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ERRATA

Page 106, footnote 41, line 1: delete "or"; insert "for."

Page 113, text, line 12: delete "Walter's; insert 'Walter's.

Page 113, text, line 13: delete "Sincerely"[93]: add Sincerely.' "[93]

Page 147, text, line 8: delete "wood"; insert "Woody".

Page 196, footnote 20, line 4: delete "Brandeis v. Warren"; add Brandeis + Warren.

Page 381, text, line 13: delete "v"; insert "IV".

Page 500, footnote 108: delete "*Id.* at § 103(1)(b)"; insert "UCC § 2-103(1)(b)".

Page 863, text, line 14: delete "Petition of"; insert "In re".

Collateral Estoppel And The Mass Produced Product: A Proposal†

*Michael Weinberger**

The author examines the use of the doctrine of collateral estoppel in the context of products liability litigation involving mass produced products and indicates that the doctrine operates unfairly to the disadvantage of potential defendants. To correct this unfairness, the author argues that the use of the doctrine in the area of products liability law should be restricted to situations in which the allegedly defective nature of a particular product may be implicitly determined through empirical evidence.

Where a fact or issue has been decided by a court of competent jurisdiction, the doctrine of collateral estoppel bars relitigation of the same fact or issue in a subsequent suit.[1] In the past, courts have generally limited the doctrine's application to narrowly defined situations. However, recent decisions indicate a growing trend towards expanding the use of collateral estoppel. More specifically, these decisions indicate that the doctrine may have a role to play in products liability litigation.[2] An expansion of the doctrine's use in such a setting would unquestion-

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† The author wishes to acknowledge the advice and criticism rendered by Assistant Dean Paul Sherman, of the Brooklyn Law School, and by Professor Margaret Berger, Co-author of *Weinstein's Evidence* (1978). The author also wishes to acknowledge the research assistance rendered by Paul Gajewski.

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1. *See* notes 44-49 and accompany text *infra*.

2. Research has revealed only six cases involving alleged defects in mass produced products in which this issue has been raised. *See* Section III *C. infra*. Note however, that it is anticipated that this issue will arise with some regularity in the future. For example, the question may ultimately be addressed in the currently pending DES litigation, which involves numerous claims filed in both the state and federal court systems.

In fact, in one recent DES case, upon oral argument to certify the action as a class action, the judge brought up the issue *sua sponte*. More specifically, the judge asked counsel for the lead defendant if he opined that his client would be estopped in future cases if it lost any particular DES case. Suffice it to say that counsel for the defendant, pointing primarily to the different facts and

ably have a widespread and substantial impact on existing legal thought and practice.

Reduced to its simplest elements, the application of the doctrine to this area of the law might preclude innumerable plaintiffs who have suffered personal injury while using a common product from prosecuting a products liability cause of action because one such plaintiff, perhaps half a continent away, previously brought a similar suit involving that product — and lost. Conversely, the doctrine might preclude a defendant from denying that its product was defective in countless personal injury lawsuits, each involving different plaintiffs and various fact patterns, because one plaintiff previously brought an action involving the same product — and won. Such a scenario, affecting the rights of numerous parties who have, in effect, participated in tort litigation *in abstentia,* would revolutionize the products liability field.

The analysis and discussion presented herein focus on the following query: Where a product has been produced in great quantities, and where it has been the subject of a products liability suit, should the findings of the court have application to subsequent suits, brought by different plaintiffs and involving different factual circumstances, merely because both suits involve the same type product? In other words, once a product has been judicially declared as either "defective" or "nondefective,"[3] should that judicial declaration collaterally estop litigants in future lawsuits from contesting the conclusions of the first court?[4]

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issues that each DES case involves, did not so opine. *See* Tigue v. E.R. Squibb & Sons, No. 03838/76 (N.Y. Sup. Ct., N.Y. Cty., March 14, 1979) (oral argument on the issue of class certification).

3. The analysis presented herein concerns itself solely with *judicial* determinations that a product is either defective or nondefective, as opposed to *administrative* determinations along the same lines. Indeed, the controversy in such cases seems to center not so much on the collateral estoppel effect of the administrative finding as it does on the admissibility. *See generally* Annot. 84 A.L.R. 3d 1220 (1978); Comment, *Recall Letter as Evidence of a Defect in an Automobile,* 29 MERCER L.R. 611 (1978).

Note that an administrative finding of a product "defect," for the purposes of ordering a recall, differs substantially with the generally understood meaning of the term when used to determine the appropriateness of allowing recovery in a civil suit. *See* United States v. General Motors Corp., 518 F.2d 420, 432-35 (D.C. Cir. 1975) (common law definitions of the term "defect," do not control in administrative law setting relating to a possible product recall). *See also* United States v. General Motors Corp., 565 F.2d 754 (D.C. Cir. 1977); United States v. General Motors Corp., 561 F.2d 923, *aff'd.,* 434 U.S. 1033 (1978); United States v. Ford Motor Co., 453 F. Supp. 1240 (D.D.C. 1978).

