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JOHN SALVI III'S REVENGE FROM THE GRAVE: HOW THE ABATEMENT DOCTRINE UNDERCUTS THE ABILITY OF ABORTION PROVIDERS TO STOP CLINIC VIOLENCE

Barry A. Bostrom, J.D.,*
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and Richard J. Seron, J.D.***

Conjuring Innocence: An Anecdote

During the protracted, six week trial of John C. Salvi III, Richard Seron and the accused's parents, John Jr. and Anne Marie Salvi, chanced to cross paths a number of times in the dim hallways of Dedham's antique courthouse. Against all likelihood, they started to engage in some amicable dialogue and gradually, over numerous vending machine cokes, succeeded in developing a comfortable association. Following the conviction of their only child, the Salvi's began to correspond with Seron on a regular basis and to exchange numerous telephone calls as well.

Death for "Young John" Salvi arrived promptly one morning in Cellblock 3 at Cedar Junction, the infamous maximum security state

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*** Former security guard, Preterm Health Services, Brookline, Massachusetts; B.A. (*cum laude*), Boston College, 1971; J.D., Boston College Law School, 1974. For a few weeks in the fall of 1994, Mr. Seron was a part-time security guard at Preterm Health Services. At that time he was also president and owner of Armed Personal Defense Training, Inc., a personal firearms instruction school. He previously had a successful career as senior partner of Type Modifications Unlimited, an advertising design firm in Boston. Mr. Seron successfully completed firearm qualifications at Lethal Force Institute (Dunbarton, NH, 1991) and Alba Training (Concord, MA, 1992), and has been a National Rifle Association Certified Personal Protection and Safety Instructor for Pistols since 1993. Mr. Seron has been disabled since his injuries from the John Salvi, III, attack on December 30, 1994.

prison. It was late November and young Salvi was dead, a mere eight months into his double-life stretch. Within weeks of Salvi's death, a successful motion for the abatement of all his criminal indictments and convictions was filed. The slate was clean.

Eight months passed and on a scorching August morning, John Jr., Anne Marie and I met for breakfast at the I-HOP down by the state line in Salem, New Hampshire. I ordered pancakes; the Salvis' ordered eggs. Time passed agreeably enough until, in the course of some innocuous table banter, Anne Marie forgot herself and hazarded onto the subject of her dead son's criminal abatement. It seemed she was the one who had pushed most vigorously for it, and now, she was quite satisfied and proud for having succeeded.

I, on the other hand, could feel nothing but frustration and so began to lament about how the abatement might ruin my claim for the \$100,000 reward. Abatement was a massive stumbling-block in my path and I did not feel too kindly about it. Abatement made possible the immediate dismissal of my case, upon a motion by the defense — my cause of action might face sudden death on Day One.

Now, after hearing all this, Anne Marie looked more than a little bit pale. She began to recite very gravely that instead of being the negative thing I had just described, abatement was truly a blessing that had given some measure of peace to her husband and to herself. Almost magically, abatement had assuaged the guilt of Young John and it had cleansed his family name as well. And that was that.

Later on, while driving home, I reflected on the meaning of the terse exchange between myself and one very grief-stricken mother. I could understand her pain and despair. But I realized that, in trying to fix things, Anne Marie had inadvertently complicated my life. I also knew that the Salvi abatement was continuing to generate a firestorm of public indignation. The Salvis' had conjured innocence for their dead son through abatement, and it made them feel better. But nobody else was buying into it — nobody.

— Richard J. Seron

On November 16, 1993, the Bureau of Alcohol, Tobacco and Firearms, Planned Parenthood Federation of America, Inc. (PPFA), and the National Abortion Federation (NAF) announced at a joint news conference the establishment of a \$1 million reward fund to help solve attacks on abortion clinics.¹ News of the an-

¹ The first newspaper to break the news was the *Lancaster New Era*:

Rewards of up to \$100,000 are being offered for information leading to convictions in nearly 50 unsolved arsons, bombings and chemical attacks on abortion clinics and family planning centers, including the firebombing of the Lancaster Planned Parenthood.

The National Abortion Federation and the Planned Parenthood

nouncement was carried nationwide.² Since that time PPFA and

Federation of America announced the creation of the reward fund today in response to increasing violence directed at women's reproductive services throughout the nation.

The Sept. 29 firebombing of the local clinic did more than \$150,000 worth of damage. In Lancaster, Planned Parenthood counsels and refers women seeking abortions and is an advocate of abortion choice, but it does not perform the medical procedure.

The local attack came on the heels of a \$1.4 million arson fire of a family planning clinic in Bakersfield, Calif. That case also remains unsolved.

Anyone with information about attacks on abortion or family planning providers should call 1-800-772-9100. All callers' identities will be kept confidential.

Up to \$100,000 Offered for Clinic Bombing Information, LANCASTER NEW ERA, Nov. 16, 1993, at C6.

The Lancaster *Intelligencer Journal* followed with a longer story the next day:

Escalating violence surrounding the abortion issue has prompted a mysterious donor to pledge \$100,000 for information about the Sept. 29 firebombing of Lancaster's Planned Parenthood office. The reward is part of "at least" \$1 million made available for leads in similar incidents nationwide, according to Gina Shaw, spokeswoman for the National Abortion Federation in Washington, D.C. . . .

Nancy Osgood, director of Planned Parenthood of Lancaster County, hopes the hard-hitting, high-dollar reward effort will bring results. "Clearly, \$100,000 for each case solved is a lot of money," she said. "So in our case, if one person came up with the information . . . they would be eligible. They would get the \$100,000, as long as they cooperated." . . .

The rewards were announced Tuesday at a joint press conference in the nation's capital, where representatives of the NAF were joined by officials from the Planned Parenthood Federation of America, and John Magaw, director of the Bureau of Alcohol, Tobacco and Firearms.

Rewards of up to \$100,000 are being offered for information leading to the arrest and conviction of those responsible for "abortion clinic bombings, arsons, and criminal acts of vandalism that have occurred in various locations throughout the country," according to a statement issued by the ATF.

David Griffith, *\$100,000 Reward Offered in Clinic Bombing Here*, INTELLIGENCER J., Nov. 17, 1993, at A1.

² Other newspapers across the country also carried the story the following day:

A \$1 million reward fund will be offered to help solve cases of violent attacks against abortion clinics, including the torching of a Richmond health center, two abortion rights groups and a federal agency announced yesterday. . . . To solve past crimes, the National Abortion Federation and Planned Parenthood Federation of America offered rewards of up to \$100,000 per case from what they called the largest reward fund ever established to help crack anti-abortion violence cases. . . . Federal agents will man a 24-hour, toll-free hotline for tips about arson, bombings and terrorism at abortion and family planning clinics. The number is (800) ATF-4867.

Peter Hardin, *Reward Fund Targets Attacks on Abortion Clinics*, RICHMOND TIMES-DISPATCH, Nov. 17, 1993, at A1. See also Michael Ross, *Senate Passes Bill to Curb Anti-abortion Violence*, AUSTIN AM.-STATESMAN, Nov. 17, 1993, at A1 ("abortion rights supporters

NAF have reaffirmed the reward offer after every serious abortion clinic attack,³ including the December 30, 1994 Brookline, Massachusetts clinic shootings.⁴

took their own step to protect clinics, announcing that they will pay up to \$100,000 for anonymous tips leading to convictions in 25 unsolved cases. Rewards for tips . . . will come from a \$2.5 million fund started largely with money from an anonymous donor."); Randall Edwards, *Reward Fund Set Up for Abortion Clinic Arsons*, COLUMBUS DISPATCH, Nov. 17, 1993, at 2B ("The National Abortion Federation and the Planned Parenthood Federation of America announced the reward fund yesterday at a news conference in Washington. Local news conferences, such as the one at the YWCA in Columbus, were scheduled across the country to coincide with the announcement."); *Senate Oks Bill to Curb Violence by Abortion Foes*, DALLAS MORNING NEWS, Nov. 17, 1993, at 4A; Dawn Webber, *Rewards of up to \$100,000 Offered to Stem Violence at Abortion Clinics*, L.A. DAILY NEWS, Nov. 17, 1993, at N4; Michael Ross, *Protection for Abortion Clinics Voted by Senate Legislation*, L.A. TIMES, Nov. 17, 1993, at 1; Stephen Buttry, *Omahans Hope Fund Cuts Abortion-Clinic Violence*, OMAHA WORLD-HERALD, Nov. 17, 1993, at 1; Mary Beth Lane, *Reward Offered to Find Abortion Clinic Bombers*, PLAIN DEALER (Cleveland, Ohio), Nov. 17, 1993, at 13A; *Rewards Offered in Clinic Attacks*, PRESS-ENTERPRISE (Riverside, CA), Nov. 17, 1993, at A6; Mimi Hall, *\$100,000 Reward in Clinic Attacks*, USA TODAY, Nov. 17, 1993, at 3A; and Helen Dewar, *Abortion Clinics Voted Protection*, WASH. POST, Nov. 17, 1993, at A1.

³ E.g., newspapers across the country announced the PPFA and NAF offer of \$100,000 reward after a fatal shooting at a clinic in Pensacola, FL, and a firebombing at Falls Church, Va. See *U.S. Marshals Dispatched to Guard Clinics*, ARIZ. REPUBLIC, July 31, 1994, at A8; *At a Glance, Accused Killer is Relaxed in the Dock*, ATLANTA CONST., July 31, 1994, at A6; Judy Lundstrum Thomas, *Marshals to Guard Abortion Clinics*, AUSTIN AM.-STATESMAN, July 31, 1994, at A1; *Authorities Probe Arson Behind Abortion Clinic*, BALTIMORE SUN, July 31, 1994, at 17A; *Reward Offered in Va. Clinic Fire*, BOSTON GLOBE, July 31, 1994, at 22; *Clues Sought in Va. Clinic Firebombing*, CHI. SUN-TIMES, July 31, 1994, at 3; *Clinic Target of Arson Attempt*, DES MOINES REG., July 31, 1994, at 2; *Nation in Brief*, SUNDAY PATRIOT-NEWS, July 31, 1994, at A14; *Suspect Sought in Virginia Fire*, HOUSTON CHRON., July 31, 1994, at 22; *Fire at Virginia Abortion Clinic Causes Minor Damage*, INDIANAPOLIS STAR, July 31, 1994, at A14; *Help Sought in Virginia Abortion-Clinic Fire*, ORANGE COUNTY REG., July 31, 1994, at A27; *Arson Investigated at Abortion Clinic*, PITTSBURGH POST-GAZETTE, July 31, 1994, at A12; Jim Mason, *Fire Set Behind Va. Clinic, Groups Offer Reward*, RICHMOND TIMES-DISPATCH, July 31, 1994, at A2; *Agents Seek Help in Finding Suspect in Arson at Virginia Abortion Clinic*, ROCKY MOUNTAIN NEWS, July 31, 1994, at 72A; *Public's Help Sought Over Fire at Va. Clinic*, SEATTLE TIMES, July 31, 1994, at A2; *Fire Set at Abortion Clinic in Va.*, ST. PETERSBURG TIMES, July 31, 1994, at 3A; *Abortion Clinic Arson Probed*, TULSA WORLD, July 31, 1994, at N14; Lorraine Woellert, *Hot Line Gets Tips on Clinic Bombing*, WASH. TIMES, Aug. 1, 1994, at C6.

A \$100,000 reward was also announced after arsons at a family planning clinic in Cloquet, Minn., and a Planned Parenthood office in Brainerd, Minn. See Allie Shah & Rhonda Hillbery, *Brainerd Fire Determined to be Arson*, STAR-TRIBUNE NEWSPAPER OF THE TWIN CITIES, Aug. 12, 1994, at 1B; and Carolyn Pesce, *Abortion Violence Hits Home, Torching of Clinic Mars "Peaceful" Town*, USA TODAY, Aug. 18, 1994, at 3A.

