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A Legacy of Scholarship: The Judicial Decisions of Justice Samuel L. Hanson

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A LEGACY OF SCHOLARSHIP: THE JUDICIAL DECISIONS OF JUSTICE SAMUEL L. HANSON

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Although Justice Hanson's¹ judicial career spanned only seven years, his impact on the law in Minnesota will extend far into the future. He often provided balance to the court in difficult or controversial cases, either writing for a narrow majority or a large minority. In other instances, Justice Hanson stood out from the court with his unyielding desire to preserve the role of the judiciary in governing the common law and his call for sweeping reform in favor of recovery for victims of torts committed by the government. Whether the case called for defining the rights of the criminally

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1. Associate Justice, Minnesota Supreme Court, 2002–2007. Prior to joining the court, Justice Hanson was a trial lawyer for thirty-four years and a judge on the Minnesota Court of Appeals for two years. Justice Hanson recently announced his retirement from the court to return to private practice at Briggs and Morgan in Minneapolis.

accused, interpreting intricate statutory provisions, applying the common law, or setting the scope and limits of the division of governmental powers, Justice Hanson's passion for his work, attention to detail, careful deliberation, and impartial judgment are apparent in each of his opinions.

I. CRIMINAL LAW

A. *Constitutional Rights*

The Minnesota Supreme Court has a celebrated history of interpreting its state constitution more broadly than the United States Constitution where "language, concerns, and traditions unique to Minnesota" justify extending additional rights to Minnesota citizens.² Justice Hanson played an integral role in this function on several important occasions. His majority opinion in *Deegan v. State*³ is one such example.

Minnesota has a unique right of first appellate review by postconviction proceeding where a convicted defendant claims that "the conviction was obtained or that the sentence or other disposition made violated [his] rights under the constitution or laws of the United States or of the state."⁴ A 2003 statute attempted to ease the financial burden on the public defenders' office by allowing it to refuse a request for postconviction counsel under certain circumstances.⁵ The issue in *Deegan* was whether this

2. Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005).

3. 711 N.W.2d 89 (Minn. 2006).

4. MINN. STAT. § 590.01, subdiv. 1 (2006). Section 590.01 was enacted in 1967 in response to the United States Supreme Court's decision to grant certiorari in *Case v. Nebraska*, 381 U.S. 336 (1965), which suggested that "a convicted defendant is entitled to at least one state corrective process to determine a claim of violation of Federal constitutional rights." *State v. Knaffla*, 309 Minn. 246, 251, 243 N.W.2d 737, 740 (1976). Because section 590.01 permits review of state law violations in addition to state and federal constitutional violations, it provides broader grounds for relief than is arguably required by *Case. Id.*

5. MINN. STAT. § 590.05 (2004). The statute provided in relevant part: If, however, the person pled guilty and received a presumptive sentence or a downward departure in sentence, and the state public defender reviewed the person's case and determined that there was no basis for an appeal of the conviction or of the sentence, then the state public defender may decline to represent the person in a postconviction remedy case.

Id. This 2003 amended language was declared unconstitutional and was severed from the language of section 590.05 by *Deegan*, 711 N.W.2d at 98.

limitation on the right to postconviction counsel violated the Minnesota Constitution.⁶

Writing for the five justice majority,⁷ Justice Hanson compared the Minnesota Postconviction Remedy Act and four decades of Minnesota interpretative law with the nature of postconviction remedies in other jurisdictions.⁸ After recognizing the unique nature of Minnesota's "broad right of review in a first review by postconviction proceeding,"⁹ the court explained that "under the Minnesota Constitution . . . a defendant's access to the other protections afforded in criminal proceedings cannot be meaningful without the assistance of counsel."¹⁰ Justice Hanson wrote:

Although we recognize the salutary purpose of the 2003 amendment—to direct the limited public defender resources to the cases that will likely present the greatest need—we nevertheless conclude that the 2003 amendment deprives some defendants of meaningful access to one review of a criminal conviction, in violation of their right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution. We hold that a defendant's right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding. We therefore hold that section 590.05, as amended by Act of May 28, 2003, ch. 2, art. 3, § 2, 2003 Minn. Laws 1st Spec. Sess. 1400, 1401, is unconstitutional.¹¹

Extending greater protections to citizens through constitutional interpretation often involves a careful balance between fundamental individual freedoms and significant governmental interests. In *Deegan*, the court elevated the right to postconviction counsel over fiscal concerns of the government.¹² More difficult issues arise when the competing governmental

6. *Deegan*, 711 N.W.2d at 97.

7. Justice Gildea took no part in the consideration or decision of the case. Justice G. Barry Anderson filed a dissenting opinion.

8. *Deegan*, 711 N.W.2d at 93–94. The United States Supreme Court has yet to definitively answer the question of whether the right to counsel extends to a first review by postconviction proceeding. *Id.*

9. *Id.* at 94.

10. *Id.* at 98.

11. *Id.*

12. *Id.*

interest is crime control. Justice Hanson's majority opinion in *State v. Carter*¹³ is a unique example of the court's attempt to maintain this delicate balance.

The issue in *Carter* was whether a police-dog drug sniff—which courts have generally held to not be a “search”¹⁴—became a search when conducted in the less private setting of a self-storage rental unit.¹⁵ Normally, when a particular activity is classified as a search, police are required to have probable cause and a search warrant (or satisfy an exception to the search warrant requirement) prior to conducting that activity.¹⁶ Conversely, when an activity is not classified as a search, police are generally allowed to conduct the activity without any level of suspicion.¹⁷

But the *Carter* decision broke this mold. Writing for the court, Justice Hanson recognized the heightened privacy interests implicated by self-storage units; but at the same time he acknowledged “the government has a significant interest in the use of drug-detection dogs in aid of law enforcement.”¹⁸ The solution

13. 697 N.W.2d 199 (Minn. 2005).

14. This is true under both the United States and Minnesota Constitutions. The United States Supreme Court has, on at least two occasions, held that a dog sniff is not a Fourth Amendment search. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (holding that a dog sniff of a vehicle is not a Fourth Amendment search); *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a dog sniff of luggage in an airport was not a Fourth Amendment search). Similarly, the Minnesota Supreme Court has held that a dog sniff around a lawfully stopped vehicle was not a search under either the United States or Minnesota Constitutions. *State v. Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002). But the *Wiegand* court concluded that even though not a search, a dog sniff of a vehicle at a police traffic stop required reasonable articulable suspicion because it extended the duration of the seizure. *Id.* at 135.

15. *Carter*, 697 N.W.2d at 209–10. Although the United States Supreme Court has not addressed the precise issue of whether a dog sniff of a self-storage unit is a search, it has held that a dog sniff of a vehicle lawfully seized on a public roadway is not a search. *Caballes*, 543 U.S. at 409. Moreover, the *Carter* court noted that “all of the state and lower federal court decisions that have addressed that issue have concluded that a dog sniff outside a storage unit is not a search under the Fourth Amendment.” *Carter*, 697 N.W.2d at 208 (citations omitted). Thus, the *Carter* court concluded that “a drug-detection dog sniff in the area immediately outside a self-storage unit is not a search under the Fourth Amendment.” *Id.* at 209.

16. *Id.* at 211.

17. See *Wiegand*, 645 N.W.2d at 133. There are exceptions to this general rule, such as when the activity extends the duration of an otherwise lawful seizure without a reasonable suspicion of illegal activity justifying the extension. *Id.* at 136.

18. *Carter*, 697 N.W.2d at 211–12. An earlier Justice Hanson majority decision acknowledged similar heightened privacy interests in self-storage units despite their “commercial” nature and the often broad right of the landlord to enter and

was for the three-justice plurality to create a “middle ground” standard that “balances a person’s expectation of privacy against the government’s interest in using dogs to detect illegal drugs.”¹⁹ This hybrid approach classifies a dog sniff of a self-storage unit as a search,²⁰ but only requires that the officer articulate a “reasonable suspicion” of drug activity.²¹ The court adopted this standard, which is lower than probable cause, from Fourth Amendment seizure law.²²

Carter is a significant decision because of the implications for other less intrusive law enforcement activities—such as facial recognition software, thermal imaging devices, breath alcohol content detection devices, and other technologies yet to be developed—used in other quasi-public locations, such as parked vehicles, school lockers, student book bags, and travel luggage. Because of the harsh consequences on either side of the traditional

inspect the units. *See* *State v. Licari*, 659 N.W.2d 243, 249–50 (Minn. 2003) (holding permission from landlord was ineffective to satisfy the consent exception to the search warrant requirement).

19. *Carter*, 697 N.W.2d at 211. This middle ground approach caused sharp division among the court. Justice Russell Anderson dissented, arguing that a dog sniff is not a search. *Id.* at 212–15 (Anderson, Russell, J., dissenting). Justice Page and Chief Justice Blatz focused on the heightened privacy interest in storage units and would have required probable cause and thus a search warrant prior to conducting a dog sniff. *Id.* at 212 (Page, J., concurring specially). Justice G. Barry Anderson was not a member of the court at the time of submission and thus took no part in the decision.