Note also that administrative approval of a product has never been held to have a collateral estoppel effect in a subsequent civil case. On the contrary, such administrative approval has generally been thought to only have *some* probative value on the issue of a defect. It has generally been held that compliance with administrative standards does not foreclose civil liability because such standards are said to represent only minimum standards. *See, e.g.,* Roberts v. May, 583 P.2d 305 (Colo. Ct. App. 1978). *See also,* Weinberger, *The State of the Art and Products Liability,* 28 DEFENSE L. J. 303 (1979). Note however, that this general proposition has recently been rejected by some states. *See, e.g.,* Arkansas Product Liability Act of 1979, (S.B. 476), and cases and statutes cited in Weinberger, *supra.*

4. The so-called "first case" mentioned above shall be presumed to be a civil case. The

Several of the issues relative to the above queries are also present in class action products liability suits. Such suits usually involve one type of product (as opposed to a single product, in the physical sense), many plaintiffs, various fact patterns, *but only one trial.*[5] Similarly, there are also common issues where collateral estoppel is applied to mass accident products liability litigation. Such cases involve a single product, numerous lawsuits by various plaintiffs, *but only one fact pattern.* Notwithstanding the existence of these similarities, class action[6] and mass

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special problems that arise when the seminal case is criminal in nature shall not be discussed herein. Note that research has revealed only one current case where criminal charges have been brought against a product manufacturer because of product design. *See* Indiana v. Ford Motor Co., Cause No. 5324 (Ind. Super. Ct., Elkhart Cty., filed September 13, 1978) (criminal indictment of Ford alleging three counts of reckless homicide and one count of criminal recklessness, relating to the design of the Pinto fuel system). For a general discussion of the application of collateral estoppel in a civil suit, based on an earlier criminal suit, *see* Note, *Civil Procedure — The Admissibility of Criminal Convictions as Collateral Estoppel in Subsequent Civil Actions,* 13 WAKE FOR. L. REV. 445 (1977); Note, *The Conclusiveness of Criminal Judgments in Subsequent Civil Cases: An Expanding Role for Collateral Estoppel in Oregon,* 11 WILLAMETTE L.J. 176 (1975).

5. An exception to this situation is where several members of the class "opt-out." In that situation there could be several trials. The application of collateral estoppel in a subsequent suit, based on the findings of the court in the prior action, would entail the same issues discussed herein.

6. The authorities on point indicate a distinct judicial disfavor of the class action approach to products liability suits. *See, e.g.,* City of Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd,* 467 F.2d 1262, 1264-68 (7th Cir. 1972) (the city of Chicago could not maintain a class action against an automobile manufacturer where it was alleged that the defendant's vehicles were defective due to their propensity to cause air pollution because there no showing that a particular motor vehicle was unreasonably dangerous or had caused a particular personal injury to an individual plaintiff); Yandle v. PPG Industries, Inc., 65 F.R.D. 566, 570-72 (E.D. Tex. 1974) (common questions of law and fact did not predominate where numerous former employees of an asbestos plant brought suit against nine defendants; class action device is not a superior method of adjudication where individual acts of individual defendants directly relate to their potential liability; members of purported class had a vital interest in controlling their own individual suits); Rosenfeld v. A. H. Robins Co., 63 App. Div. 2d 11, 17-21, 407 N.Y.S.2d 196, 200-02 (1978) (possible existence of common questions of law and fact did not outweigh the substantial individual issues involved since class consisted of numerous women who used an intrauterine device known as the Dalkon Shield and reliance on the alleged express warranties would vary from case to case).

This is not to say that there have been no instances in which the class action device has been applied to a products liability setting. *See, e.g.,* Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 562 (S.D. Fla. 1973), *aff'd.,* 507 F.2d 1268 (1975) (six persons who were taken ill while on a pleasure cruise could maintain a class action on the issue of whether the drinking water or food available on the vessel was stored or prepared negligently); Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 704-05, 109 Cal. Rptr. 254, 257 (1973) (class action maintainable to force vehicle manufacturer to recall allegedly defective truck wheels even though no personal injuries were involved).

See generally 3A FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 46A (1979); Becker, *The Class Action Conflict — A 1976 Report,* 75 F.R.D. 89, (1978); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356 (1967); *Proposed Rules of Civil Procedure,* 39 F.R.D. 103 (1966); Weinstein, *Revision or Procedure: Some Problems in Class Actions,* 9 BUFFALO L. REV. 433, (1960).