⁴ "The Washington-based National Abortion Federation joined Planned Parenthood in offering a \$100,000 reward for information leading to the arrest and conviction of anyone involved in the attacks. (800) ATF-4867." Bob Hohler, *Anguish and Arguments Mark Nationwide Reaction*, BOSTON GLOBE, Dec. 31, 1994, at 1. See also, Helen Kennedy, Ralph Ranalli & Jack Meyers, *Rampage! N.H. Suspect Hunted After Gunman Kills 2 at Brookline Abortion Clinics*, BOSTON HERALD, Dec. 31, 1994, at 1; Robert W. Trott (AP), *2 Killed, 5 Wounded at Clinics*, BUFFALO NEWS, Dec. 31, 1994, at A3; Robert

On September 29, 1994, ninety days before the Brookline clinic shootings, NAF published a news release reaffirming that it was offering a standing award of \$100,000 per incident for information leading to the arrest and conviction of any person responsible for murder or serious acts of vandalism at abortion and family planning clinics. The news release stated in part:

We call upon the press to stop giving celebrity status to extremists through interviews and talk shows, to stop giving them a platform for justifying their violence. Just as we do not give a platform to kidnappers or international hijackers, we should not give a platform to these criminals. And we particularly call upon responsible leaders in the anti-abortion community to join us in deploring the violence advocated in [the Army of God] manual. *We want to remind the anti-abortion community that there is a \$100,000 per incident reward for information leading to the arrest and conviction of any person responsible for murder or serious acts of vandalism at abortion and family planning clinics.*⁵

This News Release was circulated to Preterm Health Services where Richard J. Seron was employed. Preterm Health Services was a family planning and abortion provider in Brookline, Massachusetts. Seron's duties were split as a part-time facilities worker and a part-time security guard.

On December 30, 1994, Seron was working as a facilities worker, stocking and checking supplies in the storage room, when John C. Salvi III entered Preterm Health Services and launched an armed attack with a high capacity assault weapon, killing Lee Ann Nichols, a clinic employee, and wounding another person. Unknown to anyone at Preterm, Salvi had already visited the Planned Parenthood Center of Greater Boston, also in Brookline, killing Shannon Lowney,⁶ a clinic employee, and wounding two other persons.

Although Seron had been instructed by his employer not to fire his weapon except in self-defense, he opened the storage room

W. Trott (AP), *2 Slain in 'Domestic Terrorism,' 7 Shot at 2 Abortion Clinics*, HOUSTON CHRON., Dec. 31, 1994, at 1; Elizabeth Mehren & John J. Goldman, *2 Killed, 5 Wounded in Shootings at 2 Abortion Clinics*, L.A. TIMES, Dec. 31, 1994, at 1; Fran Bauer, *Area Clinics Call for Tighter Security*, MILWAUKEE J., Dec. 31, 1994, at A6; Nell Porter Brown & Mark Hamblett, *Trail of Terror, Police Hunt Clinic Killer*, PATRIOT LEDGER, Dec. 31, 1994, at 1; and Joyce Price, *Rifleman Slays Two Women at Abortion Clinics, Attacker Escapes After Boston*, WASH. TIMES, Dec. 31, 1994, at A1.

⁵ NAF News Release, *Statement: Sylvia Stengle re. release of "Army of God" underground anti-abortion manual*, Sept. 29, 1994, at 2 (emphasis added) (on file with authors).

⁶ Shannon E. Lowney graduated from Boston College *magna cum laude* with a Bachelor of Arts degree in history in 1991. Dan Kennedy, *Tragedy on Beacon Street*, B.C. L. SCH. MAG., Fall 1997, at 17.

door and engaged in a shoot out with Salvi at close range, approximately five feet between them. This exchange of gun fire resulted in Salvi fleeing the building, leaving behind his black bag that contained seven hundred rounds of reserve ammunition, a Ruger pistol, and certain crucial gun store receipts. During the shoot-out, Seron suffered four gunshot wounds to his arms and left hand resulting in serious injuries while many of Salvi's shots narrowly missed him. By his actions in the face of superior firepower, Seron saved the life of Jane Sauer who was being fired upon at the very moment Seron opened the storage room door. He also saved the lives of at least eight other people in an adjacent room, preventing an abortion clinic massacre of historic proportion.⁷

Based on the information and evidence provided by Seron and from Salvi's abandoned duffel bag, law enforcement authorities traced the serial number on the pistol and the names on the gun store receipts, leading to the speedy identification and arrest of the assailant, John C. Salvi, III, for the shootings at the Brookline clinics.⁸ Seron received private and public recognition for stemming the loss of life during the attack and for capturing physical evidence that led to Salvi's swift identification,⁹ arrest¹⁰ and

⁷ Michael D. Lemonick, *An Armed Fanatic Raises the Stakes*, TIME MAG., Jan. 9, 1995, at 34 ("The final toll in the two-day shooting spree was two dead and five wounded. Were it not for security guard Richard Seron's quick reflexes, the casualties could have been much higher: Salvi's abandoned satchel also contained a second gun and 700 rounds of ammunition.").

For a meticulous analysis of the entire shooting incident at Preterm, see Massad Ayoob, *Terror in the Clinic: The Brookline Pre-Term Incident*, AM. HANDGUNNER, May/June 1995, at 50 ("In this case, Seron fulfilled his mission: once he engaged Salvi, the killing stopped. Lee Ann Nichols was already dead, and Jane Sauer already down, when Seron carried the action to the killer and turned a wholesale murder into a gunfight with no further innocent casualties except Seron's own wounds." *Id.* at 94. "Had [Seron] fled, . . . Salvi would almost certainly have executed Jane Sauer and then hosed the nearby waiting room, killing or maiming eight to a dozen more victims before proceeding to the target-rich environment of the medical service area upstairs." *Id.* at 95).

⁸ Catherine S. Manegold, *Though Hunt for Suspect Was Vast, Chance Proved Crucial for Capture*, N.Y. TIMES NAT'L, Jan. 2, 1995, at 10:

As they pieced together the events, police learned that the gunman had exchanged fire with a security guard at the Preterm clinic. The security guard, Richard J. Seron, was wounded, but he unwittingly provided crucial material that would soon identify the suspect. When [Seron] shot at the assailant, the gunman left a duffel bag behind as he fled.

⁹ "It's a ballistics case," the law enforcement source said. "We have him with the gun before and after the shootings. The forensics are there. We have him ID'd at the scene by the guard and other witnesses." Judy Rakowsky, *Salvi Pleads Not Guilty to Charges*, BOSTON GLOBE, Jan. 7, 1995, at 1, 6.

¹⁰ Although Salvi was arrested in Norfolk, Virginia, after a drive-by shooting at an abortion clinic, it was the evidence provided from the duffel bag left behind by Salvi

conviction.¹¹

at Preterm that linked Salvi to the Brookline shootings. Shelley Murphy & Richard Chacon, *Clinic Shooting Suspect Captured*, BOSTON SUNDAY GLOBE, Jan. 1, 1995, at 1; Daniel Golden & Brian McGrory, *N.H. Man Held in Brookline Deaths After Va. Facility Hit*, BOSTON SUNDAY GLOBE, Jan. 1, 1995, at 1; and Manegold, *supra* note 11.

¹¹ John Ellement, *Guilty Verdict Sends Salvi to Prison for Life*, BOSTON GLOBE, Mar. 19, 1996, at 1, 22.

Public recognition received by Seron includes a letter from Howard A. Brackett, Chief of Police:

I want to thank and commend you for your action December 30, 1994 at the Pre-Term Clinic. *There is no doubt in my mind, or [in] any of the investigating officers [minds], that your action provided the evidence that led to the arrest of John Salvi.*

It is unfortunate that there was a homicide that day at Pre Term and one at Planned Parenthood, 1031 Beacon Street. As a result of your professionalism and bravery I am sure that further bloodshed was prevented. As soon as you were aware of the situation you responded and confronted Salvi in gunfire without regard to your own safety [that] led to his arrest.

Your action momentarily confused Salvi and caused him to leave his bag behind him. The evidence recovered at the scene led to John Salvi. Please accept my personal thanks for your assistance, which was pivotal in the arrest of this extremely dangerous felon. I hope that things at the clinic remain quiet and that you recover from your wounds completely.

Letter from Howard A. Brackett, Chief of Police, Town of Brookline, Mass., to Richard Seron (Jan. 23, 1995) (on file with authors).

Seron also received a commendation from the Massachusetts Senate, which states in pertinent part:

Whereas, on December thirtieth, nineteen hundred and ninety-four an alleged terrorist, John Salvi, allegedly launched surprise attacks on both Planned Parenthood and Preterm Health Services in Brookline, killing one person at Planned Parenthood; and

Whereas, the alleged murderer then drove to 1842 Beacon Street and allegedly attacked Preterm Health Services, killing the receptionist, Leanne Nichols; and

Whereas, Richard Seron then opened the door to the crime scene, surprising the terrorist, thus preventing the death of Preterm staffer, Jane Sauer, who was being shot by the terrorist; and

Whereas, Richard Seron was shot at least four times in the arms and hands by the terrorist, all the while returning gunfire to force the terrorist to flee the building and leave behind a large black bag which led to the terrorist's subsequent identification; and

Whereas, during the entire gunfight, the muzzle of the terrorist's semi-automatic rifle was approximately sixty inches from Seron's face; and

Whereas, by his act of gallantry, in the face of superior firepower and with utter disregard for his own life, Richard Seron saved the lives of Jane Sauer and at least eight other people in an adjacent room and prevented a massacre of historic proportion; . . . *Now Therefore Be It Resolved*, that the Massachusetts Senate commends Richard Seron for his

outstanding bravery and heroism on December thirtieth, nineteen hundred and ninety-four at the Preterm Health Services in Brookline; . . .

Resolutions Honoring Richard Seron, Security Guard at Preterm Health Services in Brookline for His Heroic Actions on December Thirtieth, Nineteen Hundred and Ninety-Four, Senate of the Commonwealth of Massachusetts, adopted June 15, 1995 (on file with authors).

In March 1996, Seron served as a key witness for the prosecution in the trial of Salvi, that resulted in Salvi's conviction on two counts of first degree murder, five counts of attempted murder, and a host of lesser charges.¹² On March 18, 1996, Salvi was sentenced to two mandatory life sentences without parole for first-degree murder and an additional 20 years for attempted murder.¹³ Salvi's notice of appeal was filed March 22, 1996.¹⁴

Seron had earlier notified PPFA and NAF of his claim for the \$100,000.00 reward in letters addressed to each of them dated May 8, 1995.¹⁵ His letters stated in part:

By this letter, I stake my claim for the \$100,000 reward for information leading to the arrest and conviction of abortion clinic terrorists. . . I assert that my defensive action as Security Guard at the Preterm, Inc. clinic in Brookline, MA on Friday, December 30, 1994 effected the capture from suspect John Salvi of critical material and documentary evidence which led to his early identification, [and] apprehension, and will be a great asset in his ultimate conviction. My action on December 30, which jeopardized my own life and led to my injury by gunshot wounds, is officially credited with saving numerous other lives as well as helping to provide vital evidence in the case. My claim for the reward is the one true and legitimate claim against all the world and I request that the P.P.F.A. and the N.A.F. jointly make public declaration to that effect and proceed to pay me the sum of the reward with all due speed. . . I would like to salute both the Planned Parenthood Federation of America, Inc. and the National Abortion Federation for their public spirit in offering a reward which is a step in the direction of combating domestic terrorism in the medical field.¹⁶

¹² Commonwealth vs. John C. Salvi, III, No. 99518 (Norfolk County Superior Court, guilty verdict entered on Mar. 18, 1996).

