property rights should be enforced within the online community. The answer, unequivocally, must be “Yes!” The overwhelming fact in the whole debate is that many people have their livelihoods staked in intellectual property – from the design of the shoes we wear to the formula of the soda we drink. Because so much is riding on the integrity of intellectual property rights, they must be protected. After all, what is the incentive to create if there is no profit in doing so? Disregarding intellectual property rights is extremely dangerous – further, not labeling the blatant disregard for these rights as theft is just as dangerous.

In spite of the heavy legal blow dealt Napster last year, online free music swapping has continued to flourish. Online music swap communities are nothing more than services that allow and facilitate theft of intellectual property. By examining why intellectual property rights exist, the mechanics of companies like Napster, and the tremendous amount of fallout from disregard for intellectual property rights, the importance of securing intellectual property rights will be clear.

Why the Laws Are Here In The First Place

When addressing the issue of online music swapping services that challenge intellectual property rights, it is important to remember that copyright laws exist because society values individual creativity and creative ownership. The alternative to owning and controlling our own thoughts and creations is one totally different than the founder’s guarantee of life, liberty, and the pursuit of happiness. Are these virtues even attainable without the ability to control one’s own thoughts and creations? I don’t think so – and neither did the founders.

I see the lack of personal control of thought and creation caused by slavery as analogous in some ways to the “Napster debate.” This might offend some. But, the parallel between the two is that the blatant disregard for a citizen’s right to own his or her thoughts and creations cannot stand in American society – there is, literally, no place for this thinking. Additionally, this is exactly the kind of environment these trading communities create. Napster and other communities encourage the stripping of the fundamental rights artists are entitled to under the American way of life.

The Reality of Life as a Performing Artist

Among the most vocal opponents of free online swapping has been Lars Ulrich of Metallica. In 2000, Metallica earned \$28 million dollars. Thus, any way you slice it, Metallica will not be greatly affected financially by the presence of Napster and its successor swap sites. And, in many ways, this has turned Ulrich into a lightning rod for his adversaries. Indeed, the fact that

Ulrich has launched litigation and appeared before Congress pleading his cause, has been music to the ears of Napster proponents. Seeing Metallica leading the debate gives plenty of legitimacy to the argument that the crusade against Napster has everything to do with greed. But this is being short sighted – what Mr. Ulrich is doing is actually quite admirable. The truth is, Ulrich knows more than many about how difficult it is to be a struggling artist and that is why he is doing what he is doing. When an artist is first starting out, copyright protection is especially important.

For artistic novices and the typical hard working (non-superstar) writer or performer, every move is a giant risk. Time in a recording studio can cost hundreds of thousands of dollars. Concert tours can cost thousands daily. All of this money is put up by a record company and needs to be recouped. The major method for recouping expenses is with record sales – usually new artists sell such a small number of records that each sale is critical. The large majority of the artists want nothing more than their records to be available only for sale. If Napster and the new breed of swap sites allow a user to get for free the same music offered for sale, it puts the artist at great risk. This is a risk that is totally unfair.

The Weak Arguments of The Pro Napster Crowd

For the most part, the people arguing in defense of Napster and other swap communities are uninformed. Their primary argument appears to be that Napster should be allowed to carry on because record companies have continued, even in the face of such competition, to make more and more money. This overlooks the central reason why musicians like Lars Ulrich have had the guts to stand up for intellectual property rights – the fact is, it is the musicians, specifically, younger, poorer musicians who are being destroyed by Napster-like sites. Examining the profit figures from a record company will leave someone farther from the central issue of the debate.

Of course record companies are not going to be greatly effected by Napster – these large companies will continue to make money because there is still a thriving record industry. When a record is sold, the record company makes more than enough to recoup their expenses. The presence of Napster just means some will chose to use Napster instead of buying albums, therefore causing record companies to make less of an already huge profit on record sales. They are not hurting – or, at least, not hurting badly.

Who is being hurt are the musicians who need to recoup all of their expenses based on the often small cut of record sales and publishing. The artists, not the record companies, are the central players in this debate. Most artists barely eke out a living – this is the reality. They need all the record sales they can muster. If online swaps impede the process, the struggling artist has every right to demand that the service, which does nothing more than allow theft of material they own, be shut down.