20. Justice Hanson was careful to “specifically limit” the scope of the decision to drug-detecting dogs, noting that the court was expressing “no opinion regarding bomb-detection dogs, as to which the special needs of law enforcement might well be significantly greater.” *Carter*, 697 N.W.2d at 211 n.8. Justice Hanson later wrote a lengthy concurring opinion in a case involving the admission of dog-sniff evidence at a civil trial. *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 531 (Minn. 2007) (Hanson, J., concurring). He identified “two serious layers of subjectivity involved in dog sniff evidence,” and concluded that while “a dog’s alert may provide probable cause to support a dog’s search,” such evidence should be inadmissible at a civil forfeiture trial, in part, because of its imprecise, unscientific nature. *Id.* at 533–36.

21. *Carter*, 697 N.W.2d at 212.

22. When a police officer can articulate specific observations that led the officer to reasonably believe that a person has committed, is committing, or is about to commit a criminal offense, the officer may temporarily seize that person in order to confirm or refute his or her suspicion. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”). In contrast, an officer must have probable cause in order to make a full custodial arrest. *See* U.S. CONST. amend. IV (providing that “no warrants shall issue, but upon probable cause”).

search versus no search dichotomy, the *Carter* court's hybrid standard is likely to gain popularity.

Justice Hanson led the court in another unique instance of balancing interests protected by the Minnesota Constitution with strong competing governmental interests in *State v. Schmidt*.²³ The Minnesota Supreme Court previously held that under the Minnesota Constitution, a motorist has a right to counsel before deciding whether to submit to chemical testing.²⁴ The court also permitted, in certain circumstances, collateral attacks on the constitutionality of prior convictions to prevent the use of those convictions for enhancement purposes.²⁵ The issue in *Schmidt* was whether the defendant could collaterally attack two South Dakota DWI convictions, where (as in most states) there was no constitutional right to counsel before submitting to chemical testing.²⁶

Writing for the majority, Justice Hanson first concluded that principles of conflict of laws and full faith and credit generally require respect for and thus recognition of South Dakota's final judgments.²⁷ But the court also recognized the competing interest of enforcing the protections of the Minnesota Constitution, and thus adopted a "very narrow" public policy exception to the general rule of not allowing a collateral challenge to out-of-state convictions.²⁸ The court concluded that, although a constitutional right, the right to pre-chemical test counsel is "more limited in nature" than other constitutional rights, due in part to its many

23. 712 N.W.2d 530 (Minn. 2006).

24. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991).

25. *See, e.g., State v. Nordstrom*, 331 N.W.2d 901, 905 (Minn. 1983). The defendant in *Nordstrom* argued that his offense could not be enhanced by his prior DWI conviction because the prior conviction contained no record that he made a knowing, voluntary, and intelligent waiver of his right to counsel. *Id.* at 903. The supreme court held that "[a]bsent that valid waiver on the record of defendant's right to counsel, the misdemeanor DWI conviction based on an uncounseled plea of guilty cannot be used as the basis of a gross misdemeanor charge." *Id.* at 905.

26. *Schmidt*, 712 N.W.2d at 534.

27. *Id.* at 536-37. The court explained that this was because "the right to counsel for a test decision under the Minnesota Constitution is only triggered by a prosecution in Minnesota," and thus South Dakota has a greater interest in governing the "police conduct of the traffic stop, arrest, and ultimate test decision." *Id.* at 536.

28. *Id.* at 537. The court borrowed this exception from the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971) ("A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition . . . would involve an improper interference with important interests of the sister State.").

exceptions.²⁹ Thus, the court held that foreign convictions may be used to enhance a Minnesota offense even if based on an uncounseled chemical test decision that would violate *Friedman* if taken in Minnesota.³⁰

These decisions demonstrate Justice Hanson's active but cautious approach to interpreting the Minnesota Constitution. His work reflects his objectivity and careful deliberation over issues that implicate one of the more controversial and important debates in our democratic society: balancing individual freedoms with crime control. Moreover, his exercise of judicial restraint in confining holdings to their facts—often manifested in his frequent statements about what the court is *not* holding—does not detract from the practicality of his opinions. His well-reasoned, understandable, and logical decisions leave practitioners with little doubt as to the scope of the rule of law established therein, as well as provide useful frameworks for future application.³¹

29. *Schmidt*, 712 N.W.2d at 538–39. While noting hesitation to “distinguish between the importance of constitutional rights,” Justice Hanson characterized this as a “unique case” that justified such prioritization. *Id.* at 538 n.4.

30. *Id.* at 539. The court was careful to note that it was expressing no opinion on the use of foreign convictions obtained under circumstances that would have violated the right to counsel in Minnesota in other contexts. *Id.* at 537–38. Thus, in *State v. Borst*, the Minnesota Supreme Court departed from most other jurisdictions in recognizing the right to counsel for indigents facing misdemeanor charges, even if there is no possibility of imprisonment. 278 Minn. 388, 154 N.W.2d 888 (1967). The *Schmidt* court also noted that it did not believe it necessary “to determine whether the public policy exception would apply to a foreign conviction that is based on an uncounseled plea and that would violate *Borst* if it had been taken in Minnesota.” 712 N.W.2d at 537–38.

31. *See also, e.g., Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322 (Minn. 2004). *Wanzek* involved the interpretation of clause in a standard form commercial general liability policy of insurance that provided coverage for damage to the insured's work only if the damage arose out of the work of the insured's “subcontractor.” Noting that the term “subcontractor” had no policy definition and did not incorporate any statutory or regulatory definition of the term, Justice Hanson (writing for the majority) explained that the term was ambiguous, and thus had to be construed broadly and in favor of coverage. Although the court chose to find that the materials supplier at issue was a “subcontractor” based on the unique facts presented in the case, Justice Hanson's concise and articulate explanation of the court's holding resulted in a useful, two part test for interpreting this standard insurance policy clause: “We hold that where, as here, a supplier custom fabricates the materials to the owner's specifications and provides on-site services in connection with the installation, the supplier meets the definition of subcontractor under the exception to the ‘your works’ exclusion.” *Id.* at 329. Demonstrating the practicality of this holding, this author recently litigated an insurance coverage case that was centered entirely around Justice Hanson's formulation of the subcontractor test from *Wanzek*. *See*

B. Waiver of Constitutional Rights

While Justice Hanson was one of the more moderate members of the court when addressing issues of constitutional interpretation, he took a more aggressive approach when faced with issues pertaining to waiver of constitutional rights. Whether writing for a unanimous court or in a solo dissent, Justice Hanson has unequivocally taken the position that constitutional rights cannot be denied by anything short of a knowing, voluntarily, and intelligent waiver.

In *State v. Caulfield*,³² the court unanimously agreed that the admission of a drug test lab report, in lieu of live testimony by the lab technician who performed the analysis, violated the defendant's Sixth Amendment right to confrontation.³³ But the state argued that the defendant waived his right to confrontation by failing to comply with a Minnesota "notice-and-demand statute," which required the defendant to give the state notice at least ten days prior to trial if he or she wanted live testimony from an analyst.³⁴ This issue divided the court. Justice Hanson drew the majority in concluding that:

[A]lthough there may be legitimate public policy reasons to advance the time to assert confrontation rights to a reasonable time before trial, such a shift cannot be constitutionally accomplished without adequate notice to the defendant that his failure to request the testimony of the analysis will result in the waiver of his confrontation rights, especially when the report is offered to prove an element of the offense with which the defendant is charged.³⁵

The court explained that without notice of the report's contents and the consequence for failing to request testimony, "there is no reasonable basis to conclude that a defendant's failure

Web Constr., Inc. v. Cincinnati Ins. Co., No. 06-5061, 2007 WL 4230751 (D. Minn. Nov. 29, 2007).

32. 722 N.W.2d 304, 306-07 (Minn. 2006).

33. *Id.* at 306-07.

34. MINN. STAT. § 634.15, subdiv. 2 (2004). The statute at issue permitted the admission of "a report of the facts and results of any laboratory analysis or examination if it is prepared and attested by the person performing the analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension." *Id.* at subdiv. 1(a)(1).

35. *Caulfield*, 722 N.W.2d at 313.

to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights.”³⁶

*State v. Licari*³⁷ involved the ability of a police officer to search a rented storage locker based on the consent of a landlord who had the contractual right to enter the storage unit for “inspection” purposes.³⁸ Writing for the majority, Justice Hanson first distinguished between consent by a co-inhabitant, which can be effective, and consent by a landlord, which is generally ineffective.³⁹ The court then rejected the state’s argument that the officer was justified in relying on the landlord’s apparent authority to conduct the search.⁴⁰ Justice Hanson wrote:

While searches based on honest, reasonable mistakes of fact are unobjectionable under the Fourth Amendment, a police officer’s mistake of search and seizure law (here, a mistake as to the legal requirements for the authority of a landlord to consent to a search) cannot be reasonable. “Otherwise, the protections of the Fourth Amendment would be effectively limited to what the average police officer believed was reasonable.”⁴¹

It is reassuring, to say the least, that a citizen does not waive a constitutional right simply because a police officer made an incorrect on-the-spot interpretation of search and seizure law.