¹³ *Id.*

¹⁴ *Id.* at docket entry no. 224.

¹⁵ PPFA and NAF had advance notice that Seron was going to make a claim since Seron had announced his intent to claim the reward in a January 30, 1995 interview:

Richard J. Seron of Quincy said yesterday he will apply for the \$100,000 reward offered by two national abortion rights groups in exchange for tips leading to convictions for clinic violence. . . . At Planned Parenthood Federation of America Inc. in New York City, officials said Seron is welcome to apply for the reward. But his request will not even be reviewed unless Salvi is convicted.

Nell Porter Brown, *Clinic Guard Sets Hopes on Reward*, PATRIOT LEDGER, Jan. 31, 1995, at 5.

¹⁶ Letters to Ann Glazier, Director of Clinic Defense, Planned Parenthood Federation of America, New York, N.Y. and Gina Shaw, Media Relations Coordinator, National Abortion Federation, Washington, D.C. (May 8, 1995) (on file with authors). "Richard J. Seron of Quincy said yesterday he will apply for the \$100,000 reward of-

Almost a year later, Seron finally received a letter from PPFA, dated April 21, 1996, informing him that his inquiry was being processed.¹⁷ After another six months had passed, Seron's attorney wrote to PPFA and NAF again on October 29, 1996, requesting a response within two weeks.¹⁸

Then the unexpected happened: Salvi was found dead in his cell, an apparent suicide, on November 29, 1996.¹⁹ Salvi's body was found under his bed with a white plastic trash bag tied around his head at the Massachusetts Correctional Institution at Cedar Junction, the state's maximum security prison in Walpole.²⁰ On December 20, 1996, Salvi's lawyer filed a notification of death and motion to vacate judgment of conviction and to dismiss indictments. The motion was granted on January 21, 1997.²¹ A public outcry followed.²²

PPFA and NAF ignored Seron's notices of claim and never notified him of their decision. After waiting nearly five years, Seron sent a final notice of his claim to PPFA and NAF before filing suit.²³

ferred by two national abortion rights groups in exchange for tips leading to convictions for clinic violence." Nell Porter Brown, *Clinic Guard Sets Hopes on Reward*, PATRIOT LEDGER, Jan. 31, 1995, at 5.

¹⁷ Letter from Ann Glazier, Director, Clinic Defense & Research, Planned Parenthood Federation of America, Inc., New York, N.Y. to attorney Stephen W. Carter, Carter Law Office, Dedham, MA (Apr. 21, 1996) (on file with authors) ("I am in receipt of your material regarding Richard Seron. We've had several inquiries about the reward fund. We are processing those inquiries and I will be in touch with you soon.").

¹⁸ Letters from attorney Michael J. Heineman, Mingace & Heineman, Framingham, MA to Ann Glazier, PPFA and Vicki Saporta, NAF (Oct. 29, 1996) (on file with authors) ("It seems that adequate time has passed for you to render your decision. If your decision has been reached and is adverse to Mr. Seron, kindly notify me immediately so that litigation may be commenced. If you have not yet reached a decision, kindly advise me in writing of the information which you lack.").

¹⁹ *Salvi's Suicide*, BOSTON SUNDAY GLOBE, Dec. 1, 1996, at D4.

²⁰ *Id.*

²¹ Commonwealth vs. Salvi, at docket entries 235 and 237.

²² David Talbot, *Legal Loophole Voids Salvi Slay Convictions*, BOSTON HERALD, Feb. 1, 1997, at 6 ("In an emotionally charged legal technicality, the murder convictions against abortion clinic killer John C. Salvi III have been voided posthumously, infuriating the families of his victims."); John Ellement, *Salvi's Record Wiped Clean, Posthumously*, BOSTON GLOBE, Feb. 1, 1997, at A1, A7 ("In what may be the ultimate legal technicality, John C. Salvi III's two murder convictions in the 1994 shootings at two women's health clinics have been wiped out, with all criminal charges dismissed, because he died before his appeal was heard."); Linda Shepherd, *Salvi's Guilt Affirmed by Jurors*, PATRIOT LEDGER, Feb. 3, 1997, at 1.

²³ Letter from attorney Barry A. Bostrom, Bopp, Coleson & Bostrom, Terre Haute, Indiana, to PPFA and NAF (Dec. 30, 1999) (on file with authors) ("Pursuant to law, and more than thirty days before filing suit, Mr. Seron is now giving final notice to you of his written demand for relief, identifying himself and describing your unfair

Seron received rejection letters from PPFA and NAF denying his claim. They stated in part:

As we explain hereafter, there are numerous deficiencies in the letter which make it both inappropriate and impossible at this time to respond with any monetary offer. . .

1. Your letter provides no basis for concluding that PPFA has any responsibility or liability for the reward referred to in your letter. . .

2. In Massachusetts, it has been the law for more than 150 years that an employee's performance of actions that are within the scope of his employment does not entitle him or her to a contract claim for a reward. . .

3. In Massachusetts, it has also been the law that the death of the accused pending appeal from a judgment of conviction vacates the judgment *ab initio*. [citation omitted] That is precisely what happened in the case of Salvi, whose counsel filed a motion to vacate, which was granted under well-established law. Consequently, there was no "conviction" and the conditions to reward described in your letter were not met. . .²⁴

Seron filed suit in the United States District Court in Boston, Massachusetts on February 25, 2000, in an attempt to claim his \$100,000 reward.²⁵ His suit stated five claims: specific performance, breach of contract, substantial performance, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive practices pursuant to Massachusetts Gen. Laws ch. 93A, §§ 2 and 9. In May, 2000, PPFA and NAF contested each count and filed a motion to dismiss for failure to state a claim upon which relief may be granted, citing the same arguments as set forth above in their response letters. In June of 2000, Seron reached a settlement agreement with PPFA and NAF, the terms of which are confidential.²⁶

and deceptive practices, the injury suffered, and enclosing herewith a copy of the proposed complaint.").

²⁴ Letters from attorney John H. Henn, Foley, Hoag & Eliot LLP, Boston, MA, and Jennifer Blasdell, Esq., Staff Attorney, NAF, to attorney Barry A. Bostrom (Jan. 28, 2000) (on file with authors) (the letters were identical except for the opening sentence).

²⁵ Richard J. Seron v. Planned Parenthood Federation of America, Inc., No. 00CV10317 NG (D.C. Mass. filed Feb. 25, 2000) (dismissed by stipulation in June, 2000, upon reaching a settlement).

²⁶ The *Boston Globe* reported that:

The security guard who traded gunfire with John Salvi at a family planning clinic in 1994 and was seeking the \$100,000 reward offered by Planned Parenthood and the National Abortion Federation for the gunman's arrest has settled his lawsuit . . . for an undisclosed amount, his lawyers said yesterday. . . Seron was "pleased" with the settlement, Bos-

The motion to dismiss filed by PPFA and NAF raised two defenses. One argument was that Seron was only doing his duty and therefore should receive no reward; and the second argument was that because Salvi's conviction was abated by the court, Seron's actions did not result in a "conviction" as required by the reward offer. The second argument raises two issues: (1) the definition of a "conviction" in the reward context; and (2) the effect of abatement on a conviction. These two defenses are the subject of this article. They are important because they undercut the ability of abortion providers and government to stop clinic violence. Thus, for abortion providers to use such defenses in order to defeat a claim for a reward, is to defeat the very purposes of a reward offer, i.e., the discouragement of clinic violence and the successful prosecution of persons who commit violent acts against clinics. If John Salvi's suicide justifies invocation of the abatement doctrine, and the abatement of Salvi's conviction disqualifies Richard Seron from receiving his reward, then the denial of the reward becomes Salvi's revenge from the grave against the very informant whose testimony resulted in his conviction.

The subject of abatement, and its effect on informants to clinic violence, remains an important issue because clinic violence continues. Although many clinic crimes do not make national news, clinic violence has become widespread. In the past five years there were two murders, five attempted murders, ten bombings, 25 arsons, 15 attempted bombings or arsons, 299 acts of vandalism, 23 assaults, 71 death threats, one kidnapping, 27 burglaries, and 162 stalking incidents, for a total of 632 crimes committed against clinics and abortion providers.²⁷ Most of these crimes remain unsolved. The cooperation of informants is crucial if any of them are to be solved.

DID SERON HAVE A DUTY TO STOP SALVI?

The first obstacle to Seron's claim for a reward was PPFA and NAF's argument in their motion to dismiss that when Seron shot at Salvi and caused Salvi to leave his duffel bag of evidence behind Seron's actions were within the duties of his employment as a security guard. It should be noted, however, that Mr. Seron was not a

from said, although the exact amount is confidential under the terms of the [settlement] agreement.

Ralph Ranalli, *Suit Settled in '94 Clinic Attacks*, BOSTON GLOBE, Aug. 29, 2000 at B8.

²⁷ NAF, *Violence and Disruption Statistics* (12/31/2000) <<http://www.prochoice.org>>; see also, NARAL Foundation, *Clinic Violence, Intimidation, and Terrorism* <<http://www.naral.org>>.

public police officer, and had no duty as a security guard to stop Salvi's attack. Even police officers cannot make warrantless arrests outside their jurisdiction if they are not in fresh and continued pursuit of a suspect. If they do so, they act as private citizens and the arrest will be held valid only if a private citizen would be justified in making an arrest under the same circumstances.²⁸

But Seron has never been a public police officer of any kind. Thus, he only has the authority of a private citizen, even when on duty as a security guard. "A private citizen may lawfully arrest someone who has in fact committed a felony. Generally, the 'in fact committed' element must be satisfied by a conviction . . . to deter private citizens from irresponsible action."²⁹ Private citizens, of course, have no duty to make arrests, but they *may* do so if the suspect has "in fact" committed a felony.³⁰

Seron, whether acting as a security guard, or as a facilities worker, had no more authority than a private citizen. He had no authority to make arrests, except citizen arrests. He had no authority to shoot his weapon, except in self-defense or in the defense of others. But "in order to deter private citizens from irresponsible action," the law nowhere places a duty on citizens to defend themselves or others by use of force, and holds them to a strict standard for their actions, subject to both criminal penalties and civil damages for any mistakes. Thus, Seron could lawfully defend himself and others, *but he had no duty to do so*.

²⁸ Commonwealth v. Claiborne, 667 N.E.2d 873, 876 (Mass. 1996):

When a police officer makes a warrantless arrest outside of his jurisdiction, and not in, "fresh and continued pursuit" of the suspect within the meaning of G.L. c. 41, § 98A, then he acts as a *private citizen*, and the arrest will be held valid only if a private citizen would be justified in making the arrest under the same circumstances. (quoting Commonwealth v. Grise, 496 N.E.2d 162 (Mass. 1986)).

Id. (emphasis added).

²⁹ *Id.* (citing Commonwealth v. Harris, 415 N.E.2d 216 (Mass. 1981) (citing Commonwealth v. Lussier, 128 N.E.2d 569 (Mass. 1955))).