Control of Creative Output: The Argument of The Big Guys

Another issue that Lars Ulrich has addressed in his congressional testimony is the notion that Napster takes creative control away from artists. Ulrich’s argument is completely logical:

“My band authored the music which is Napster's lifeblood. We should decide what happens to it, not Napster -- a company with no rights in our recordings, which never invested a penny in Metallica's music or had anything to do with its creation. The choice has been taken away from us.”

What Ulrich brings up is of particular importance to large-scale entertainers – they don’t care

about losing money, but rather losing creative control on deciding how their material is seen and heard.

Artists only feel comfortable creating and sharing their work because they know that America has laws designed to protect the integrity and freedom of that work. In other contexts, when someone uses or steals the work of others without permission, we call this a travesty. In the classroom, for example, we call this plagiarism and any student at a university knows the dangers of this practice. Why not call deplorable the similar action of taking bits of an artists work for free and organizing and using it how you see fit?

The issue of control brings out another central question that Ulrich and other big artists fear. Indirectly, what I think Ulrich is saying that by condoning the illegal and immoral actions of Napster and its users, we stand the risk of convincing artists not to create. In the case of a band like Metallica, if there is no way to control how their art is translated, why do it at all?

Concluding Remarks

If it is important to Americans that their thoughts be their own and what they think should be controlled by them, why doesn't this carry over into protecting these same ideals within the music industry? I believe that intellectual property laws were created to ensure that these ideals of securing individuals rights to their own thoughts and ideas. The principle of intellectual property, as stated before, runs deep in the creative and entrepreneurial spirit of America.

With online swapping sites, users are lured into the great possibilities of free music that they otherwise would need to pay for. But, in these actions, there exists a much larger question that needs to be addressed – is it worth it? By disregarding artist's rights to control their own thoughts and work, society is setting a horrible precedent. Like the cop that could steal thousands of dollars worth of drug money from evidence and send his kid to college – doing so would undermine the whole reason he is a police officer, to ensure the freedoms that Americans deserve.

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Life, Liberty, and the Right to Die ***By Erin Abell, Senior, Political Science***

The Declaration of Independence tells us that we have the right to “Life, Liberty and the pursuit of Happiness,” but, according to the Supreme Court, the Constitution, our guiding federal body of law, does not give us the right to death. The right to death is the ability to choose death for oneself, or for a close relative who is in a vegetative state.

The Supreme Court examined these issues over the past 15 years in three important cases. The first was *Cruzan v. Missouri Department of Health (1990)* in which the Court scrutinized the rights of relatives to remove life support from a person in a vegetative state. Nancy Cruzan's parents sued the Missouri Department of Health after the employees of the state hospital, where Cruzan was kept alive through an artificial nutrition and hydration process, refused to remove that support on their request. Cruzan's parents had been appointed her co-guardians and felt they had the right to ask for removal of such support. A Missouri trial court ruled in their favor,

asserting that “a person in [Cruzan’s] condition had a fundamental right under the Missouri and Federal Constitutions to refuse or direct withdrawal of ‘death prolonging procedures’.” Because Cruzan had, in past conversation with a housemate, expressed a desire not to have her life “continue unless she could live at least half normally,” the trial court suggested that Cruzan would not want to go on in a vegetative state. The Supreme Court of Missouri, however, reversed the decision, and the case proceeded to the U.S. Supreme Court.

Chief Justice Rehnquist, writing the opinion for the Court, agreed with the state high court, reasoning that the state has an interest in “the protection and preservation of human life,” as well as more particular interests in safeguarding incompetents from potential abuse by surrogates. Although, significantly, the Court admitted that “the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition,” it upheld the state’s interest in protecting “voiceless” patients such as Cruzan, stressing the importance of “living wills” as a means of conveying intent.