Another waiver case produced the rare occasion for companion dissents by Justice Hanson and now Chief Justice Russell Anderson. The majority in *Spann v. State*⁴² held that, after conviction and sentencing, a defendant cannot waive the right to appeal.⁴³ In dissent, Justice Anderson noted the importance of plea bargaining in our criminal justice system and argued that

36. *Id.* Justice G. Barry Anderson filed a dissenting opinion, arguing that although the Bureau of Criminal Apprehension lab report was testimonial, the defendant waived his right to confrontation by failing to request live testimony. *Id.* at 317–19 (Anderson, G. Barry, J., dissenting). Justices Russell Anderson and Gildea joined in his dissent.

37. 659 N.W.2d 243 (Minn. 2003).

38. *Id.* at 251–52.

39. *Id.* at 252.

40. *Id.* at 254.

41. *Id.* (quoting *Peterson v. People*, 939 P.2d 824, 831 (Colo. 1997)).

42. 704 N.W.2d 486 (Minn. 2005).

43. *Id.* at 493. Citing numerous public policy and due process considerations, the majority explained that even a knowing, voluntary, and intelligent waiver of the right to appeal offends the integrity of the judicial system, allows the state to take advantage of the disparity in bargaining power, and allows the state “to hide its own misconduct and errors.” *Id.* at 493–94.

“institutional concerns related to the integrity of a conviction obtained by plea agreement or by trial are equally important” to the integrity of a conviction obtained by jury trial.⁴⁴ Because plea bargaining is fundamental to our criminal justice system, Justice Anderson would have remanded for a “comprehensive inquiry by the district court” as to whether Mr. Spann’s waiver was knowing, intelligent, and voluntary.⁴⁵ Justice Hanson agreed that the right to appeal can be waived, but would have gone further and concluded that the facts of the case supported a finding of a knowing, voluntary, and intelligent waiver as a matter of law.⁴⁶ Alternatively, Justice Hanson would have concluded that even if the waiver were invalid, the appropriate remedy was to challenge the effectiveness of his counsel in securing a proper waiver in a postconviction proceeding.⁴⁷

C. Evidentiary Rules

Rights contained in the rules of evidence are often as important to the fairness of a trial as constitutional rights themselves. For example, courts have long recognized that direct evidence of a third party’s commission of a crime (direct third-party perpetrator evidence) is admissible under Rule 402.⁴⁸ The

44. *Id.* at 495–96 (Anderson, Russell, J., dissenting). Justice Anderson also pointed out the ironic result of the majority’s decision: a criminal defendant can waive almost any *constitutional* right, but not the *statutory* right to appeal. *Id.* at 495.

45. *Id.* at 497.

46. *Id.* at 497–98 (Hanson, J., dissenting). The defendant was represented by counsel, was fully aware of the precise issues on appeal, signed a letter drafted by his attorney waiving his rights, and stated on the record that he was aware of his rights and was voluntarily waiving them. *Id.* at 497–98.

47. *Id.* at 498–99. When accepting a plea bargain, the rules of criminal procedure require the court to make detailed inquiry as to the validity of the waiver of trial rights. MINN. R. CRIM. P. 15.01 (2008). Justice Russell Anderson would have imposed similar requirements on the district court for waivers of appeal rights. *Spann*, 704 N.W.2d at 497 (Anderson, Russell, J., dissenting). Justice Hanson did not believe the district court’s failure to inquire was fatal to the waiver. *Id.* at 498 (Hanson, J., dissenting). Instead, he would have shifted the burden to the defendant to “challenge his appeal waiver [in a postconviction proceeding] by alleging facts showing that his waiver was the product of ineffective assistance of counsel or was otherwise not knowing, intelligent or voluntary.” *Id.*

48. *State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977). MINNESOTA RULES OF EVIDENCE 402 (2004) provides, “[a]ll relevant evidence is admissible, except as otherwise provided by the United States Constitution, the State Constitution, statute, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.” Evidence that a third party

more difficult issue is when a defendant can submit evidence of a third party's prior bad acts to suggest that the third party also committed the charged offense.⁴⁹ This "reverse-*Spreigl* evidence" presents a tension between honoring the defendant's right to present potentially exonerating evidence and avoiding collateral trials on irrelevant character evidence of third parties.⁵⁰ Accordingly, the Minnesota Supreme Court has required a heightened standard for the admission of reverse-*Spreigl* evidence.⁵¹

Applying this reverse-*Spreigl* standard and separating reverse-*Spreigl* from direct third-party perpetrator evidence has divided the court on several occasions during Justice Hanson's tenure. Facing charges related to the death of a child under his care, the defendant in *State v. Gutierrez* attempted to introduce evidence of a third party's (1) history of abusing children and (2) presence at the home where the child died around the time of death.⁵² While acknowledging that the district court improperly blended the standards for reverse-*Spreigl* and third-party perpetrator evidence,⁵³ the majority nonetheless affirmed the district court's exclusion of the evidence because its potential for unfair prejudice outweighed

committed the crime is obviously relevant to the issue of whether the charged defendant committed the crime.

49. *E.g.*, *State v. Bock*, 229 Minn. 449, 458, 39 N.W.2d 887, 892 (1949) (A criminal defendant "should . . . have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of defendant as the person who committed the crime charged against him.").

50. *Spreigl* evidence is evidence of other crimes or bad acts offered by the state as evidence that the defendant committed the crime in question. *State v. Johnson*, 568 N.W.2d 426, 432 (Minn. 1997); *State v. Spreigl*, 272 Minn. 488, 495, 139 N.W.2d 167, 172 (1965). Reverse-*Spreigl* evidence is character evidence offered by the defendant as evidence that a third party committed the charged crime. *State v. Williams*, 593 N.W.2d 227, 233 (Minn. 1999). *See also* *State v. Deans*, 356 N.W.2d 674, 676 (Minn. 1984).

51. The foundational requirements for admission of reverse-*Spreigl* evidence are: "(1) clear and convincing evidence that the defendant participated in the *Spreigl* incident; (2) that the *Spreigl* evidence is relevant and material to the state's case; and (3) that the probative value of the *Spreigl* evidence outweighs its potential for unfair prejudice." *Johnson*, 568 N.W.2d at 433.

52. *State v. Gutierrez*, 667 N.W.2d 426, 436-37 (Minn. 2003).

53. The district court applied a clear and convincing standard—the first prong of the reverse-*Spreigl* test—to the second prong of the test: relevance and materiality. *Id.* at 437. The district court concluded that the defendant failed to satisfy the second prong because he did not establish the relevance of the history of child abuse—which was the third party's presence at the home at the time of death—by clear and convincing evidence. *Id.*

its probative value.⁵⁴ Justice Hanson filed a concurring opinion in which he agreed that the third party's history of child abuse was properly excluded reverse-*Spreigl* evidence, but clarified that the evidence of the third party's presence at the home was admissible as direct third-party perpetrator evidence.⁵⁵ He identified that the confusion in this case arose because third-party perpetrator evidence "serves both as exculpatory evidence for the defendant and as foundation evidence for the use of reverse-*Spreigl* evidence."⁵⁶

In *State v. Richardson*,⁵⁷ Justices Hanson and Meyer again departed from the majority on a reverse-*Spreigl* issue.⁵⁸ The defendant wanted to testify that a third party fired the fatal shot and that this third party had motive and intent to do so as demonstrated by her abusive relationship with the deceased.⁵⁹ The majority affirmed the exclusion of this evidence because it did not satisfy the reverse-*Spreigl* standard and, alternatively, because any error in its admission was harmless.⁶⁰ Justice Hanson disagreed, explaining that the defendant's eyewitness testimony was clearly admissible because it was more properly classified as direct third-party perpetrator evidence (not reverse-*Spreigl* evidence).⁶¹ As for the true reverse-*Spreigl* evidence, Justice Hanson would have remanded for an evidentiary hearing to determine whether it was adequately connected to the charged offense.⁶²

54. *Id.* at 437–38. More specifically, the court held that the evidence "has limited probative value and serves no purpose other than to attempt to persuade the jury that [the third party] was in some way responsible for [the child's] death merely because she was not an ideal mother." *Id.*

55. *Id.* at 440 (Hanson, J., concurring). As for the past history of child abuse, Justice Hanson actually would have gone further and held that all three prongs of the reverse-*Spreigl* test had not been satisfied. *Id.* Justice Meyer joined in Justice Hanson's concurrence.

56. *Id.* at 439. Justice Hanson ultimately concluded that the district court's reverse-*Spreigl* analysis was harmless error because it technically did not prevent the defendant from offering evidence of the third party's presence at the home. *Id.* at 440.

57. 670 N.W.2d 267 (Minn. 2003).

58. *Id.* at 289 (Hanson, J., concurring in part, dissenting in part). This time, Justice Hanson would have remanded for an evidentiary hearing on the admissibility of the evidence. *Id.*

59. *Id.* at 274–75 (majority opinion).

60. *Id.* at 277–80.