³⁰ The "in fact" requirement means that the suspect must be convicted if the citizen's arrest is to be found lawful. If the conviction is abated, does that mean that the citizen arrest is unlawful, subjecting the citizen making the arrest to civil liability for false arrest? Since Salvi's conviction has been abated *ab initio* as if he were innocent of any crime, does that mean that Seron did not have the authority to shoot at Salvi in order to protect the clinic employees' lives, and that he is subject to civil liability for assault and battery, or criminal liability for attempted murder? Without a subsequent conviction of the felon, a citizen does not have authority to arrest a felon, and therefore he wouldn't have authority to shoot at him either. The abatement doctrine, according to PPFA and NAF's argument, would make citizen's arrests and use of force to stop felons inadvisable under any circumstances. Just how wide a swath should the abatement doctrine cut in negating a conviction? *Should it affect unrelated legal matters at all?*

His employer had previously instructed Seron that in case of a clinic attack, his duty was to notify the police, and he should never use his weapon except in self-defense. Thus, his employer did not attempt to impose any duty on its security guards to defend the clinic from attack. This is a reasonable position since the clinic might be held liable under the doctrine of *respondeat superior* for any mistakes made by its security guards resulting in harm to innocent persons (e.g., false arrests, injuries, and death).³¹

Whether viewed from the law, or from his duty to his employer, Seron's actions in defending the clinic employees were beyond the call of duty, not the simple fulfillment of his duty, as argued by PPFA and NAF. Even if he had a duty to defend the clinic employees as a security guard, which he didn't, the facts show that, at the time of the Salvi attack, he was off duty, did not have his uniform and protective vest on, and was performing ordinary inventory duties. He carried his weapon only because there was no safe place to store it on the premises. He had no duty to carry his weapon while off duty, even though he was still on clinic property in another capacity. He certainly had no legal duty to fire his weapon, whether in self-defense or the defense of others.

PPFA and NAF cited the old case of *Pool v. City of Boston*,³² in support of their claim that "an employee's performance of actions that are within the duties of his employment does not entitle him or her to a contract claim for a reward."³³ But in *Pool*, and the seaman example cited in *Pool*, the Court concluded that claimants were only performing their duty.³⁴ As shown above, Seron had no

³¹ The general rule of employer liability under the doctrine of *respondeat superior* for the actions of employees is as follows: "the employee must be subject to control by the employer, not only as to the result to be accomplished but also as to the means to be used." *Konick v. Berke, Moore Company, Inc.*, 245 N.E.2d 750, 751 (Mass. 1969) (quoting *Khoury v. Edison Elec. Illuminating Co.*, 164 N.E. 77, 78 (Mass. 1928)). See also RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958), which defines a servant (employee) as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." When this test is satisfied, the master (employer) may be held liable for the actions of the servant (employee).

³² 59 Mass. 219 (Mass. 1849) (plaintiff was a watchman (a public employee) of the city of Boston who, while in the discharge of his duty, discovered a person setting fire to a building and prosecuted him to conviction. His claim for reward offered by the city government for the detection and conviction of an incendiary was denied.).

³³ Letters from attorney John H. Henn, Foley, Hoag & Eliot LLP, Boston, MA, and Jennifer Blasdell, Esq., Staff Attorney, NAF, to attorney Barry A. Bostrom (Jan. 28, 2000) (on file with authors) (the letters are identical except for the opening sentence).

³⁴ *Pool*, 59 Mass. at 220:

The defense to this action is, that the plaintiff has done no more than it

duty to stop Salvi, by arrest or by force. *He could have done nothing, remained hidden, or exited through a hallway door from the storage room.* He could have hidden, like others who were present and aware of the attack, without violation of any legal obligation. No action at law could have been maintained against him for simply running away and calling the police, or for totally avoiding a confrontation with Salvi. "Therefore, the principle that performance of a legal duty cannot support a promise to pay is inapposite and cases like *Pool v. Boston*, 5 Cush. 219, 221, are not pertinent."³⁵

The fact that Seron was an employee of a targeted clinic is also irrelevant. This case is similar to that of *Braun v. Northeast Stations & Services, Inc.*,³⁶ which held that "even though plaintiff was an employee of defendant and was a victim of the robbery, nevertheless he was 'eligible for the reward' which had been prominently posted by defendant at its place of business."³⁷ In that case, the employer had posted the reward offer at a service station with the words "NOTICE \$5,000 REWARD" printed in large bold type, and in small type the words "A reward of up to \$5,000 will be paid for information leading to the arrest and conviction of anyone robbing this station or the attendant on duty."³⁸ By contrast, Mr.

was his duty as a watchman to do, and that a promise of a reward to a man for doing his duty is illegal, or void for want of consideration. . . . The same principle has been applied to promises made to persons not being public officers; such as promises to seamen, to pay them extra wages for the performance of their duty. . . . 'Every seaman,' says chancellor Kent, in his Commentaries, (3 Kent, 185) 'is bound, from the nature and terms of his contract, to do his duty in the service, to the utmost of his ability, and, therefore, a promise made by the master when the ship is in distress, to pay extra wages, as an inducement to extraordinary exertion, is illegal and void.' (quoting *Harris v. Watson*, Peake, at 72 (Lord Kenyon)).

³⁵ *Kaplan v. Suher*, 150 N.E. 9, 10 (Mass. 1926). In *Kaplan*, a contract with executor for payment to plaintiff of one-half of the assets revealed by plaintiff was enforced by the Court:

The case at bar is not an instance where the plaintiff was under legal duty established by the law to disclose his knowledge to the defendant. He might have kept silence without violation of any legal obligation owed to the defendant. No action at law could have been maintained by the defendant against him for simple refusal to reveal his information. Therefore, the principle that performance of a legal duty cannot support a promise to pay is inapposite and cases like *Pool v. Boston*, 5 Cush. 219, 221, are not pertinent.

Id.

³⁶ 93 A.D.2d 994 (N.Y.A.D. 4th Dept 1983).

³⁷ *Id.*

³⁸ *Id.*

Seron, although an employee of the clinic, was not an employee of PPFA or NAF.

In *Braun*, the New York Appellate Division held that: (1) “[p]arties purporting to act seriously in the making of an offer will be taken to have intended that the offer have meaning, and the courts will attempt to ascertain the meaning intended and give it effect”; (2) “[i]t was well stated more than a century ago that ‘a paper like this ought to be construed as the public, to whom it was addressed, would understand it’”³⁹; and (3) “[i]t is well settled, however, that ‘motivation of a person performing the acts required by an offer of a reward is immaterial, but consent to the offer is vital.’”⁴⁰

For the above reasons, Seron had no duty to stop Salvi and he was not performing a duty when he did so. The same is true for “employees” who rise to the occasion, meet danger head-on and take the steps necessary to stop clinic violence at great risk to themselves.

WHAT IS A “CONVICTION”?

A second obstacle to Seron’s claim is the definition of “conviction.” The reward offer is contingent on the “arrest and conviction” of the perpetrator. Everyone knows what an “arrest” is. The concept of “conviction” has proven to be more illusive. The general public may understand conviction to mean the verdict and judgment of guilt entered at trial. But under the law in many jurisdictions, a conviction is only final after the completion of all appeals. The definition of “conviction” is important because it determines: when the conditions precedent have been met, when a claim for reward may be made, and ultimately, whether a reward offer presented as a unilateral contract may be enforced by a worthy claimant.

For example, the New York Supreme (trial) Court dismissed a claim by Security Consultants, Inc. The security guards at the Virginia abortion clinic, where Salvi did a drive-by shooting, attempted to claim a reward. The trial court rejected their claim on PPFA’s motion to dismiss because there was no “final conviction.”⁴¹

The New York court noted:

³⁹ *Id.* at 624 (quoting *Farago v. Arthur*, 43 How.Prac. 193, 197)

⁴⁰ *Id.* (quoting 50 N.Y. Jur., Rewards, §4, pp. 490-491).

⁴¹ *Security Consultants, Inc. v. Planned Parenthood Federation of America, Inc.*, N.Y.L.J., Sept. 2, 1997, at 29 (N.Y. Supreme Court, Justice Cahn, granting PPFA’s motion to dismiss due to abatement).

Various courts have held that to entitle a party to an award offered for information leading to the "conviction" of an offender, *there must be a final conviction which settles the guilt of the party, and as long as there is an appeal pending, or the defendant dies pending an appeal, there is no conviction within the meaning of an offer of a reward.*⁴² (emphasis added).

If such a "final conviction" is required, no rewards may be made to informants until all appeals have been successfully completed. Also, where the defendant dies during the appeal of his case, no final conviction can be achieved.

"Final conviction" is a nice legal concept that creates several problems when rewards have been offered for information leading to "arrest and conviction." *First, if a "final conviction" is required, then it renders reward offers inherently ambiguous.* If lack of a final conviction is a basis for denying offers of reward, then in order to avoid ambiguity the PPFA/NAF offer should have read as follows: "A reward of \$100,000 is offered for information leading to the arrest and conviction of the perpetrator, *if and only if the perpetrator lives long enough for all appeals of conviction to be completed.*" Otherwise, an offer without such an express statement is inherently ambiguous, deceptive and misleading.

As the New York Appellate Division stated in *Braun v. Northeast Stations & Services, Inc.*:

Parties purporting to act seriously in the making of an offer will be taken to have intended that the offer have meaning, and the courts will attempt to ascertain the meaning intended and give it effect. (citations omitted). It was well stated more than a century ago that '*a paper like this ought to be construed as the public, to whom it was addressed, would understand it.*' (citation omitted).⁴³

The average person would expect to receive the reward after a conviction at trial. They would not understand the offer to mean a "final conviction" after all appeals had been exercised. Further, the average person would not understand that the reward offer could be rendered void by abatement, since the average person has never heard of abatement, unless they live in Massachusetts. Such ambiguity in a contract should be resolved against the drafter of the

⁴² *Id.* (citing *Scott v. American Express Co.*, 233 S.W. 492 (Mo. App. 1921) and *Stone v. Wickliffe*, 50 S.W. 44, 45-46 (Ky. 1899)).

⁴³ *Braun v. Northeast Stations & Services, Inc.*, 93 A.D.2d 994, 994-95, 461 N.Y.S.2d 623, 624 (1983) (Court held that even though the plaintiff was an employee of the defendant and was victim of the robbery, nevertheless he was eligible for the reward that had been prominently posted by the defendant at its place of business.) (emphasis added).

contract, especially when the drafter is a lawyer.⁴⁴ PPFA and NAF drafted the reward offer without an express contingency regarding successful appeal without abatement. "Courts should interpret a [reward offer] to effectuate its spirit and purpose. An interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result."⁴⁵ Thus, under contract law, such an ambiguous unilateral contract should be enforceable despite the abatement of the conviction.

Second, if the doctrine of "final conviction" is used to deny legitimate claims for rewards by informants, then it results in making reward offers a deceptive practice. If PPFA and NAF's offer of a reward was made for the purpose of inducing citizens to come forward with case-breaking information, all the while knowing that informants will seldom be able to enforce a claim for the reward, and only after all appeals have been completed, then the reward offer becomes a *deceptive practice*.⁴⁶ If the "final conviction" doctrine becomes an excuse to deny worthy claimants their just reward, the offer of reward may be a violation of State Consumer Protection Laws like those in Massachusetts.⁴⁷

⁴⁴ Cambridge Trust Company v. Hanify & King Professional Corp., 721 N.E.2d 1, 8 (Mass. 1999) ("The 'offset' approach also comports with the principle that contract ambiguities should be interpreted against the drafter, 'particularly [when] an attorney drafts a contingent fee contract which he knows will be signed by a person without legal training.'" (quoting Benalcazar v. Goldsmith, 507 N.E.2d 1043, 1045 (Mass. 1987) (both were lawsuits to enforce contingency fee agreement))). The same principle applies here where PPFA and NAF no doubt consulted legal counsel before issuing the reward offer to the general public, which is "without legal training."

