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FOREWORD

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Legal reformers of all stripes will find plenty to ponder in Volume 43 of the *Western New England Law Review*. The very relatable topics include emotional support animals, distribution rights for small beer brewers, fairness in accident insurance coverage, alternative legal education materials, and custody challenges for parents with abusive partners. Drawing from diverse subject matter, what each article shares in common is the identification of a perceived problem with the legal status quo and a presentation of proposed solutions. By highlighting and briefly engaging with the central points raised in this collection of articles, I hope to entice readers to learn and reflect more on these emerging issues.

With *Inclusion of Emotional Support Animals as Service Animals Under the ADA: Creating the Right to Use Dogs to Assist People Living with Mental Health Issues*,[1] Amanda M. Foster identifies a gap in existing federal law that if addressed could benefit the lives of millions of Americans. In this compelling article, Foster calls for a broadening of the definition of "service animal" under regulations implementing the Americans with Disabilities Act ("ADA") to embrace animals that offer genuine emotional support to their human companions. This could allow those with emotional support animals access to places of public accommodation. Foster's recommendations would support millions of Americans who experience serious mental health issues and could benefit from bringing an emotional support animal into public spaces for ordinary daily social activity including college campuses, restaurants, and transportation centers. Foster balances the perceived benefit of an

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1. Amanda M. Foster, *Inclusion of Emotional Support Animals as Service Animals Under the ADA: Creating the Right to Use Dogs to Assist People Living with Mental Health Issues*, 43 W. NEW ENG. L. REV. 7 (2021).

expanded definition of "service animal" for ADA compliance purposes with concern for people who may have allergies or other aversions to such animals could be harmed from encounters with them.

This article educates as much as it advocates for change. Readers learn about a patchwork of laws that create confusion and uncertainty. Airlines permit passengers to travel with certain emotional support animals, and some colleges also permit emotional support animals to reside with students in dormitories. However, when the same people attempt to bring their emotional support animals along for daily activities, due to insufficient and inconsistent laws, they are often denied access to other spaces. Foster contends that both an expanded definition of service animal by the FDA and more clarity at the federal, state, and local level would help reduce the stigma associated with mental illness.

Under existing ADA regulations, because emotional support animals "do not have special training to perform tasks that assist people with disabilities," they are not covered as service animals. However, as the article details, other federal legal regimes recognize a more expansive definition of service animal, such as the Fair Housing Act (FHA) and Air Carrier Access Act (ACAA).

We enter the world of small brewing businesses in Frederickie A. Rizos' *Brewing a Solution: An Argument for Fairness in Massachusetts Beer Franchise Laws.*[2] In this article, Rizos focuses on the limitations of a state law designed years ago to protect relatively weaker distributors from far more powerful beer manufacturers. When applied to small, unsophisticated craft brewers, it is the large distributors who have the upper hand and the beer producer who struggles to get by. This was designed to prevent a powerful, often out-of-state manufacturer from squeezing a weaker distributor into bad contract terms or no deal at all.

Enacted in 1971, the Massachusetts Beer Franchise Law generally forbids a brewer from terminating a relationship to sell a particular brand of beer if that relationship has lasted at least six months with a distributor. Even if the agreement is not in writing, the brewer must continue to supply the distributor with that same product. The problem arises for craft brewers using a distributor who expends little effort to get the beer brand into retail establishments. Only after providing six-month's notice and then proving in court that there is "good cause" to end the relationship, something that is expensive and time-consuming, can the brewer terminate the distribution agreement. In theory, a brewer could simply

2. Frederickie A. Rizos, *Brewing a Solution: An Argument for Fairness in Massachusetts Beer Franchise Laws,* 43 W. NEW ENG. L. REV. 47 (2021).

find another distributor who could sell the beer in that same geographical area. However, in practice, many small brewers enter exclusivity arrangements promising a distributor they will be the only one to sell the beer to retailers in a particular location. Given that type of arrangement, the brewer could be stuck with that lackluster distributor and only that distributor indefinitely, according to the article.

Rizos recommends that Massachusetts follow Maine, Maryland, and North Carolina in crafting a legislative solution to address the way the market is actually structured today. In addition, she offers good advice for what small brewers should be wary of when entering into distribution arrangements in the meanwhile.

Two separate articles about unfairness in outcomes under Connecticut insurance and tort law pair well in this issue. In *The Sudden Medical Emergency Defense in Connecticut: Insurers Benefit While the Innocent Insured is Left to Suffer*,[3] Caitrin Ellen Kiley highlights a tremendous injustice affecting people injured in car accidents. And, in *Collateral Source Reductions in Connecticut: How Insurance "Write-Offs" Now Lead to Windfall Judgments – An Analysis of the Marciano Decision and its Impact*,[4] Frank J. Garofalo III reveals how accident victims can collect financial windfalls at the expense of defendants.

Kiley's article describes the hardship faced by a person injured in a car accident who seeks redress under Connecticut case law. Because Connecticut still relies on a tort liability scheme for automobile accidents, those in an automobile who suffers injuries and other damage must sue the driver of the other automobile in order to recover under tort law. Many other states have a type of no-fault system where each party seeks compensation from the insurance provider of the driver in whose auto they were traveling, regardless of who was "at fault." In contrast, to recover, an injured party in Connecticut must sue the driver they believed caused the accident. The problem Kiley identifies arises when the insurance company of the defendant driver who caused the accident successfully establishes a medical emergency defense, a doctrine that is often confusing as applied and has not been addressed by the Connecticut Supreme Court for nearly a century. In such a situation, the driver and any passengers in the "innocent" car have no recourse. The innocent car

3. Caitrin E. Kiley, *The Sudden Medical Emergency Defense in Connecticut: Insurers Benefit While the Innocent Insured is Left to Suffer*, 43 W. NEW ENG. L. REV. 78 (2021).