61. *Id.* at 289–90 (Hanson, J., concurring in part, dissenting in part). The majority did not specifically address the admissibility of the defendant's own eyewitness testimony.

62. *Id.* at 290. Justice Hanson would have concluded that the reverse-*Spreigl*

D. Substantive Criminal Law

Justice Hanson also made important contributions in the area of substantive criminal law. In *State v. Edwards*,⁶³ he achieved the rare feat of effecting a change in a pattern criminal jury instruction through a dissenting opinion.⁶⁴ On appeal from a first-degree murder conviction, Edwards argued that the district court erred in giving a pattern jury instruction that inaccurately stated the common law rule regarding conduct that forfeits a defendant's right to act in self-defense.⁶⁵ The instruction allowed the jury to conclude that Edwards had no right to defend himself if he "began or induced the incident that led to the necessity of using force in the defendant's own defense."⁶⁶ Although Edwards' conviction was affirmed by a majority of the court, Justice Hanson drew a separate majority⁶⁷ in his conclusion that the jury instruction was legally inaccurate because (1) it did not contain a causal nexus between the defendant's wrongful conduct and the victim's use of deadly force, and (2) "it d[id] not require a finding that the defendant was in some way culpable in beginning the 'incident.'"⁶⁸ After

evidence was admissible because the state opened the door to character evidence by eliciting positive character evidence of the relationship between the deceased and the third party. *Id.* at 291.

63. 717 N.W.2d 405 (Minn. 2006).

64. *Id.* at 414 (Hanson, J., dissenting).

65. *Id.* at 410 (plurality opinion).

66. *Id.* The instruction in its entirety provided:

If the defendant began or induced the incident that led to the necessity of using force in the defendant's own defense, the right to stand the defendant's ground and thus defend himself is not immediately available to him. Instead, the defendant must first have declined to carry on the affray and have honestly tried to escape from it, and must clearly and fairly have informed the adversary of a desire for peace and of abandonment of the contest. Only after the defendant has done that will the law justify the defendant in thereafter standing his ground and using force against the other person.

Id. (quoting 10 MINN. DIST. JUDGES ASS'N, MINNESOTA PRACTICE—JURY INSTRUCTION GUIDES, CRIMINAL, CRIMJIG 7.07 (4th ed. 1999)).

67. Three justices believed the jury instruction accurately stated the law and was not in need of revision. 717 N.W.2d at 412. Two justices joined in Justice Hanson's dissent. The swing vote came from Justice Paul Anderson, who agreed with Justice Hanson that "CRIMJIG 7.07 . . . [might have] misstate[d] the law and [was] in need of revision," but agreed with "the majority's alternative conclusion that any error in the submission of the instruction was harmless." *Id.* at 414 (Anderson, Paul, J., concurring).

68. *Id.* at 416 (Hanson, J., dissenting). In other words, Justice Hanson explained that the conduct forfeiting the right to act in self-defense must have been wrongful and must have provoked or otherwise caused the victim's violent

analyzing self-defense forfeiture instructions in other states and instructions proposed in legal commentary, Justice Hanson offered a much simpler and more logical instruction:

I would conclude that the right of self-defense is forfeited where the victim's use of deadly force was legally justified, that is, where the victim's application of deadly force was "necessary in resisting or preventing an offense which the [victim] reasonably believe[d] expose[d] the [victim] . . . to great bodily harm or death."⁶⁹

Justice Hanson's dissent in *Edwards* resulted in a change to the pattern jury instruction.⁷⁰ *Edwards* was also unique because the legislature specifically left the development of this area of substantive criminal law to the judiciary.⁷¹ But where the legislature has addressed an area of substantive criminal law, Justice Hanson's opinions demonstrate deference and restraint.

II. SEPARATION OF POWERS

Separation of powers is a particularly sensitive subject in this age when judges are routinely accused of legislating from the

response. The instruction did not make clear that innocent behaviors, such as beginning a conversation or glaring at the victim, are insufficient to justify self-defense forfeiture. In short, the instruction inadequately described what conduct justified forfeiture, thus presenting the danger that the jury would find innocent conduct justified forfeiture.

69. *Id.* at 420 (alteration in original). This instruction contains the requisite culpability because if the victim had the right to act in self-defense, the defendant was necessarily acting wrongfully. The causal nexus is also satisfied by this formulation because the victim could have only been legally justified to act in self-defense if the defendant performed some unlawful act that caused the victim to reasonably fear great bodily harm or death.

70. The Committee on Criminal Jury Instruction Guides declined to adopt Justice Hanson's formulation of the instruction. Instead, it substituted the word "incident" with the word "assault," concluding that this change "incorporates the policy choices discussed in Justice Hanson's dissent and recognizes the reasonable beliefs of the victim in responding to defendant's initial assault." 10 MINN. DIST. JUDGES ASS'N, MINNESOTA PRACTICE SERIES: JURY INSTRUCTION GUIDES—CRIMINAL § 7.07 cmt. (5th ed. 2007). While this formulation may contain the requisite causal nexus, it fails to require that the victim's violent response (i.e. the conduct necessitating the use of deadly force) be commensurate with the actor's conduct that began the assault. By permitting a finding of self-defense forfeiture even though the victim responded with a disproportionate level of force, the amendment to section 7.07 probably does not adequately address Justice Hanson's culpability concern. For example, a person could start a fistfight but not be legally justified in defending himself if the other party began unlawfully using a firearm.

71. See MINN. STAT. § 609.06 cmt. (2006). "Such questions are left for judicial development . . ." *Id.*

bench simply because the accuser happens to disagree with the result. While judicial activism (when truly present) is regrettable, abdicating judicial responsibilities out of fear of public perception can be equally repugnant. Justice Hanson cannot be accused of either. His decisions reveal his care in recognizing and giving effect to the sometimes ultra-fine distinctions among the respective roles of the three branches of government. Additionally, they demonstrate his deference where the legislature has acted, his rigorous defense for the judiciary's role in governing the common law where the legislature has not acted, and his judicial restraint when defining the implied or "inherent" powers of the court.

A. *Legislative Functions*

The majority of the court in *State v. Smith*⁷² reversed a conviction for first-degree murder while committing kidnapping because fairness required "that confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime, in order to justify a separate criminal sentence."⁷³ Noting the legislature's "exclusive authority to define crimes and offenses," Justice Hanson dissented, stating the crime of kidnapping "include[s] confinement or removal that is minimal and that may even be completely incidental to another facilitated offense."⁷⁴ Justice Hanson recognized that this could produce harsh results, but instead of reversing a conviction based on the similarity of the two offenses, Justice Hanson would have held that the incidental nature of the crime should only be a factor in the district court's sentencing determination.⁷⁵ As to the

72. 669 N.W.2d 19 (Minn. 2003).

73. *Id.* at 32. In *State v. Earl*, the court had occasion to apply this criminally significant/merely incidental standard. Writing for the majority, Justice Hanson concluded that the confinement and removal of a family in a home "may have been necessary to commit the burglary," but was not merely incidental because of the defendant's purposeful behavior of awaking the family, binding them with electrical tape, and standing by while his accomplice burglarized the house. 702 N.W.2d 711, 722-23 (Minn. 2005).

74. *Smith*, 669 N.W.2d at 35-36 (Hanson, J., concurring in part, dissenting in part).

75. *Id.* at 38. The crime of rape necessarily involves confinement of a person, and thus a kidnapping. Under Justice Hanson's approach, though the perpetrator could be convicted of both crimes, the district court should examine the specific facts of the case and decline to impose consecutive sentences if doing so would unduly exaggerate the criminality of his conduct or be otherwise unreasonable or excessive. *Id.* (citing MINN. STAT. § 244.11, subdiv. 2(b) (2002)). Because the

argument that prosecutors could abuse their charging discretion if the definition of kidnapping is not limited, Justice Hanson explained that these concerns “cannot be addressed by changing the legislature’s definition of the crime but only by exercising the court’s supervisory powers to prevent sentences that ‘are unreasonable, inappropriate, excessive or unjustifiably disparate.’”⁷⁶ Thus, Justice Hanson’s approach would have achieved the same fairness concerns as the majority, but in a manner that perhaps more appropriately recognizes the role of the legislature in defining crimes and offenses.

B. *Executive Functions*

In an issue of first impression, the court in *Schermer v. State Farm Fire & Casualty Co.*⁷⁷ was asked to apply the federal “filed-rate doctrine” to dismiss a suit challenging the legality of an insurance company’s rate structure filed with a state executive agency.⁷⁸ Writing for the majority, Justice Hanson examined the history of and the policy considerations underlying the filed-rate doctrine.⁷⁹ The court concluded that the traditional rationales for the federal filed-rate doctrine—justiciability, separation of powers, and legislative intent—applied equally to the Minnesota insurance

appellant did not raise this argument, Justice Hanson would have affirmed the conviction. *Id.*

A short time later, an appellant did in fact argue that his sentence unduly exaggerated the criminality of his conduct partly because his kidnapping conviction was based on minimal confinement. *State v. Welch*, 675 N.W.2d 615, 621 (Minn. 2004). Relying on *Smith*, the majority reversed the kidnapping conviction altogether. *Id.* As in *Smith*, Justice Hanson filed a dissenting opinion indicating that instead of reversing the kidnapping conviction, he would modify the 45 month sentence for kidnapping to run concurrently (instead of consecutively) with the 150 month sentence for attempted criminal sexual conduct. *Id.* (Hanson, J., concurring in part, dissenting in part).