⁴⁵ Confidential Informant v. United States, 46 Fed. Cl. 1 (2000).

⁴⁶ Ironically, this was confirmed by Ann Glazier, director of clinic security at PPFA, in an interview with reporters when she stated: "We really want to encourage people to be aware when violence happens so we can catch the criminal as soon as possible, . . . If [Seron] did that, and qualifies for the reward, then I think he should get it. . . . Because the money is tied to convictions, the rewards are rare, she said." Nell Porter Brown, *Clinic Guard Sets Hopes on Reward*, PATRIOT LEDGER, Jan. 31, 1995, at 5 (emphasis added).

⁴⁷ One of Seron's claims was for unfair and deceptive practices pursuant to Mass Gen. Laws. Ann. ch. 93A, §§ 2 and 9 (Card Co-op. 1994), which state in part:

§ 2(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

* * *

§ 9(1) Any person, . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two . . . may bring an action in the superior court, . . . whether by way of original complaint, counterclaim, cross-claim or third party

Third, the definition of "conviction" even draws into question the proper time for claiming a reward. If a claim is made before trial and conviction of the accused, it will be deemed premature.⁴⁸ If a claim is made after conviction but before being affirmed on appeal to the highest court, it will also be deemed premature because the conviction is not "final." If the claimant waits until all appellate courts have affirmed the conviction, the reward offeror will no doubt claim laches and the statute of limitations defenses, just as PPFA and NAF threatened to do to Seron.⁴⁹ Thus, the proper time to make the claim is at best unclear, and no doubt, subject to debate and the risk of dismissal for filing too early or too late.

action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

⁴⁸ As aptly stated by PPFA: "Seron is welcome to apply for the reward. But his request will not even be reviewed unless Salvi is convicted." Nell Porter Brown, *Clinic Guard Sets Hopes on Reward*, PATRIOT LEDGER, Jan. 31, 1995, at 5.

⁴⁹ Letter from John H. Henn, Foley, Hoag & Eliot, LLP, counsel for PPFA, to Barry A. Bostrom, Bopp, Coleson & Bostrom, counsel for Seron (Jan 28, 2000) (on file with authors), and letter from Jennifer Blasdell, Esq., staff attorney for NAF, to Bostrom (Feb. 14, 2000) (on file with authors) both stated in identical words: "Your letter fails to suggest any reason for [PPFA or NAF] to believe that the claim you assert would not be barred by the applicable statute of limitations. See Mass. Gen. Laws Ann. § 5A (Law. Co-op 1992) (four year statute of limitations)."

This defense was not a serious problem in the Seron case and was not included in PPFA and NAF's motion to dismiss. G.L.c. 260 §5A, sets forth the statute of limitations that applies to claims brought under chapter 93A and provides that a plaintiff must bring an action under G.L.c. 93A within four years of the date on which the plaintiff knew or should have known of the appreciable harm caused by the unfair or deceptive actions. *Dwyer v. Barco Auto Leasing Corp.*, 903 F. Supp. 205, 211 (D.Mass. 1995).

The discovery rule triggers the running of the statute of limitations at the time when the plaintiff was likely first to have had some knowledge of the harm. *Franklin v. Albert*, 411 N.E.2d 458 (Mass. 1980). "[A] cause of action accrues at the happening of an event likely to put the plaintiff on notice." *Hendrickson v. Sears*, 310 N.E.2d 131, 135 (Mass. 1974), cited in *Breneman v. Wolfson*, 10 Mass. L. Rptr. 634, 1999 WL 1203920, at 4 (Mass. Super. 1999).

While claims under the unfair trade practices law generally accrue at the time of injury from the allegedly unfair or deceptive act, the discovery rule applies such that, regardless of the actual time of injury, the cause of action does not accrue until the plaintiff discovers, or reasonably could have discovered, that he may have been injured *as the result of the defendant's conduct*. In re *Fidler*, 210 B.R. 411 (Bkrcty. D. Mass. 1997), vacated in part 226 B.R. 734.

The natural point at which Seron would have had notice of the harm (breach of contract) was the point at which PPFA and NAF denied his claim. Since they never gave Seron a determination prior to his filing suit, the statute of limitations arguably had not even begun to run. Even PPFA's response to Seron's claim, in April 1996, saying his claim was under consideration, was sent less than four years from the filing of Seron's complaint. Certainly it was reasonable for Seron to wait another six months for a determination. Thus, the limitations began to run no sooner than the fall of 1996, two weeks after his attorney requested a determination within two weeks.

Fourth, public policy requires the denial of the enforcement of a contractual term in order to protect the public welfare. If no reward will be given until a conviction is finally affirmed on appeal, thereby eliminating the possibility of reversal or abatement, very few persons will cooperate, reducing the number of successful prosecutions. Few potential informants will be willing to go to the trouble of becoming a witness in a criminal trial, only to wait 5-10 years for a possible, but uncertain, reward. Thus, the "final conviction" doctrine may be void as against public policy, as applied to reward offers and claims.

This public policy exception rule was recently reiterated by the Massachusetts Supreme Judicial Court in *Beacon Hill Civic Association v. Ristorante Toscano, Inc.*:

[I]t is a principle universally accepted that the public interest in freedom of contract is sometimes outweighed by public policy, and in such cases the contract will not be enforced. (citations omitted) 'Public policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare.⁵⁰

In order to accomplish the goals of offering private rewards, it will be necessary to avoid the requirement of a "final conviction" in order to permit an informant to receive a reward. The phrase "final conviction" has been argued by PPFA and NAF to mean that all appeals have been pursued unsuccessfully, and no abatement has occurred. If the word "conviction" in the reward offer is given this very technical meaning, then it is an implied contract term that should not be enforced because enforcement of such is against public policy. Enforcement of such a provision defeats the whole purpose behind offering rewards to informants. If informants who properly perform, sometimes at great risk to themselves, as did Seron, do not receive their rewards due to the mechanical enforcement of a technical requirement that the conviction not be abated due to the untimely death of the perpetrator, then fewer informants will come forward, fewer convictions will be achieved, more criminals will go unrestrained, more innocent persons will be harmed by criminal acts, and more vandalism to property will

⁵⁰ *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 662 N.E.2d 1015, 1017 (Mass.1996) (citing *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123 (Mass. 1995)); *Begelfer v. Najarian*, 409 N.E.2d 167 (Mass.1980); *Bates v. Southgate*, 31 N.E.2d 551 (Mass. 1941); and *Adams v. East Boston Co.*, 127 N.E. 628 (Mass.1920) ("The test is whether the underlying tendency of the contract under the conditions described was manifestly injurious to the public interest and welfare.").

occur.⁵¹

For these reasons, it is important that the "final conviction" requirement be legislatively or judicially modified in the reward context. To demand a "final conviction" is to render offers of reward meaningless.

SHOULD THE ABATEMENT OF A CONVICTION STOP AN INFORMANT
FROM RECEIVING A REWARD?

A third obstacle to Seron's claim for a reward was PPFA and NAF's argument that Seron could not meet the "conviction" requirement to obtain the reward because Salvi's conviction had been abated. When a defendant dies while his conviction is on direct review, it is Massachusetts' practice to vacate the judgment and remand the case with an instruction to dismiss the complaint or indictment, thus abating the entire prosecution.⁵² This procedure is known as abatement *ab initio*. In this section, we will discuss the history and policy of the abatement doctrine, why the abatement doctrine should not block the ability to claim otherwise proper rewards, and, at the very least, why the doctrine of abatement should never be applied in the case of a criminal defendant's suicide.

⁵¹ Even if the abatement was determined by the courts to render the unilateral contract unenforceable, Seron had a claim for substantial performance. In order to make a claim for the reward, an informant must perform immediately. He or she must contact law enforcement, submit to an interview and investigation of the facts revealed, testify against the accused at the grand jury, and testify against the accused at trial. This is similar to the requirement of substantial completion in construction contracts. A substantial completion provision lists certain conditions precedent to payment of amounts due under the contract. Normally, all conditions precedent must be met before the duty to pay arises. But, under the law, "the non-occurrence of a condition precedent may be excused if (i) the occurrence of a condition was not a material part of the bargain or (ii) non-occurrence of the condition would cause a disproportionate forfeiture." RESTATEMENT (SECOND) OF CONTRACTS § 29 (1981); *Johnson Controls, Inc. v. Bowes*, 409 N.E.2d 185 (Mass.1980); *Barry v. Frankini*, 191 N.E.2d 651 (Mass. 1934); *HCE Pepperell, Inc. v. Energy Management, Inc.*, 2 Mass. L. Rptr. 351, 1994 WL 879544, at 3 (Mass. Super. 1994). Thus, when subsequent events have rendered impossible a literal compliance with each of the preconditions for substantial completion of the conditions under a construction contract, literal compliance with each condition should not be deemed to constitute a material part of the bargain so as to effect a forfeiture of rights. To hold otherwise would be manifestly unjust where the result is a disproportionate forfeiture. *Id.*

For these same reasons, to require the informant to fully perform, but deny a reward due to abatement of the conviction, is to place a condition precedent upon the informant for circumstances beyond his or her control in order to receive the reward that is due. This is manifestly unjust because it causes the informant a disproportionate forfeiture due to the abatement of the conviction.

⁵² *Commonwealth v. De La Zerda*, 619 N.E.2d 617, 618 (Mass. 1993).

The Abatement Doctrine

Of the states that have addressed the issue, abatement *ab initio* is the majority rule, where the conviction is set aside as a matter of course.⁵³ The basic public policy behind this practice is to protect the rights of persons who have been convicted, but whose right to appeal has not been fully exercised.⁵⁴ There are two minority rules. Some states dismiss the appeal, leaving the conviction to stand.⁵⁵ Other states allow the appeal to continue by substitution of the defendant.⁵⁶

⁵³ Jurisdictions that abate a deceased defendant's appeal *ab initio* are: Alaska (Hartwell v. State, 423 P.2d 282 (1967)); Arizona (State v. Griffin, 592 P.2d 374 (1978)); California (People v. Keister, 54 Cal. Rptr. 2d 431 (Cal. App. 4th Dist. 1996)); Colorado (People v. Valdez, 911 P.2d 703 (Colo. App. 1996)); District of Columbia (Howell v. United States, 455 A.2d 1371 (1983)); Idaho (State v. Stotter, 175 P.2d 402 (1946)); Illinois (People v. Robinson, 719 N.E.2d 662 (1999)); Iowa (State v. Holbrook, 261 N.W.2d 480 (1978)); Louisiana (State v. Beasley, 438 So. 2d 1229 (La. App. 3 Cir. 1983)); Maine (State v. Carter, 299 A.2d 891 (1973)); Maryland (Jones v. State, 486 A.2d 184 (1985) (limited to cases where statutory right to appeal is pending or has not been exercised)); Massachusetts (Commonwealth v. De La Zerda, 619 N.E.2d 617 (1993) (retained in discretionary appeal)); Missouri (State v. West, 630 S.W.2d 271 (1982)); Nebraska (State v. Campbell, 193 N.W.2d 571 (1972)); New York (People v. Craig, 585 N.E.2d 783 (N.Y. Ct. App. 1991)); North Carolina (State v. Dixon, 144 S.E.2d 622 (1965)); Oklahoma (Johnson v. State, 392 P.2d 767 (Okla. Cr. 1964)); Rhode Island (State v. Marzilli, 303 A.2d 367 (1973)); South Dakota (State v. Hoxsie, 570 N.W.2d 379 (1997)); Tennessee (Carver v. State, 398 S.W.2d 719 (1966)); Utah (State v. Christensen, 866 P.2d 533 (1993) (but continues if restitution)); and Wyoming (State v. Free, 260 P. 173 (1927)).