More recently, the Court considered the issue of doctor-assisted suicide. At issue in the case of *Washington v. Glucksberg* (1997) was a Washington state statute, enacted in 1975 that classified knowingly helping someone commit suicide as a felony. The respondents, a group of physicians who treated the terminally ill along with their terminally ill patients, argued that the statute was a violation of the Fourteenth Amendment’s Due Process Clause. Glucksberg’s group won in the trial court and in the Ninth Circuit of Appeals, both of which concurred that the statute was in violation of the Fourteenth Amendment. The United States Supreme Court, however, reversed the decision holding that the statute was not a violation of due process. Again, writing for the majority, Chief Justice Rehnquist declared that “[t]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” Assisted suicide, Rehnquist said, is not a right that we as a people have historically valued or even recognized, and for that reason, it is not included in the rights protected by the Constitution. “To hold for respondents,” he said, “we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every state.” Another reason the Court presented for its decision is that the law banning assisted suicide is “rationally related to legitimate government interests.” Among the state interests Rehnquist enumerated in support of the above assertion are: the preservation of human life (regardless of physical or mental condition), the prevention of suicide from a public health standpoint, to protect “vulnerable groups—including the poor, the elderly and disabled persons--from abuse, neglect and mistakes,” the integrity and reputation of the medical community, and to protect from embarking on the slippery slope of euthanasia. The Court also cited the ban on assisted suicide as a reinforcement of its policy “that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person’s suicidal impulses should be interpreted and treated the same as anyone else’s.”

The same term, the Court considered the case of *Vacco v. Quill* (1997), in which litigants claimed that a New York statute banning assisted suicide was a violation of the Fourteenth Amendment’s Equal Protection Clause. A group of doctors treating the terminally ill and their patients filed for an injunction against enforcement of the statute upon its enactment in 1994. The group (Quill) asserted that the law “violated the equal protection clause of the Federal

Constitution's Fourteenth Amendment as applied to physicians who assisted mentally competent, terminally ill adults who chose to hasten death, insofar as New York (1) sanctioned a patient's refusal of medical treatment, but (2) criminalized physician assisted suicide." The District Court issued a summary judgment, affirming the state's right to differentiate between "allowing nature to take its course and intentionally using an artificial death-producing device," and thus rejecting the claim that it violates the Fourteenth Amendment. However, the United States Court of Appeals for the Second Circuit reversed the decision, holding that:

"(1) the ending of life by the withdrawal of life-support systems was nothing more or less than assisted suicide; and (2) to the extent that the criminal statutes prohibited a physician from prescribing medications to be self-administered by a mentally competent, terminally ill person in the final stages of terminal illness, such statutes were not rationally related to any legitimate state interest and violated the equal protection clause."

The Supreme Court reversed the Circuit Court decision, stating that the statute did not violate the equal protection clause for a number of reasons.

Chief Justice Rehnquist, writing for the majority, explained that the "Equal Protection Clause commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' This provision creates no substantive rights." Rehnquist asserted that statutes that ban assisted suicide treat everyone fairly, stating, "*Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide." The Court also differed with the Court of Appeals' lack of distinction between assisted suicide and removal of life-sustaining equipment, asserting that it sees a clear distinction between the two, "a distinction widely recognized and endorsed by the medical profession and in our legal traditions, [which is] both important and logical; it is certainly rational."

Clearly, the Supreme Court believes that there is no right to die -- at least not protected within the Fourteenth Amendment. I respectfully disagree with the Court. I believe that there is an inherent right to choose to die under circumstances of terminal illness or intractable pain. After all, the Declaration of Independence states that among our inalienable rights, are "Life, Liberty and the pursuit of Happiness." If I am free to pursue happiness, I should have the right to end my life if it becomes a horrible, excruciating experience, as long as I have all of my mental faculties intact.

I agree completely with the voters of the state of Oregon, the only state to legalize physician-assisted suicide, under its *Death with Dignity Act*. It provides a reinforcement of the right that we as people should possess to end our own lives if the pain and suffering of a diagnosed illness become too much. It is frustrating and disturbing to me that Attorney General John Ashcroft is attempting to undermine the Oregon Act. In November of last year, Ashcroft issued an order declaring that the use of federally controlled drugs in assisted suicides is not a "legitimate medical purpose." This then gave the Drug Enforcement Administration (DEA) the power to punish physicians found to be using federally controlled substances in assisted suicides, either by suspension or revocation of the physicians power to distribute prescription drugs. In effect, the order made it illegal for physicians in Oregon to act under a law ratified by the voters of their state. An executive agency of the federal government, whose job it is to carry out the laws, not to make them, has in effect done just that: made law. The rulings by the Supreme

Court allowed states to decide individually whether to permit assisted suicide; the Attorney General is attempting to subvert that. And, although in April, a federal district court ruled that Ashcroft lacks the authority to effectively overturn the Oregon law, its status remains very uncertain pending appeal.

For a list of sources used in this article, please contact Erin Abell at elabell@earthlink.net or Cindy Cates at ccates@towson.edu.

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