76. *Smith*, 669 N.W.2d at 35 (Hanson, J., concurring in part, dissenting in part).

77. 721 N.W.2d 307 (Minn. 2006).

78. *Id.* at 314. Generally, the filed-rate doctrine prevents the judiciary from reviewing the reasonableness or legality of a rate filed with and approved by an agency within the executive branch. See *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163–64 (1922). Rationales for the doctrine include: (1) the judiciary being ill-suited to second-guess the decisions of regulatory agencies; (2) the inability of the judiciary to calculate damages because of the highly specialized nature of setting rates for regulated industries; (3) deference to legislative intent to confine rate-making authority to the executive branch; and (4) considerations of separation of powers. See *Schermer*, 721 N.W.2d at 311–13.

79. *Schermer*, 721 N.W.2d at 311–13.

regulatory scheme.⁸⁰ No doubt drawing from Justice Hanson's thirty-four years of experience practicing in the area of regulated utilities,⁸¹ the court provided unique insight into another rationale for the doctrine that has apparently not been articulated by any other court:

[W]hen a regulatory agency approves rates, it seeks to achieve a balance by assuring that the rates are not excessive for ratepayers but yet are adequate to satisfy the regulated entity's due process right to earn a reasonable return. And, for insurance rates specifically, "[r]ate regulation is designed to generate premium charges that are equitable for each policyholder-insured as well as yield insurers a fair return for the risks undertaken." When a court is asked to determine whether one part of the rate structure is unlawful, as applied to a subset of ratepayers, it must necessarily interfere with the function delegated by the legislature to the DOC, and it has neither the expertise nor the mechanisms to deal with the entire rate structure or the adequacy of the return to the regulated entity.⁸²

Thus, the court refrained from infringing on the executive branch's quasi-legislative function of designing and governing rates for regulated industries.

*Kmart Corp. v. County of Stearns*⁸³ involved the scope of the legislature's delegation of quasi-judicial powers to the executive branch. The core issue in *Kmart* was whether the supreme court's interpretation of a statute should only be applied prospectively because the tax court had interpreted the same statute differently in prior cases.⁸⁴ The supreme court has previously recognized this purely prospective ruling doctrine in very limited circumstances when a court reverses clearly established precedent upon which litigants have relied.⁸⁵ Writing for the majority, Justice Hanson

80. *Id.* at 315–17.

81. *Id.* at 314. Indeed, the *Schermer* majority relied in part on *Hibbing Taconite Co. v. Minnesota Public Service Commission*, 302 N.W.2d 5 (Minn. 1980), a rate case in which Justice Hanson participated as an attorney more than twenty-five years before.

82. *Schermer*, 721 N.W.2d at 314 (citations omitted).

83. 710 N.W.2d 761 (Minn. 2006).

84. *Id.* at 767.

85. *Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982). But even in situations where clearly established precedent has been overruled, the court will not apply the purely prospective ruling doctrine unless doing so is consistent with

distinguished between the role of the tax court, which is an administrative agency within the executive branch, and that of an appellate court within the judicial branch.⁸⁶ The court explained that while *stare decisis* applies to the latter, decisions of the tax court “have little, if any, precedential effect.”⁸⁷ Thus the court concluded that even if these prior tax court decisions “could be characterized as being ‘clearly established,’ . . . they do not qualify as the type of ‘precedent’ on which litigants may rely for retroactivity purposes.”⁸⁸ Although the *Kmart* court did not explicitly identify separation of powers as a basis for its holding, the same principals underlie its refusal to essentially give precedential effect to an executive official’s interpretation of a statute while acting in a quasi-judicial capacity.

C. *Judicial Functions*

The district court in *State v. Chauvin*⁸⁹ was faced with a unique situation that required the supreme court’s clarification on the demarcation between legislative and judicial functions in sentencing criminal offenders. Although presented with evidence of aggravating circumstances that would justify departure from the presumptive guideline sentence, the mechanism for doing so had been held unconstitutional.⁹⁰ The defendant argued that absent legislative authority to utilize a sentencing jury, the only option was

the purpose and history of the rule in question and the relative equities involved.
Id.

86. *Kmart*, 721 N.W.2d at 769.

87. *Id.*

88. *Id.*

89. 723 N.W.2d 20 (Minn. 2006).

90. The Minnesota Sentencing Guidelines previously authorized a district court judge (not a jury) to make findings on aggravating circumstances and to impose an upward sentencing departure if it found the circumstances to exist by a preponderance of the evidence. MINN. STAT. § 244.10 (2004). In *Blakely v. Washington*, 542 U.S. 296, 303 (2004), the United States Supreme Court held that the Washington Sentencing Guidelines, which were substantially similar to the Minnesota Sentencing Guidelines, violated an accused’s constitutional right to a jury trial and proof of each element of a crime beyond a reasonable doubt. Relying on *Blakely*, the Minnesota Supreme Court subsequently struck down Minnesota’s Sentencing Guidelines to the extent it “permit[ted] an upward durational departure based on judicial findings.” *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005). Although the legislature later amended the guidelines to authorize district courts to impanel sentencing juries to make findings on sentencing factors, there was a gap of several months where district courts were left with no guidance on how to impose sentencing departures.

for the court to impose the presumptive guideline sentence.⁹¹ Not persuaded, the district court impaneled a sentencing jury and imposed an aggravated sentence based on the jury's finding of the existence of aggravating factors beyond a reasonable doubt.⁹² Writing for the majority, Justice Hanson described the historical and constitutional role of the judiciary in determining court procedural matters and safeguarding "the rights of criminal defendants."⁹³ Characteristic of Justice Hanson's opinions, the *Chauvin* court was careful to limit the scope of its holding to situations where exercising the court's inherent power did "the least amount of damage" to a statutory scheme that had been deemed partially unconstitutional and where exercising the power "did not infringe on the legislative function of creating a sentencing guideline system."⁹⁴

91. *Chauvin*, 723 N.W.2d at 23. "[He] objected to any proceeding that would result in a departure from the presumptive sentence of 24 months because there were no rules or statutes authorizing the procedure that the court was contemplating." *Id.*

92. *See id.* (describing the procedure used by the district court).

93. *Id.* at 25–26.

94. *Id.* at 24–27. In reaching this conclusion, the court applied a three-part test articulated in *In re Clerk of Lyon County Courts' Compensation*, 308 Minn. 172, 180–81, 241 N.W.2d 781, 786 (1976). Although many supreme court opinions discussing the court's inherent authority cite to the *Lyon County* test, most only discuss the historical and constitutional authority for the court's inherent powers while ignoring the other two prongs of the test (necessity and whether it infringes on a function of another branch of government). Justice Hanson's strict application of each prong of the *Lyon County* test is important to avoid overbroad applications of the court's inherent powers and to ensure proper allocation of governmental powers.

By way of contrast, *State v. Krotzer*, 548 N.W.2d 252 (Minn. 1996), is a controversial example of the supreme court not applying all three prongs of the *Lyon County* test. As background to the *Krotzer* decision, it is well-established that absent evidence of selective or discriminatory intent, considerations of separation of powers provide criminal prosecutors with absolute discretion in making criminal charging determinations. *See State v. Carriere*, 290 N.W.2d 618, 620 n.3 (Minn. 1980); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (stating that the decision whether or not to prosecute generally rests entirely with prosecutor). In *Krotzer*, a 19-year-old man was charged with statutory rape for having otherwise consensual sex with a 14-year-old. 548 N.W.2d at 253. The child's mother was aware of the incident and reached an amicable resolution without police involvement that ultimately resulted in her consent to a non-sexual relationship between the two. *Id.* Still, the state pressed charges. Despite the prosecutor's objection, the district court imposed a stay of adjudication of these mitigating circumstances. *Id.* Relying on the distinction between the prosecutor's charging function and the district court's sentencing function, the supreme court affirmed. *Id.* at 254. But the court failed to take into account the unique nature of a stay of adjudication, which essentially nullifies a charge after a certain period

While sentencing involves a blend of judicial and legislative functions, matters of court procedure are clearly for the courts. *State v. Lemmer* involved a challenge to a legislative pronouncement that affected a traditional judicial function: re-litigating issues that have already been determined by a court.⁹⁵ The statute at issue in *Lemmer* prevented courts from applying the collateral estoppel doctrine in a DWI proceeding, even though the issue had already been determined in an implied consent proceeding.⁹⁶ Although acknowledging that collateral estoppel is a judicial function, the majority upheld the statute as a matter of comity because the elements of collateral estoppel are not satisfied by virtue of the fact that the two proceedings are prosecuted by different parts of the government.⁹⁷ Justice Hanson dissented, arguing that the elements of collateral estoppel were satisfied by a defendant who prevailed in an implied consent proceeding.⁹⁸ As to the constitutionality of the statute, he examined the similarities between the two proceedings and other public policy considerations, and concluded that:

[b]ecause the public policy considerations that underlie the collateral estoppel doctrine are fundamental to the judicial function, and the detriment to the state of being

of lawful behavior. By not focusing on the impact of the charging function of executive branch officials, and by failing to clearly explain why the decision was necessary to preserve a uniquely judicial function, the *Krotzer* decision has resulted in significant confusion as to the scope of its application. Accordingly, *Krotzer* has since been significantly limited in its application. See *State v. Foss*, 556 N.W.2d 540, 541 (Minn. 1996) (permitting a stay of adjudication over prosecutor's objection only "for the purpose of avoiding an injustice resulting from the prosecutor's *clear abuse of discretion* in the exercise of the charging function.") (emphasis in original); see also *State v. Streiff*, 673 N.W.2d 831, 837 (Minn. 2004) (Hanson, J., majority opinion) (recognizing the limitations of *Krotzer*).