⁵⁴ This rationale has been expressed in *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977):

When an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an integral part of our system for finally adjudicating his guilt or innocence. [citation omitted].

⁵⁵ Jurisdictions which retain the conviction are: Alabama (*Ulmer v. State*, 104 So. 2d 766 (Ala. Ct. App. 1958) (court ruled "appeal abated" without saying more)); Connecticut (*State v. Trantolo*, 549 A.2d 1074 (1988) (appeal dismissed as moot since fine uncollectible)); Delaware (*Perry v. State*, 575 A.2d 1154 (1990)); Florida (*State v. Clements*, 668 So. 2d 980 (1996)); Georgia (*Harris v. State*, 194 S.E.2d 76 (1972)); Indiana (*Whitehouse v. State*, 364 N.E.2d 1015 (1977)); Kentucky (*Royce v. Commonwealth*, 577 S.W.2d 615 (1979)); Michigan (*People v. Peters*, 537 N.W.2d 160 (1995)); Minnesota (*In re Carlton*, 171 N.W.2d 727 (1969)); Montana (*State v. Cripps*, 582 P.2d 312 (1978)); New Hampshire (*State v. Poulos*, 88 A.2d 860 (1952) (court ruled "appeal abated" without saying more)); North Dakota (*State v. Dalman*, 520 N.W.2d 860 (1994) (post-conviction appeal)); Oregon (*State v. Kaiser*, 683 P.2d 1004 (1984)); South Carolina (*State v. Anderson*, 314 S.E.2d 597 (1984)); and Texas (*Polhemus v. State*, 659 S.W.2d 433 (Tex. Ct. App. 1983)).

⁵⁶ States which permit the appeal to continue subsequent to the defendant's death are: Hawaii (*State v. Makaila*, 897 P.2d 967 (1995)); Kansas (*State v. Jones*, 551 P.2d 801 (1976)); Mississippi (*Gollott v. State*, 646 So. 2d 1297 (1994) (defaults to abate-

Many state courts applying the majority rule of abatement *ab initio* cite the seminal United States Supreme Court decision of *Durham v. United States*,⁵⁷ which established the abatement *ab initio* doctrine. *Durham* held that the death of a criminal defendant pending appeal of his conviction abated not only the appeal but also all prosecutorial proceedings since its inception.⁵⁸ The defen-

ment status if no motion to substitute filed)); New Jersey (*City of Newark v. Pulverman*, 95 A.2d 889 (1953)); New Mexico (*State v. Salazar*, 945 P.2d 996 (1997)); Ohio (*State v. McGettrick*, 509 N.E.2d 378 (1987)); Pennsylvania (*Commonwealth v. Bizzaro*, 535 A.2d 1130 (Pa. Super 1987)); and Wisconsin (*State v. McDonald*, 424 N.W.2d 411 (1988)).

⁵⁷ 401 U.S. 481 (1971). In addition to being the majority rule in state courts, abatement *ab initio* continues to be the majority rule in federal jurisdictions. See *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990); *United States v. Mollica*, 849 F.2d 723 (2d Cir. 1986); *United States v. Williams*, 874 F.2d 968 (5th Cir. 1989); *United States v. Wilcox*, 783 F.2d 44 (6th Cir. 1986); *United States v. Littlefield*, 594 F.2d 682 (8th Cir. 1979); *United States v. Bechtel*, 547 F.2d 1379 (9th Cir. 1977); *United States v. Davis*, 953 F.2d 1482 (10th Cir. 1992); *United States v. Logal*, 106 F.3d 1547 (11th Cir. 1997). See also Joseph Sauder, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement Ab Initio Doctrine*, 71 TEMP L. REV. 347, 350-54 (1998) (general overview of history of abatement doctrine).

⁵⁸ *Id.* at 483. As noted in an article by David Pureza, *Mississippi Allows Any Party to File Motion for Substitution Upon Death of Criminal Defendant and Adopts Abatement Ab Initio as Default Rule*, 64 Miss. L.J. 819, 821 n.15 (1995):

The United States Supreme Court employed the abatement *ab initio* doctrine as early as 1888. See *List v. Pennsylvania*, 131 U.S. 396, 396 (1888) (dismissing writ of error and holding that cause abated upon death of defendant). Numerous early decisions said nothing more than that the cause abated upon the defendant's death. See, e.g., *Johnson v. State*, 214 U.S. 485, 485 (1909) (stating that appeal abated upon death of defendant and dismissing case); *Menken v. Atlanta*, 131 U.S. 405, 405 (1889) (considering cause abated upon death of plaintiff in error); *Rossi v. United States*, 21 F.2d 747, 747 (8th Cir. 1927) (stating that death of plaintiff in error abated causes); *McGovern v. United States*, 280 F. 73, 76 (7th Cir. 1922) (finding that judgments abated as to defendant who died prior to hearing); *Pino v. United States*, 278 F. 479, 483 (7th Cir. 1921) (finding that death of defendant abated judgment); *United States v. Dunne*, 173 F. 254, 258 (9th Cir. 1909) (holding that entire action abated upon defendant's death); *accord Crooker v. United States*, 325 F.2d 318, 319 (8th Cir. 1963) (holding that causes abated when defendant died during pendency of two criminal appeals); cf. *Mintzes v. Buchanon*, 471 U.S. 154, 154 (1985) (vacating order granting writ of certiorari upon respondent's death and dismissing petition for certiorari); *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983) (holding that death of defendant prior to filing of notice of appeal abated prosecution *ab initio* where defendant possessed appeal of right from conviction). Other [appellate courts] have remanded such cases to lower courts with instructions "for such disposition as law and justice require." *Singer v. United States*, 323 U.S. 338, 346 (1945); *accord United States v. Johnson*, 319 U.S. 503, 520 (1943) (remanding to lower court "for proper disposition in accordance with" majority opinion).

dant in *Durham* died pending his writ of certiorari.⁵⁹ In its decision, the Supreme Court praised the federal courts' adoption of abatement *ab initio* and instructed the lower court to dismiss the indictment.⁶⁰ The Court found the distinction between a direct appeal as of right and a petition for certiorari unimportant since the death of the defendant would prevent review of the conviction on the merits. Thus, the Court abated the proceedings from the beginning even though the cases involved a petition for certiorari rather than an appeal of right.⁶¹ But, this was not a unanimous decision. In dissent, Justice Blackmun argued that the petition should be dismissed rather than the indictment.⁶² Blackmun believed that the majority failed to consider the distinction between a defendant's direct right to appeal and the Supreme Court's discretionary power to grant certiorari.⁶³ Because of that distinction and because *Durham*'s conviction was affirmed by the Ninth Circuit, Justice Blackmun asserted that the petition, alone, should be dismissed; whereas, the conviction should be permitted to stand.⁶⁴

Five years later, the Supreme Court in *Dove v. United States*⁶⁵ adopted Blackmun's dissent and dismissed a petition for writ of certiorari upon notice that the petitioner had died pending his petition for writ of certiorari, thus, overruling *Durham* to the extent it was inconsistent with the Court's ruling in *Dove*. "These two decisions have been distinguished by the lower federal courts and state courts as *Durham* providing the rule for death of a defendant pending an appeal of right, or direct review, and *Dove* providing the rule for the death of a defendant pending discretionary review."⁶⁶

The abatement *ab initio* doctrine has several significant effects:

⁵⁹ *Durham*, 401 U.S. at 481.

⁶⁰ *Id.* at 483.

⁶¹ *Id.*

⁶² *Id.* at 484 (Blackmun, J., dissenting).

⁶³ *Id.* at 484-85 (Blackmun, J., dissenting).

⁶⁴ *Id.* (Blackmun, J., dissenting).

⁶⁵ 423 U.S. 325, 325 (1976) (*per curiam*).

⁶⁶ *State v. Hoxsie*, 570 N.W.2d 379, 380-81 (S.D. 1997). At first, the *Dove* Court's one paragraph opinion created confusion. Where the defendant died pending appeal, the *Dove* ruling did not make clear whether it applied only to petitions for certiorari pending before the Supreme Court or to all cases, regardless of their appellate posture. However, one year later, the Seventh Circuit clarified the *Dove* ruling in *United States v. Moehlenkamp*, 557 F.2d 126. The *Moehlenkamp* Court distinguished appeals of right (at issue in *Moehlenkamp*) from petitions for certiorari (at issue in *Dove*), recognizing the greater significance of a defendant's first appeal opportunity. The Seventh Circuit did "not believe that the Court's cryptic statement in *Dove* was meant to alter the longstanding and unanimous view of the lower federal courts that the death of an appellant during the pendency of his appeal of right . . . abates the entire course of the proceedings" *Moehlenkamp*, 557 F.2d at 128. Thus, the Court

"(1) wiping the slate clean, as it were, restores the decedent's 'good name' to some extent; (2) abating the conviction forecloses a potential plaintiff from using the abated conviction in a civil action; . . . (3) if the trial court levies a fine, abatement *ab initio* precludes attendant recovery";⁶⁷ (4) in some jurisdictions, abating the conviction abates a restitution order along with all criminal proceedings, thus precluding the victim from being compensated for losses incurred as a result of the defendant's conduct; and (5) abatement *ab initio* may preclude an informant from receiving his otherwise proper claim for a reward.

The Effect of Abatement in the Salvi Case

The doctrine of abatement *ab initio* does not justify denial of a reward to an otherwise deserving informant. The extent of this problem is illustrated by the attempt of Security Consultants, Inc., to claim an award based on Salvi's botched Hillcrest Clinic shooting spree that took place at the Bel-Aire building in downtown Norfolk, Virginia.⁶⁸ Security Consultants alleged that its security guards, in reliance upon the award offer, had "provided information that led to the apprehension and subsequent conviction of Salvi for the Massachusetts shootings."⁶⁹ The lawsuit was commenced after Salvi's death. Just as in the *Seron* case, Planned Parenthood filed a motion to dismiss the complaint because "the terms and conditions of the reward offer were not satisfied since the conviction was vacated *ab initio*."⁷⁰

The Supreme (trial) Court of New York County dismissed the case holding:

In New York and Massachusetts, as in many states, in criminal cases, the death of the accused pending an appeal from a judgment of conviction abates the prosecution *ab initio* (citations omitted). This abatement has the effect of entirely eliminating the jury verdict and the sentence of the trial court (citation omitted).

The complaint states that the Reward Offer was 'for information leading to the *conviction* of anyone involved in the slayings at the [clinics] . . .' (emphasis added). Various courts have

vacated the conviction and remanded the case to the district court to dismiss the indictment.

⁶⁷ Sauder, *supra* note 57, at 353.

⁶⁸ Security Consultants, Inc. v. Planned Parenthood Federation of America, Inc., N.Y.L.J., Sept. 2, 1997, at 29 (Justice Cahn).

⁶⁹ *Id.*

⁷⁰ *Id.*

held that to entitle a party to an award offered for information leading to the 'conviction' of an offender, there must be a *final conviction* which settles the guilt of the party, and *as long as there is an appeal pending, or the defendant dies pending an appeal, there is no conviction within the meaning of an offer of a reward* (citation omitted).

. . . [T]he purpose of the reward offer was to obtain a conviction of the guilty party. That purpose is not attained where, as in this case, the conviction has been declared entirely abated due to the death of the defendant during the pendency of the appeal. . . .

Security Consultants is bound by the *plain meaning* of the Reward Offer, i.e., that the reward would only be paid upon a final conviction. Accordingly, the complaint is dismissed as *Security Consultant's* cause of action never accrued due to the abatement of Salvi's conviction.⁷¹

The *Security Consultants* court, in analyzing whether an otherwise proper reward should be abated with the conviction, simply held that because the conviction had been abated, no claim for reward could be successful.