4. Frank J. Garofalo III, *Collateral Source Reductions in Connecticut: How Insurance "Write-Offs" Now Lead to Windfall Judgments – An Analysis of the Marciano Decision and its Impact*, 43 W. NEW ENG. L. REV. 144 (2021).

insurer will not cover the injuries or damages; and those in the innocent car are even barred from recovering via the uninsured or underinsured motorist coverage.

Kiley wisely recommends ending this unfairness through statute or regulation that would allow someone injured due to another driver's sudden medical emergency to recover from that driver's insurance policy. As she points out, Connecticut years ago enacted legislation to protect innocent plaintiffs in car accident cases where the defendants are uninsured or underinsured. It seems irrational not to also protect innocent plaintiffs from being left to pay for their own injuries when the driver who caused the accident had a medical emergency.

In the companion article, Garofalo a former in-house attorney for an insurance company, shows how Connecticut courts can unjustly allow personal injury victims to collect in compensatory damages more than what they had to pay out of pocket because of their injuries. First, he sets out an example where the system works properly to reduce a plaintiff's recovery from the person who injured them when that plaintiff has another source of reimbursement. In this fair situation, the plaintiff is awarded $100,000 in damages of which $50,000 is meant to cover economic damages (in this case, medical expenses). If the plaintiff had paid $20,000 in premiums for insurance coverage, and the insurance company paid the full $50,000 in medical expenses, this would mean, the insurance company covered $30,000 net. Thus, under Connecticut statute, to avoid a windfall, in a post-trial hearing, the judge would reduce the recovery to just $70,000. This reduction is pursuant to what's called the "collateral source" rule. While that seems equitable, a different result can ensue if the insurance company only paid $35,000 of those medical expenses, but the medical provider wrote off the remaining $15,000, so that the plaintiff had no obligation. In such a situation because under federal law the medical provider could be entitled to reimbursement for that loss, through what's known as subrogation, Connecticut courts would not apply the "collateral source" rule. As a result, instead of reducing the award at all, the court could allow the full $100,000 be paid by the defendant to the plaintiff. This is due to a 2016 court decision that forbids any collateral source reduction when any right of subrogation exists. The simple legislative fix would be to make clear that only the exact amount subject to a right subrogation would be exempted. If such a rule were in place, in the second scenario above, the award would be reduced to $85,000. This is a fairer outcome, the author contends.

In *Open Your Casebooks Please: Identifying Open Access*

Alternatives to Langdell's Legacy,[5] Emma Wood and Misty Peltz-Steele encourage law professors to stop relying on traditional, expensive casebooks and instead compile their own digital course materials. The authors recommend these customized course materials be comprised of content not subject to copyright protection, such as excerpts from judicial opinions made available by the court, or material that is subject to an open-source license. Barriers to law professors moving in this direction, they believe, are both lack of knowledge and incentives.

Central to the authors' argument is that "the primary sources used to teach law are available for free." Before adopting this approach, it is worth considering bar passage, perhaps a topic for a follow-on paper. Law professors who are motivated to create their own course materials for bar subjects are reasonably wary of doing so without sufficient data about correlations. We have many goals for our students including trained for bar passage, practice-readiness, and in possession of sufficient knowledge, legal writing training, and analytical tools to adjust and adapt as client's needs and the law evolves.

The final article in the collection focuses on child custody and domestic violence. In *The Revictimization of Survivors of Domestic Violence and their Children: The Heartbreaking Unintended Consequence of Separating Children from their Abused Parent*,[6] co-authors Jeanne M. Kaiser and Caroline M. Foley, document how courts in Massachusetts fail to fully and fairly assess the threat to children before removing them from a parent who is the victim, not the perpetrator of domestic violence. There is a tragic anomaly in existing law. While courts must provide "detailed and specific findings" about the impact of domestic violence on a child before placing a child in the home of an abuser, they are not expected to be that careful before removing a child from a victim. What this means in practice is that courts can remove children from a mother who is caught up in a cycle of domestic violence and even sever parental rights without actual evidence presented that the particular children are being neglected or psychologically harmed.

Further, they contend that "[t]he result of this practice [of non-fact-specific removals] can prove more damaging to children than the effect of witnessing the abuse." By way of example, they described a five-year-old

5. Emma Wood & Misty Peltz-Steele*, Open Your Casebooks Please: Identifying Open Access Alternatives to Langdell's,* 43 W. NEW ENG. L. REV. 103 (2021).

6. Jeanne M. Kaiser & Caroline M. Foley, *The Revictimization of Survivors of Domestic Violence and their Children: The Heartbreaking Unintended Consequence of Separating Children from their Abused Parent,* 43 W. NEW ENG. L. REV. 168 (2021).

who was seeking to be reunited with her mother, who had been separated from her because the mom had previously been in abusive relationships that her older children had witnessed. She spent years living a series of foster homes, separated from her siblings. The trial court judge refused to return the girl to her mom, even though the mother was in therapy and participated in domestic violence training, and even though she had a strong bond with her mom, and even though the DCF-required psychologist testified at trial that it was unlikely the mom would expose her daughter to domestic abuse. The appellate court affirmed. As the authors note, neither court "considered the fact that there was no evidence that exposure to domestic abuse had ever had an adverse effect on" the child.

The authors argue that courts should be required to provide the same level of "detailed and specific findings" that they would before placing a child with an abuser. In their words, "[t]he trial court should be required to make findings about the effect of domestic violence on this particular child whose welfare is at issue."

In conclusion, I hope you enjoy the rich and thoughtful selection of articles and I thank the staff for inviting me to read and comment on them in this issue of the *Western New England Law Review*.