95. 736 N.W.2d 650, 653 (Minn. 2007).

96. MINN. STAT. § 169A.53, subdiv. 3(g) (2006). In the implied consent proceeding, the district court rescinded the revocation after concluding that the police officer did not have a particularized and objective basis for stopping the defendant. *Lemmer*, 736 N.W.2d at 653–54. At his omnibus hearing during the criminal proceedings, the defendant argued that section 169A.53 violated separation of powers because preventing a party from re-litigating an issue already decided is solely a judicial function. *Id.* at 654. The district court agreed, declaring the statute unconstitutional and issuing an injunction that prevented the state from enforcing the statute. *Id.*

97. *Lemmer*, 736 N.W.2d at 662–63. The Attorney General represents the state at implied consent hearings and the county attorney represents the state at the criminal proceeding. One element of collateral estoppel is that the estopped party must have been "a party or in privity with a party to the prior adjudication." *Willems v. Comm'r of Pub. Safety*, 333 N.W.2d 619, 621 (Minn. 1983).

98. *Lemmer*, 736 N.W.2d at 665–70 (Hanson, J., dissenting).

faced with collateral estoppel is only a matter of inconvenience, not of fundamental right, I would not defer to the legislature as a matter of comity. I would hold that Minn. Stat. § 169A.53, subd. 3(g), is unconstitutional and that the judgment in the implied consent proceeding operates as collateral estoppel in the DWI proceeding to establish that the stop of Lemmer was unlawful and that the evidence obtained by that stop must be suppressed.⁹⁹

III. JUDICIAL RESPONSIBILITY FOR GOVERNING THE COMMON LAW

Application of the separation of powers doctrine to the substantive common law is another controversial topic. The judiciary has the responsibility to interpret and define the common law even where doing so involves the traditionally legislative task of weighing competing public policy considerations.¹⁰⁰ But equally well-established is the principal that the legislature may abrogate or change the common law.¹⁰¹ The more difficult issue is whether a statute that only partially governs a subject area justifies complete deference to the legislature in that entire area. The general rule in these circumstances is that statutes are presumed to be consistent with the common law, “and if a statute abrogates the common law, the abrogation must be by express wording or necessary implication.”¹⁰² But application of this rule has divided the court on numerous occasions. In several split decisions, Justice Hanson took a strong position favoring the judiciary’s role in governing and advancing the common law unless the legislature has unequivocally expressed its intent to the contrary.

His majority opinion in *Rosenberg v. Heritage Renovations, LLC*¹⁰³ illustrates this debate. The common law remedy of “procuring cause” recognizes a right to commissions for real estate brokers

99. *Id.* at 674.

100. A recent example is Justice Hanson’s majority decision in *Bjerke v. Johnson*, 742 N.W.2d 660 (Minn. 2007). The core issue in *Bjerke* was whether a homeowner had a “special relationship” with a child to whom she provided room, board, and a stable home environment, such that the homeowner had a duty to protect the child from sexual abuse by another adult resident. *Id.* at 662–63. The court recognized the lack of opportunity for self-protection when a child lives away from her parents for an extended period and, as a matter of public policy, held that the homeowner owed the child a duty to protect her from sexual abuse. *Id.* at 665–66.

101. *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000).

102. *Id.*

103. 685 N.W.2d 320 (Minn. 2004).

who are the procuring cause of a sale, but who are not entitled to commissions under the applicable listing agreement because the agreement was terminated prior to the closing of the sale.¹⁰⁴ After the supreme court first announced this equitable remedy, however, the legislature enacted a comprehensive statutory scheme governing real estate listing agreements and commissions in general.¹⁰⁵ More specifically, Minnesota Statutes section 82.195 provided real estate brokers with an “override” right to commissions even after termination of the listing agreement if within 72 hours the broker provided the other party with a “protective list,” which identified those who had made an affirmative showing of interest in the property during the period of the listing agreement.¹⁰⁶ The issue in *Rosenberg* was whether the

104. *Id.* at 327 (citing *Spring Co. v. Holle*, 248 Minn. 51, 55, 78 N.W.2d 315, 318 (1956)).

105. *See generally* MINN. STAT. Ch. 82 (2002). More specifically, section 82.195 generally governed the required content of listing agreements, including:

- (1) a definite expiration date;
 - (2) a description of the real property involved;
 - (3) the list price and any terms required by the seller;
 - (4) the amount of any compensation or commission or the basis for computing the commission;
 - (5) a clear statement explaining the events or conditions that will entitle a broker to a commission;
 - (6) information regarding an override clause, if applicable, including a statement to the effect that the override clause will not be effective unless the licensee supplies the seller with a protective list within 72 hours after the expiration of the listing agreement; [and]
-
- (10) for residential listings, a notice stating that after the expiration of the listing agreement, the seller will not be obligated to pay the licensee a fee or commission if the seller has executed another valid listing agreement pursuant to which the seller is obligated to pay a fee or commission to another licensee for the sale, lease, or exchange of the real property in question. This notice may be used in the listing agreement for any other type of real estate.

MINN. STAT. § 82.195, subdiv. 2 (2002) (renumbered to MINN. STAT. § 82.21, subdiv. 2 (2004)).

106. *Id.* *See also Rosenberg*, 685 N.W.2d at 327–30.

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statutory override remedy abrogated the common law procuring cause remedy.¹⁰⁷ Justice Hanson identified several reasons why section 82.195 did not abrogate the common law:

- (1) “[S]ection 82.105 makes no explicit reference to the procuring cause remedy and does not state that the override remedy displaces any other remedies that might be available at common law”;¹⁰⁸
- (2) The “Scope and Effect” section of chapter 82 indicates legislative intent to not abrogate any common law remedy;¹⁰⁹
- (3) Legislative enactments must be particularly clear in order to abrogate an equitable remedy, which functions “as a supplement to the rest of the law where its remedies are inadequate to do complete justice”;¹¹⁰ and
- (4) The override remedy is listed as an optional requirement of a listing agreement, which “does not suggest an intention of exclusion.”¹¹¹

Thus, the court concluded that “the override remedy provided in section 82.195 was intended to provide an alternative to, but not to abrogate, the court’s equitable authority to use the procuring cause remedy where necessary to do complete equity.”¹¹²

107. *Rosenberg*, 685 N.W.2d at 327. Because the broker failed to demand an override clause in the listing agreement, a determination that the statutory override remedy was exclusive would have left the broker without any remedy. *See id.* at 323–24.

108. *Id.* at 328.

109. *Id.* at 329.

110. *Id.* (citations omitted).

111. *Id.* at 330.

112. *Id.* Justice Russell Anderson dissented, arguing that “[w]hen the legislature provides that events or conditions that will entitle a broker to a commission must be explained in a ‘clear statement’ in the listing agreement, I would conclude that a common law claim, neither mentioned nor explained by a clear statement in a listing agreement, is barred.” *Id.* at 333 (Anderson, Russell, J., dissenting). Chief Justice Blatz joined in the dissent.

A similar issue was presented in *Brekke v. THM Biomedical, Inc.*¹¹³ The issue in *Brekke* was whether the existence of four enumerated statutory exceptions to a wage penalty statute indicated the legislature's intent to abrogate other common law defenses.¹¹⁴ A narrow, Justice Hanson-led majority concluded that the statutory exceptions were insufficient for a finding of abrogation "by express wording or necessary implication."¹¹⁵ The court relied in part on a prior supreme court decision that held the common law defense of forfeiture was available to employers.¹¹⁶ As in *Rosenberg*, the court noted the presumption of no abrogation, the court's strong reluctance to find implied abrogation of equitable remedies, the absence of an express reference to the common law principles at issue, and no other evidence of legislative intent to abrogate.¹¹⁷

A third example involved the ability of the court to recognize new common law rights in areas where the legislature had partially spoken, but did not express a clear intent to abrogate all new common law remedies. The issue in *Larson v. Wase Miller*¹¹⁸ was whether Minnesota should recognize a new common law cause of action against a hospital for negligently issuing credentials to surgeons. Writing for the majority, Justice Hanson examined the public policy considerations for and against, and concluded that "the tort of negligent credentialing is inherent in and the natural extension of well-established common law rights," a holding that

113. 683 N.W.2d 771 (Minn. 2004).