Five reasons why abatement should not defeat an otherwise proper claim for reward by a deserving informant.

First, abatement of a conviction is irrelevant and immaterial. A criminal defendant's death pending direct appeal should not render an informant's performance invalid or incomplete. For example, Seron performed the unilateral contract by providing information and testimony leading to the identification, arrest, and conviction of Salvi. *The conviction was never overturned.* The fact that it was abated due to the suicide of Salvi is irrelevant and immaterial to Seron's claim for the reward. Salvi's suicide, and the abatement of conviction as a result, should not render Seron's performance invalid or incomplete. He performed the contract; he should reap the reward.

*Second, a mechanical application of the abatement rule leads to a harsh result.*⁷² The informant is required to come forward, cooper-

⁷¹ *Id.* (emphasis added).

⁷² One of Seron's claims was for substantial performance. The concept arises by analogy from the law of construction contracts. See, e.g., PDM Mechanical Contractors, Inc. v. Suffolk Construction Company, Inc., 618 N.E.2d 72, 74 (Mass. App. 1993):

'Quantum meruit is a theory of *recovery*, not a cause of action. It is a claim independent of an assertion for damages under the contract, although both claims have as a common basis the contract itself. Recovery under this theory is derived from the principles of equity and

ate with the investigation, testify at the grand jury, and finally, the trial. After fully performing all of his duties to qualify for the reward, abatement may nevertheless act to deny the fully cooperative informant a reward. The abatement factor is utterly beyond the control of the informant. A reward for material information leading to the arrest and conviction of a perpetrator should not be denied due to *circumstances beyond the control of the informant*. Why should the informant's reward be contingent on events *beyond his control*? Informants should not have to guarantee the whole trial and appeal process in order to receive a well-deserved reward.

Third, the public policy behind the abatement doctrine is irrelevant to the public policy behind the offering of rewards to informants. PPFA and NAF argued that the reward offer required a "conviction" to result from the information provided by the informant, which they explain to mean a "final conviction," one upheld on appeal, and not abated due to the death of the convicted person. But, the public policy behind offering private rewards is (1) to protect the public from crime (e.g., clinic employees and patients), (2) to protect private property (e.g., abortion and family planning clinics), (3) to discourage crime by successfully prosecuting perpetrators of crime (e.g., clinic violence), (4) to assist law enforcement in obtaining convictions, by (5) encouraging informants to come forward with information relevant and material to the identification and prosecution of the perpetrator. "[E]ncouragement can help strengthen our communities; there is a benefit to society to be gained from

fairness and is allowed where there is substantial performance but not full completion of the contract. *See generally* 5 S. Williston, *CONTRACTS* § 805 (3d ed. 1961).' This theory of recovery is particularly applicable in actions involving building contracts in order to avoid the harsh result of the long established rule that there can be no recovery on a building contract in the absence of complete performance. [citations omitted].

... Rather, a 'de minimis' breach would not necessarily preclude a finding of substantial performance of the contract and, therefore, recovery in quantum meruit.

See also HCE Pepperell, Inc. v. Energy Management, Inc., 2 Mass. L. Rptr. 351, 1994 WL 879544 (Mass. Super. Ct. 1994):

Even were fulfillment of all of the conditions set forth in [the construction contract] considered to have been intended to comprise a condition precedent to [the contract provision entitled] Substantial Completion, *the non-occurrence of a condition precedent may be excused if* (i) the occurrence of a condition was not a material part of the bargain or (ii) *non-occurrence of the condition would cause a disproportionate forfeiture*. *RESTATEMENT (SECOND) OF CONTRACTS* § 29 (1981); *see Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 280-81 (1980), *Barry v. Frankini*, 287 Mass. 196, 199-200 (1934).

Id. (emphasis added).

encouraging each citizen to help every other citizen in need.”⁷³ As one commentator pointed out, even a Massachusetts court recognized the public policy of encouragement, noting that the goal “is to discourage calculated indifference to the plight of another [which is] predicated on the social desirability of encouraging people to go to the aid of third parties who are in danger of harm as the result of the unlawful actions of others.”⁷⁴ This is a completely separate and distinct public policy from that of the abatement doctrine. To say that rewards are abated with the criminal proceedings is antithetical to the public policy of encouraging “man to save another from mischief.”⁷⁵

The public policy behind the abatement doctrine is thus irrelevant to the public policy supporting private offers of rewards for information assisting law enforcement officials in obtaining successful arrests and prosecutions. The purpose of a reward offer is to encourage people with information to make that information public, including testifying at trial, so that successful prosecutions may occur. For these public policy reasons, abatement should not be permitted to defeat an informant’s claim where the informant has otherwise met all the reward contingencies.

Fourth, it should be against public policy to permit abatement of convictions for felons who commit suicide. First, abatement actually encourages suicide. It is the only sure way a convicted felon can clear his record before his appeals are completed.⁷⁶ Furthermore, abatement appears to reward suicide. “[T]he public might believe

⁷³ Mark C. Alexander, *Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings*, 39 ARIZ. L. REV. 1161, 1198 (1997).

⁷⁴ *Id.* at 1197 (quoting *Commonwealth v. Monico*, 366 N.E. 2d 1241, 1244 (Mass. 1977)).

⁷⁵ JEREMY BENTHAM, *Of the Limits of the Penal Branch of Jurisprudence*, in *THE COLLECTED WORKS OF JEREMY BENTHAM* 281, 293 (J.H. Burns & H.L.A. Hart eds., 1970).

⁷⁶ “[A] convicted defendant could use suicide to ensure the return to the status quo before commencement of the criminal action [A] return to that status quo would justify the public and the victim, or the victim’s family, in believing that the defendant succeeded through suicide when he would have lost on appeal. *State v. McDonald*, 405 N.W.2d 771, 772 (Wis. 1987). However, as one commentator noted:

To believe that an abatement rule encourages suicide would be an unjustified presumption. Convicted criminal defendants have suffered the turmoil and humiliation of the trial and conviction, and face incarceration or, at the very least, stigma associated with a criminal conviction. One might reasonably assume that a defendant may perceive suicide as an escape from further humiliation, stigma or incarceration. It is more speculative, however, to assume that a defendant might commit suicide in order to reap the remote benefits of abatement.

Lynn Johnston Splittek, *State v. McDonald: Death of a Criminal Defendant Pending Appeal in Wisconsin - The Appeal Survives*, 1989 WIS. L. REV. 811, 830 (1989).

that the defendant succeeded in vacating the judgment of conviction through suicide."⁷⁷ Refusing to abate the conviction in the instance of suicide "avoid[s] the public perception that the defendant defeated conviction through suicide."⁷⁸

In addition, when a reward is at stake, suicide is a way for convicted felons to deny informants of their reward. Hatred of informants and desire for revenge against them may be sufficient motivations for some prisoners to contemplate suicide. "Abatement in this circumstance allows the defendant to [] [punish the informant] through his own self-serving, albeit gruesome means. . . ."⁷⁹ Public policy should not provide even the slightest encouragement for prisoners to commit suicide. Unless there is evidence of incompetence, suicide should be considered a waiver of the right to appeal, not a basis for abatement. The state's promise of abatement should not be permitted to become the inducement of and reward for prison suicides.

Moreover, at the very least, an "exception should be carved out of the general abatement rule where an appellant takes his own life."⁸⁰ The official investigation of Salvi's death concluded that it was a suicide.⁸¹ Even strong advocates for abatement of restitution have expressed the need for an exception when a criminal defendant commits suicide pending appeal.⁸² This is because the underlying purpose of abatement — to do justice⁸³ — is inapplicable when "the defendant himself prevents a review of the merits."⁸⁴ If

⁷⁷ Splitek, *supra* note 76, at 831.

⁷⁸ *Id.* However, this "rule risks creating a negative public reaction if the criminal courts continue to toil after the defendant has died. That reaction is likely to be magnified when a public defender represents a dead defendant at public expense." *Id.*

⁷⁹ Sauder, *supra* note 57, at 373.

⁸⁰ *United States v. Logal*, 106 F.3d 1547, 1553 (11th Cir. 1997) (Cohill, J., dissenting) (upon death, restitution abates with conviction).

⁸¹ *Salvi's Suicide*, BOSTON SUNDAY GLOBE, Dec. 1, 1996, at D4.

⁸² Sauder, *supra* note 57, at 373.

⁸³ "Abatement of all proceedings is based on the recognition that a defendant pursuing an appeal of right has not yet received all of the safeguards of the judicial system. Death prior to appeal works a deprivation of a final determination of the case's merits. Because an appeal plays an integral part in our system for final adjudication of guilt or innocence, justice requires the abatement of a conviction where the merits of the appeal are left unresolved." Splitek, *supra* note 79, at 816.

⁸⁴ *Id.* at 823; *see also* *State v. McDonald*, 405 N.W.2d 771, 772 (Wis. Ct. App. 1987) (held when defendant commits suicide, justice does not require abatement of a conviction); *United States v. Dwyer*, 654 F. Supp. 1254, 1255 (M.D.Pa. 1987) ("It defies common sense to allow Mr. Dwyer to be absolved of criminal liability so carefully arrived at by a jury because he intentionally took his own life before the appeal process could run. By his suicide Mr. Dwyer waived his right to appeal."); *United States v. Chin*, 633 F. Supp. 624, 628 (E.D.Va. 1986) (District Court found that a defendant's

a criminal defendant deprives himself of his right of direct appeal through suicide, his right to appeal should be lost. Such reasoning is in line with the Supreme Court's decision in *Molinaro v. New Jersey*,⁸⁵ in which the appellant in a criminal case became a fugitive. In *Molinaro*, the Supreme Court declined to adjudicate the merits of the case since appellant, who was free on bail, refused to surrender himself to state authorities and was a fugitive from justice.⁸⁶

Fifth, because rewards are compensatory in nature, as opposed to penal, they should never be denied due to the abatement of the conviction. This is analogous to the issue of whether a restitution order should be abated when the defendant dies pending direct appeal.⁸⁷ Like the issue of abatement, courts do not uniformly agree whether restitution should be abated along with the criminal proceedings when a defendant dies pending direct appeal. In fact, the Federal Circuit Courts are split on this issue. There are three general approaches regarding the issue of restitution. First, some courts have abated the conviction while allowing the restitution to stand.⁸⁸ Second, some courts have abated the restitution along with all criminal proceedings.⁸⁹ Third, other courts have abated the conviction while allowing a substituted party to appeal the restitution order.⁹⁰

*United States v. Dudley*⁹¹ is the leading case on this issue and

suicide after a guilty verdict and before further proceedings was a "conscious and deliberate" choice, and refused to abate the criminal proceedings). *But see* *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983) ("We also reject the government's argument that Oberlin waived his right to appeal by killing himself. The contention that suicide is the 'ultimate waiver' is without merit.').

⁸⁵ 396 U.S. 365, 366 (1970) (*per curiam*).

⁸⁶ *Id.* at 365-366. *See also* *United States v. Corporan-Cuevas*, 35 F.3d 953, 957 (4th Cir. 1994) (defendant's appeal dismissed when he remained fugitive during appeal). *See generally* Andrew Moriarty, *Twenty-Sixth Annual Review of Criminal Procedure - Appeals*, 85 GEO. L.J. 1463, 1469 n.2544 (1997) (overview of cases discussing criminal defendant's waiver of appeal when fugitive during appellate process).

⁸⁷ *See* *Sauder*, *supra* note 57, at 354-74 (general overview of restitution in the context of abatement and argument in favor of abating restitution, along with the conviction).