114. *Id.* at 775. The wage statute at issue provided for a penalty if an employer made any deduction from an employee's wages for lost or stolen property, for damage to property, or to recover for a debt. MINN. STAT. § 181.79, subdiv. 1 (2004). The employee in *Brekke* was also an officer, director, and shareholder of the closely-held corporation that deducted the loan amount from his salary. 683 N.W.2d at 772-73. The corporation did not argue that any of the four statutory exceptions applied. *Id.* at 775. Instead, the corporation argued that the employee's own breach of contract and breach of fiduciary duties made the common law affirmative defenses of waiver and estoppel applicable to bar the employee's claim. *Id.* at 776-77.

115. *Brekke*, 683 N.W.2d at 776-77 (quoting *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000)).

116. *Id.* at 775-76. The court discussed *Stiff v. Associated Sewing Supply Co.*, where an employer argued that it was entitled to withhold wages because the employee forfeited his right to rely on the wage statute by embezzling funds from the employer. 436 N.W.2d 777, 780 (Minn. 1989). Although forfeiture is not an enumerated statutory exception, the court found no legislative intent to abrogate the common law defense of forfeiture. *Id.*

117. *Brekke*, 683 N.W.2d at 776.

118. 738 N.W.2d 300 (Minn. 2007).

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the court found to be consistent with the law in twenty-seven other states.¹¹⁹ But the hospital argued that Minnesota's "peer review statute"—which governs credentialing of medical professionals and provides for certain limits on liability—abrogates any common law claim for negligent credentialing because of certain conflicts between the two.¹²⁰ The court disagreed:

Although the plain language of . . . section 145.63 does limit the liability of hospitals and credentials committees, it in no way indicates intent to immunize hospitals, or to abrogate a common law claim for negligent credentialing If the legislature had intended to foreclose the possibility of a cause of action for negligent credentialing, it would not have addressed the standard of care applicable to such an action.¹²¹

Accordingly, the court adopted a new common law claim in Minnesota.

Justice Hanson also weighed in on the highly publicized case involving the impact of the Workers Compensation Act on an injured employee's common law right to recover from a co-employee.¹²² The legislature changed the common law by limiting

119. *Id.* at 303–09. These findings satisfy two of the four prongs in the test for deciding whether to recognize a new common law tort: "(1) whether the tort is inherent in, or the natural extension of, a well-established common law right, [and] (2) whether the tort has been recognized in other common law states" *Id.* at 304 (citing *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234–36 (Minn. 1998)). The other two prongs are: "(3) whether recognition of a cause of action will create tension with other applicable laws, and (4) whether such tension is outweighed by the importance of the additional protections that recognition of the claim would provide to injured persons." *Id.*

120. *Id.* at 309–11. The hospital relied on Minnesota Statutes section 145.64, subdivision 1 (2006), which prohibits review organizations (such as the hospital) from disclosing information revealed during a peer review proceeding. *Id.* at 309. The hospital argued that if negligent credentialing were recognized, this statute would prevent it from defending itself because it would not be able to disclose the information that it knew at the time it issued the credentials. *Id.* The hospital also cited a limited liability provision, which immunizes decisions of a review organization if it acted "in the reasonable belief that the action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made" MINN. STAT. § 145.63, subdiv. 1 (2006). The hospital argued that this statute conflicts with the proposed cause of action for negligent credentialing because it "creates a standard of care different from the standard of care applicable to a simple negligence claim, effectively elevating the burden of proof necessary to succeed in a claim against a hospital for credentialing decisions." *Larson*, 738 N.W.2d at 311.

121. *Larson*, 738 N.W.2d at 311.

122. *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 763–68

tort recovery from co-employees to gross negligence only.¹²³ The majority further limited recovery by holding that tort victims must also show that the co-employee was acting outside the course and scope of employment.¹²⁴ Justice Hanson dissented, arguing that because there are competing policy concerns relating to the scope of co-employee liability, any narrowing of the common law should come from the legislature, not the court.¹²⁵ Because he found no express legislative intent to restrict co-employee liability in such a way, he would have allowed the case to proceed to trial on the issue of whether the co-employees were grossly negligent.¹²⁶

Justice Hanson also dissented in *Urban v. American Legion Department of Minnesota*,¹²⁷ where the court was asked to determine whether the state and national chapters of the American Legion could be held vicariously liable for the dram shop liability of a local post.¹²⁸ The Minnesota Civil Damages Act (CDA) created a new cause of action against liquor licensees that did not exist at common law.¹²⁹ Under the common law, this direct statutory liability would impose vicarious liability against the liable party's master.¹³⁰ But the majority focused on a different statute, section 340A.501, which makes the acts of an employee who sells alcohol the same as the acts of the employer for purposes of the CDA.¹³¹ The majority concluded that because section 340A.501 imposes vicarious liability under certain circumstances, this indicates a legislative intent to abolish vicarious liability under the CDA in all

(Minn. 2005) (Hanson, J., dissenting). Former Vikings player Korey Stringer died from heat stroke in August of 2001 after two days of practice in high heat and humidity. *Id.* at 748–50, 753. The issue on appeal involved the liability of the Vikings' medical services coordinator and an assistant trainer in providing care and preventative treatment to Stringer. *Id.* at 753.

123. MINN. STAT. § 176.061, subdiv. 5(c) (2006).

124. *Stringer*, 705 N.W.2d at 757–58. Justice Paul Anderson authored the four justice majority opinion. Justice Page—a former Minnesota Vikings player—recused himself. Justice Meyer joined in the dissent of Justice Hanson.

125. *Id.* at 763–64 (Hanson, J., dissenting).

126. *Id.* at 764–65, 768.

127. 723 N.W.2d 1 (Minn. 2006).

128. *Id.* at 2.

129. MINN. STAT. § 340A.801, subdiv. 1 (2006). More specifically, the CDA imposes dram shop liability for damages caused by an intoxicated person “against a person who caused the intoxication of that person by illegally selling alcoholic beverages.” *Id.*

130. *Lange v. Nat'l Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973).

131. MINN. STAT. § 340A.501 (2006).

other circumstances, including dram shop liability.¹³² Justice Hanson disagreed, arguing that “the CDA does not abrogate, but instead incorporates, common law principles of vicarious liability.”¹³³ He explained that section 340A.501 does not *create* vicarious liability; it “*add[s]* to a licensee’s common law vicarious liability as an employer by creating a direct statutory liability.”¹³⁴ Because he believed this did not constitute clear legislative intent to abolish the common law, Justice Hanson concluded that vicarious liability should apply to the masters of licensees who are directly liable under section 340A.801.¹³⁵

These decisions illustrate Justice Hanson’s concerns over eroding the common law because of blind judicial deference to legislative inaction or partial action. His work reflects his conviction toward preserving the function of the judiciary in governing the common law. But also underlying these decisions is

132. *Urban*, 723 N.W.2d at 4–7. It is difficult to reconcile this holding with *Isles Wellness, Inc. v. Progressive Northern Insurance Co.*, 703 N.W.2d 513, 515 (Minn. 2005). The *Isles Wellness* court ultimately held that the corporate practice of chiropractic medicine was illegal because (1) Minnesota common law prohibits the corporate practice of medicine, and (2) chiropractic constitutes the practice of medicine. *Id.* at 521, 524. But the court had to explain why two statutes that specifically prohibited the corporate practice of dentistry and veterinary medicine did not indicate legislative intent to abrogate the common law prohibition of corporations practicing all other types of medicine. The only explanation offered was that the abrogation was not made “by express wording or necessary implication.” *Id.* at 521. It is difficult to understand how section 340A.501 indicates an intent to abrogate the common law when the statutes prohibiting dentistry and veterinary medicine do not. It should be noted that Justice Hanson filed a dissenting opinion in *Isles Wellness* because he believed that the Minnesota common law did not support a prohibition against the corporate practice of medicine.

133. *Urban*, 723 N.W.2d at 7 (Hanson, J., dissenting).

134. *Id.* at 8 (emphasis added). Justice Hanson focused on the language in section 340A.501 that makes the act of the employee *the same as* the act of the employer for purposes of the CDA. *Id.* By way of contrast, vicarious liability recognizes that the acts of the employee and the employer are distinct, but imposes liability on the employer as a matter of “public policy to satisfy an instinctive sense of justice.” *Id.* at 8 (quoting *Lange*, 297 Minn. at 403, 211 N.W.2d at 785). Justice Hanson ultimately believed the majority erred by improperly presuming that section 340A.501 abrogated the common law and relying on the absence of legislative intent to the contrary, instead of presuming that the legislature did not abrogate the common law absent clear intent to the contrary. *Id.* at 8–9.

135. *Urban*, 723 N.W.2d at 9. But Justice Hanson believed there were genuine issues of material fact as to whether the state and national chapters of the American Legion were in a principal-agent relationship such as to support a claim for vicarious liability. *Id.* at 12–13.