⁸⁸ *See, e.g., United States v. Dudley*, 739 F.2d 175, 178 (4th Cir. 1984) (restitution does not abate upon defendant's death); *Estate of Vigliotto*, 870 P.2d 1163, 1165-66 (Ariz. Ct. App. 1993) (restitution does not abate upon defendant's death); *People v. Peters*, 537 N.W.2d 160, 166 (Mich. 1995) (enforced restitution order upon defendant's death).

⁸⁹ *See, e.g., Logal*, 106 F.3d at 1552 (upon death, restitution abates with conviction); *cf. State v. Hoxsie*, 570 N.W.2d 379 (S.D. 1997) (restitution order stands where defendant pled guilty and then died pending appeal of his sentence).

⁹⁰ *See, e.g., United States v. Mmahat*, 106 F.3d 89, 93 (5th Cir. 1997) (criminal proceeding abates but court grants defendant's heirs right to continue appeal since restitution survives); *State v. Christensen*, 866 P.2d 533, 536-37 (Utah 1993).

⁹¹ *Dudley*, 739 F.2d at 175.

stands for the proposition that the defendant's death during direct appeal does not abate a restitution order. In *Dudley*, the defendant was convicted, sentenced and ordered to pay restitution.⁹² The defendant died during his direct appeal and defense counsel moved to abate the criminal proceedings *ab initio*.⁹³ Although the Fourth Circuit abated the criminal proceedings *ab initio*, it held that the defendant's death did not abate the restitution order.⁹⁴ The Fourth Circuit hinged its decision on the distinction between fines and forfeitures, which are penal in nature, and restitution, which is compensatory in nature,⁹⁵ stating that upon a defendant's death sanctions which are purely penal are abated since they are for the purpose of sentencing the convicted;⁹⁶ whereas, restitution is "predominately compensatory" and designed to compensate the victim.⁹⁷

In this line of reasoning, abating the reward once a defendant dies pending direct appeal is nonsensical. Awarding the victim restitution, although predominately compensatory in nature, does have a penal aspect. For example, "[t]here is no doubt that an order of restitution would cause [a] defendant financial pain, but financial pain does not automatically render the order primarily penal."⁹⁸ The order of restitution is issued "to enable victims to be compensated fairly for their suffering at the hands of convicted offenders."⁹⁹ Likewise, a reward is issued to compensate an individual for the performance of an act, which could quite possibly subject him or her to personal danger or liability, such as the danger encountered by Seron. But unlike restitution, the nature of a reward is in no way penal. It is purely compensatory and requires the defendant to bear no burden in the informant's receipt of a

⁹² *Id.* at 175-76.

⁹³ *Id.* at 176. Since *Dudley*, the Fourth and Third Circuit both held that attorneys who represented the criminal defendant at trial lacked legal authority to act as his agents after the defendant's death and thus had no standing to move to abate his conviction. See *In re Chin*, 848 F.2d 55, 57 (4th Cir. 1988) (per curiam); *United States v. R. Budd Dwyer*, 855 F.2d 144, 145 (3rd Cir. 1988).

⁹⁴ *Dudley*, 739 F.2d at 179.

⁹⁵ *Id.* at 177.

⁹⁶ *Id.* at 176; see also *id.* at 177 ("The argument that impositions of penalties in criminal cases have heretofore always been abated on death of the accused, even a fully convicted accused who has not yet paid a fine or forfeiture, grows out of the consideration that punishment, incarceration, or rehabilitation have heretofore largely been the exclusive purposes of sentences and so ordinarily should be abated upon death for shuffling off the mortal coil completely forecloses punishment, incarceration, or rehabilitation, this side of the grave at any rate.").

⁹⁷ *Id.* at 177.

⁹⁸ *Peters*, 537 N.W.2d at 165.

⁹⁹ *Id.* at 165.

reward. If the dichotomy between being "penal" and "compensatory" is significant in determining whether restitution should be abated along with other criminal proceedings, the analysis is equally applicable in the context of rewards.

In contrast to *Dudley*, in *United States v. Logal*,¹⁰⁰ the Eleventh Circuit held that restitution should be abated. In *Logal*, a defendant, found guilty of securities fraud, was sentenced to imprisonment, ordered to pay a nominal fine and provide restitution in excess of \$21 million. The day before beginning his sentence, the defendant committed suicide. Due to his savvy move, the defendant was able to avoid a conviction, avoid paying the fine, and avoid making restitution to the victim. Directly opposed to the Fourth Circuit's holding in *Dudley*, the Eleventh Circuit, nakedly relying on its own precedent, held "that 'though restitution resembles a judgment *for the benefit of* a victim, it is penal, rather than compensatory.'"¹⁰¹ The *Logal* Court found that restitution was penal in nature despite the fact that it was designed to compensate the victim under the Victim and Witness Protection Act.¹⁰² Since rewards, in contrast to restitution, are undeniably compensatory in nature, the *Logal* decision cannot be used for the proposition that abatement should defeat a claim for a reward by an informant.

Taking the middle of the road, but not deviating too far from the *Dudley* Court, the Fifth Circuit in *United States v. Mmahat*,¹⁰³ abated only the portion of the defendant's criminal proceeding unrelated to the restitution order¹⁰⁴ when the defendant, who was ordered to pay restitution, died pending direct appeal. The Fifth Circuit held that "[w]hen [] [restitution] is designed to make his victims whole, [] it is compensatory and survives his death. In such a case, only the portion of the proceedings unrelated to the restitu-

¹⁰⁰ 106 F.3d 1547 (11th Cir. 1997).

¹⁰¹ *Id.* at 1552 (quoting *United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993)).

¹⁰² The Court honed in on two issues in abating the restitution order. First, it stated that a statutory problem would arise if the court abated the conviction and let restitution stand since the specific restitution statute at issue required a conviction before a defendant could be ordered to pay restitution. *Logal*, 106 F.3d at 1552. Second, the Court reasoned that to uphold the restitution order would have violated the finality principle outlined in *Moehlenkamp*, and a statutory problem would arise. *Logal*, 106 F.3d at 1552. In its holding, the Eleventh Circuit maintained a hard-line stance on abatement - death before direct appeal abates all criminal proceedings. This was so despite a strong dissent by Judge Cohill urging the Court to create an exception to the abatement rule where the defendant commits suicide. *Id.* at 1552-53.

¹⁰³ 106 F.3d 89 (5th Cir. 1997).

¹⁰⁴ *Id.* at 93.

tion order is abated."¹⁰⁵

In determining whether restitution should be abated along with the criminal proceedings, it is apparent that courts focus on the dichotomy between being "penal" and "compensatory." Although courts do not uniformly agree whether restitution should abate along with criminal proceedings when a defendant dies pending direct appeal, one thing is quite clear: *if restitution is deemed "compensatory," as opposed to "penal," it should not be abated.* Thus, likewise, due to their purely compensatory nature, *rewards deserve the same treatment and should never be abated. This analogous precedent alone is strong enough to shield rewards from being devoured by the abatement doctrine.*

For these five reasons the abatement doctrine should not be a vehicle used by PPFA and NAF to deny informants their just reward. To pursue such an injustice is to defeat the very purpose of offering a reward in the first place.

CONCLUSION

John C. Salvi III, when he committed suicide, may have been attempting to cheat informant Richard J. Seron out of his reward. If Massachusetts law, as Planned Parenthood and the National Abortion Federation argued, permits him to do that, then *Salvi's revenge from the grave is a success.* Consequently, if the legislature or judiciary does not correct this situation, and permits the abatement doctrine to be used as an ongoing vehicle to deny future informants of their rewards, then *Salvi's revenge is complete.*¹⁰⁶ The legacy of John C. Salvi III becomes the refusal of witnesses to come forward with important information about clinic violence, or any other kind of violence, because they know that reward offers are merely illusory, and that the personal sacrifice of the informant, in

¹⁰⁵ *Id.* at 93.

¹⁰⁶ There was an unsuccessful effort in Massachusetts to void the abatement doctrine. See Carolyn Ryan, *Weld: Salvi Can't Escape Justice*, BOSTON HERALD, Feb. 3, 1997, at 1; John Ellement, *Law That Voided Salvi Conviction Questioned*, BOSTON GLOBE, Feb. 4, 1997, at B2; Eileen McNamara, *Legal Wisdom That's Foolproof*, BOSTON GLOBE, Feb. 5, 1997, at B1; Carolyn Ryan, *Panel: Death is No Final Escape*, BOSTON HERALD, Feb. 14, 1997, at 7 ("After emotional pleas from the families of John Salvi's victims, a legislative committee voted yesterday in favor of barring judges from throwing out convictions of defendants who die awaiting appeal").

To remedy the use of abatement in denying rewards to deserving informants, voiding the abatement doctrine is not necessary. The legislature only need pass an informants' reward statute, permitting them to receive their rewards after a conviction at trial. Such a statute would give notice to all persons and organizations making offers of reward that a "final conviction" is not necessary under state law, and is not a defense to any claim of reward by an informant.

terms of time and risk,¹⁰⁷ is just too great.¹⁰⁸

¹⁰⁷ Seron's risk did not end when Salvi fled. For his acts of heroism, Seron was listed on the offensive, intimidating, and ill-conceived website. *The Nuremburg Files: Alleged Abortionists and Their Accomplices*, under the subtitle, *Law Enforcement: Their Bloodhounds* (Oct. 28, 1998) <<http://www.christiangallery.com/atrocity/aborts.html>>. The website declared: "Our goal is to record the name of every person working in the baby slaughter business across the United States of America. . . Email us with your evidence. Legend: Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." Seron's name was greyed-out indicating he was wounded. The rather direct implication being that Seron was a *proper target for violent attack for his role in stopping Salvi!*

¹⁰⁸ Members of the public agree. See, e.g., Arleen Johnson (Reader's Opinions), *Clinic Should Pay Seron*, PATRIOT LEDGER, March 8, 2000, at 20 (emphasis added):

Referring to the clinic guard, Richard Seron, who was wounded by John Salvi some five years past; it would seem to be the right thing for Planned Parenthood to simply pay him the \$100,000 reward he is claiming.

It is wrong for large businesses and foundations to offer rewards to the public but then hold out for years in an effort to avoid paying legitimate claims. This kind of thing sends out the wrong message in an age when it is all too rare for people to get involved and help others — especially when it's done at great personal risk as was the case with Seron.

See also, Ardith Caissy (Reader's Opinions), *Planned Parenthood Should Pay Seron*, PATRIOT LEDGER, Apr. 3, 2000, at 6 (emphasis added):

Planned Parenthood appears to be conducting itself in a very callous and disreputable manner by not only refusing to pay Seron the reward in question, but as he has complained, even refusing to respond to his claim with an answer — yes or no — or to provide any kind of reasonable explanation to the general public.

I can recollect that in the past, every time a clinic has been attacked or threatened, Planned Parenthood spokespeople have gone on TV to denounce the violence directed against "women's choice" and boast of their \$100,000 reward, which somehow never seems to get paid out to anybody. It is clearly a disgrace for a private organization as wealthy as Planned Parenthood is to benefit from unpaid-for publicity in this manner, and at the same time not be held accountable for its promises to a member of the public.

To put this comment in perspective, PPFA reported "income in excess of expenditures" of \$42.3 million for the 1997-98 fiscal year. And for the accounting period ending June 30, 1999, PPFA reported profits of \$125.8 million on gross income of \$660 million. Lynn Vincent, *Profiting From Losses: Planned Parenthood Rakes in Abortion Cash*, WORLD MAG., Apr. 22, 2000, at 36.