Justice Hanson's desire to safeguard the rights of tort victims seeking recovery for their injuries. Nowhere did he make this desire more poignant than in his dissenting opinion from *Schroeder v. St. Louis County*.¹³⁶

IV. THE *SCHROEDER* DISSENT

Under the government immunity doctrine, tort victims face substantial barriers to recovery from governmental tortfeasors. First, statutory immunity bars recovery for “[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”¹³⁷ Next, official immunity shields “a public official charged by law with duties which call for the exercise of his judgment or discretion”¹³⁸ Further, vicarious official immunity shields a government agency when its employee's conduct is protected by the official immunity doctrine.¹³⁹ And an entirely different immunity analysis applies to claims based on a violation of the United States Constitution.¹⁴⁰

Several of these doctrines were invoked in the *Schroeder* decision.¹⁴¹ The plaintiff in *Schroeder* was killed when he collided with a county-operated road grader operating on the wrong side of the road.¹⁴² The majority held that the county was entitled to statutory immunity because operating the road grader against

136. 708 N.W.2d 497 (Minn. 2006).

137. MINN. STAT. § 466.03, subdiv. 6 (2006). Statutory immunity has generally been interpreted to only apply to policy making-type activities. Nusbaum v. County of Blue Earth, 422 N.W.2d 713, 718 (Minn. 1988). For purposes of this determination, courts distinguish between planning functions, which involve the consideration of social, political, or economic considerations and operational functions, which involve the day-to-day operations of government, technical or scientific skills, or the exercise of professional judgment. Holmquist v. State, 425 N.W.2d 230, 231–32 (Minn. 1988).

138. Anderson v. Anoka Hennepin Indep. Sch. Dist. 11, 678 N.W.2d 651, 655 (Minn. 2004) (quoting Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn. 1988)). Generally, the official immunity analysis inquires as to whether the government official was exercising a ministerial function, which can give rise to liability, or a discretionary function, which is protected. *Id.*

139. Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn. 1992).

140. See Mumm v. Mornson, 708 N.W.2d 475, 483 (Minn. 2006) (explaining that “[q]ualified immunity shields government officials from civil liability ‘if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

141. 708 N.W.2d at 503.

142. *Id.* at 500–01.

traffic was the result of an unwritten, policy-based decision that saved the county money.¹⁴³ In a dissent that is far longer than the majority opinion, Justice Hanson first noted the irony associated with the court's historically broad construction of statutory immunity:

If the grader operator had been working for a private party, he and his employer would surely be liable. In fact, if the private employer had made a policy decision to permit the creation of this dangerous condition, by weighing the cost of remedying the danger against the risk to human life, we would consider that policy reprehensible—a callous disregard for the safety of others that would warrant the imposition of punitive damages. The question then is whether comparable conduct by the government should escape liability, precisely because it involved a policy made by weighing the cost of remedying a dangerous condition against the risk to human life. I would first conclude that, under an appropriately narrow construction of our existing tort immunity law, the county should not escape liability. But if our existing tort immunity law does not yield this result, then I would conclude that it is time to seriously reexamine that law.¹⁴⁴

Although the supreme court previously held to the contrary,¹⁴⁵ Justice Hanson explained that it is more logical and more appropriate to not apply the statutory immunity exception to situations where the government failed to warn of a dangerous condition that it created.¹⁴⁶ He concluded by suggesting that there exists a substantial basis to overrule the court's prior cases that held to the contrary.¹⁴⁷

143. *Id.* at 505.

144. *Id.* at 509 (Hanson, J., concurring and dissenting).

145. *See* *Holmquist v. State*, 425 N.W.2d 230, 234–35 (Minn. 1988).

146. *Schroeder*, 708 N.W.2d at 513 (Hanson, J., concurring and dissenting) (describing the term “statutory immunity” as “misnomer,” because it appears in a statutory scheme with the “primary effect . . . of establish[ing] governmental liability for the torts of its employees . . .”). The statutory immunity provision is merely an exception that is extended to those acts. *Id.*

147. *See id.* at 513. However, because the *Schroeders* did not raise this issue, Justice Hanson agreed with the majority that the court's precedent should be applied. *Id.* But he wrote separately to express his opinion that the court “should be open to reexamine the question in a future case that presents it more fully and squarely” *Id.* Justice Hanson went on to disagree with the majority's application of the statutory immunity exception. In his characteristic mastery of the factual record, Justice Hanson cited affidavit testimony, deposition testimony, and exhibits in reaching his conclusion that the county was not entitled to

Noting that the doctrine is often applied but rarely questioned, Justice Hanson then took the opportunity to critically analyze the history and policy considerations underlying the official immunity doctrine as well. He argued that the core justification for official immunity—to avoid deterring independent action and effective performance by government officials—has been “seriously questioned” by reputed commentators,¹⁴⁸ and has been all but eliminated by the passage of the Municipal Tort Claims Act.¹⁴⁹ Justice Hanson concluded his dissent by characterizing official immunity as a doctrine that is “not firmly grounded in reasoned analysis.”¹⁵⁰

Although Justice Hanson made a compelling case for limiting statutory immunity and abolishing official immunity, he ultimately conceded that *Schroeder* was not the appropriate case to take such drastic measures.¹⁵¹ But his exhaustive research, thorough analysis, convincing logic, and candid acknowledgement of the court’s prior oversights is certain to catch the attention of tort victims wading their way through the government “immunity thicket”¹⁵² in the

immunity because the road grade operator failed to comply with the policy. *Id.* at 516.

148. *Id.* at 518 (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 273, at 733 (West Group 2000)).

149. *Id.* Justice Hanson argued that:

the Municipal Tort Claims Act did adopt four provisions that essentially eliminated the policy concerns that underlie official immunity: (1) it established liability limits that also apply to direct claims against public officers and employees (Minn. Stat. § 466.04, subdiv. 1(a) (2004)); (2) it required that a notice of claim be given within 180 days after loss or within 1 year for wrongful death (Minn. Stat. § 466.05 (2004)); (3) it authorized the municipality to procure insurance against liability, including that for liability of “its officers, employees, and agents” (Minn. Stat. § 466.06 (2004)); and (4) it required the municipality to defend and indemnify its “officers and employees,” subject to certain qualifications (Minn. Stat. § 466.07, subdiv. 1 (2004)).

Id. at 517–18.

150. *Schroeder*, 708 N.W.2d at 520. Again, Justice Hanson declined to reverse the court’s precedent in this case because the appellant failed to raise the issue. *Id.* at 519. Thus Justice Hanson agreed with the majority that the driver of the road grader was entitled to official immunity. *Id.* But he disagreed with the majority’s conclusion that vicarious official immunity for the county necessarily followed. *Id.* After an extensive analysis of the competing policy considerations, Justice Hanson concluded that “[w]hen the interests of the county . . . are weighed against the interests of an innocent victim to obtain compensation, I would conclude that vicarious official immunity should not be available.” *Id.* at 521.

151. *Id.* at 513, 519.

152. Michael K. Jordan, *Finding a Useful Path Through the Immunity Thicket*, 61

future. Perhaps that occasion will arise sooner than he expected. When questioning the logic of immunizing policy decisions where the government has no need to weigh the risk of liability for poor choices, Justice Hanson posed a prophetic rhetorical question:

Could a county, for example, allow travelers to continue to use an unsafe bridge, without warning, because it weighed the safety of the travelers against budget constraints that made it financially difficult to make the bridge safe? One would hope not, but the extension of the discretionary function exception to the deliberate abdication of governmental responsibilities, purely for cost-saving reasons, could produce precisely that extreme result.¹⁵³

The collapse of the I-35 Bridge in downtown Minneapolis less than two years later may well result in the litigation of this precise issue. Accordingly, the *Schroeder* dissent may prove to be Justice Hanson's most significant work.

V. CONCLUSION

One need not have worked closely with Justice Hanson to appreciate the many qualities that describe his judicial career: impartiality, respect for the rule of law, scholarship, passion for his work, and deference to the division of governmental powers are among the many discussed in this article. Perhaps most revealing is that these qualities are manifested in cases across such a broad spectrum of factual circumstances and areas of law. Whether the issue sounded in tort, contract, statute, the common law, court rules, or constitutional interpretation, litigants could be assured that every argument would be closely scrutinized, every brief thoroughly reviewed, every issue independently researched, and every opinion carefully drafted.

Those who have had the honor of working directly with Justice Hanson witnessed the foundations of these qualities. His desk was routinely covered with open volumes of the Northwest Reporter. And it was not uncommon to find him reading reporters from other jurisdictions. Nor was it unusual to pass him in the treatise aisle of the supreme court library, or to find him in his law clerk's office pouring over deposition and trial transcripts. On the bench,

BENCH & BAR OF MINN., 24, 28–29 (Oct. 2004).

153. *Schroeder*, 708 N.W.2d at 512 (Hanson, J., concurring in part, dissenting in part).

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his reverent demeanor put practitioners at ease; but his incisive questions struck at the heart of the controversy, exposing weaknesses in arguments and enriching debate. The product of Justice Hanson's work is a legacy of scholarship that will extend far beyond the relatively short duration of his time on the bench.