At least two commentators have advocated that the class action device is applicable, on occasion, to the products liability setting. *See* 3B MOORE'S FEDERAL PRACTICE, ¶ 23-45(3), at 811 n.35 (2d ed. 1969); 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1783 (1972).

accident[7] situations shall not receive treatment herein, simply because their inclusion would broaden this article's scope to an unmanageable degree.[8]

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7. Several courts have held that collateral estoppel may be applied to mass accident litigation. *See, e.g.*, United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-29 (E.D. Wash. & D. Nev. 1962), *aff'd. sub nom.*, United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert dismissed sub nom.*, United Airlines Inc. v. United States, 379 U.S. 951 (1964) (because there was a previous judgment on the merits and the issue of liability was specifically litigated, and since the estoppel was asserted against the same defendant who lost the prior suit, collateral estoppel was applicable; the fact that certain aspects of the first case were the subject of a pending appeal did not prevent the application of the doctrine); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 42-43, 304 N.Y.S.2d 810, 812-13 (Sup. Ct. 1969) (where the issue of liability has been decided and the defendant had a full and fair opportunity to litigate the issue during the first trial, collateral estoppel applied).

However, it appears that the greater weight of judicial authority stands for the proposition that collateral estoppel should not be applied in mass accident litigation. *See, e.g.*, Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), *cert denied*, 416 U.S. 956 (1974) (collateral estoppel can not be asserted defensively against a plaintiff who was not a party to the prior action); Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 539-41 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (federal court deciding 1964 diversity case concluded that neither New York nor California law allowed the offensive use of collateral estoppel in mass accident litigation; and the court further stated that if federal law was applicable, the same result would have been reached due to a lack of reasons for abandoning the requirement of mutuality and the existence of a prior judgment for the defendant); State of Maryland *ex. rel.* Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298, 305 (D. Md. 1967) (court noted that the strange history of appeals in aircraft disaster cases warranted a refusal to apply collateral estoppel where the first case, resulting in a plaintiff's verdict, was present on appeal; and that as between co-defendants, collateral estoppel does not apply to a finding not *explicitly* reached in the first case); Price v. Atchison, T. & S.F. Ry. Co., 164 Cal. App. 2d 400, 405-06, 330 P.2d 933, 935 (1958), *citing*, Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111, 118-19 (1958) (public policy of California, circa 1958, does not allow the use of collateral estoppel in multi-party accident cases); Montgomery v. Taylor-Green Gas Co., 306 Ky. 256, 258-60, 206 S.W.2d 919, 920-21 (1947) (collateral estoppel not applied where trial attorneys for the defendant in the first case were retained by the defendant's insurance carrier and the defendant had no right to control trial strategy).

See generally Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Weinstein, *supra* note 6; Wolcott, *Collateral Estoppel and Other Practical Approaches to Commercial Air Crash Claims*, 13 N.Y.L.F. 509 (1967); Note, *Mass Accident Class Action*, 60 CAL. L. REV. 1615 (1972); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967); Note, *Collateral Estoppel — Choice of Laws — A New Approach to Multi-Passenger Accident Litigation*, 35 J. AIR. L. & COM. 289 (1965).

8. Likewise, "chain of distribution" cases, involving one physical product, one set of facts, one accident, and one plaintiff, but *several* actions against *several* defendants (each involved in a different phase of the product's chain of distribution), are beyond the scope of this work. For a discussion of the problems involved in this type of case *see, e.g.*, Brown v. R. D. Werner Co., 428 F.2d 375, 376-77 (1st Cir. 1970) (where plaintiff sued seller and lost, subsequent suit against manufacturer barred); *accord*, Gillespie v. Thomasville Coca Cola Bottling Co., 17 N.C. App. 545, 195 S.E.2d 45 (1973); Cantrell v. Burnett & Henderson Co., 187 Tenn. 552, 216 S.W.2d 307 (1948). *But see* Olivarez v. Broadway Hardward, Inc., 564 S.W.2d 195, 199-202 (Tex. Ct. App. 1978) (plaintiff sued manufacturer and lost, but subsequent suit against retailer not barred by res judicata where it is claimed retailer had an independent duty to warn). Similarly, the following non-"chain of distribution" cases involving one physical product, one accident, but several lawsuits arising from the accident, do not come within the scope of this work. *See, e.g.*, Skrzat v. Ford Motor Co., 389 F. Supp. 753 (D.R.I. 1975); Beights v. W. R. Grace Co., Inc., 67 F.R.D. 81 (W. D. Okla. 1975); Eisel v. Columbia Packing Co., 181 F. Supp. 298 (D. Mass. 1960); Barbour v. Great Atl. & Pac. Tea Co., 143 F. Supp. 506 (E.D. Ill. 1956).

This article is organized in the following manner. Section I presents a background discussion of the law of collateral estoppel and explains how its application is affected by the legal concepts of privity and mutuality. Section II focuses upon the federal law of collateral estoppel and upon the public policy considerations arguing for or against the application of the doctrine to products liability litigation. Section III provides an in depth analysis of the application of collateral estoppel to suits involving mass produced products,[9] primarily through the use of existing case law and hypothetical examples. Working from this analysis, a prospective guideline for handling such cases is suggested.

I. THE DOCTRINE OF COLLATERAL ESTOPPEL

Numerous courts have observed that collateral estoppel is one aspect of the more general doctrine of res judicata.[10] Hence, it would perhaps prove fruitful to discuss, in a general manner, the doctrine of res judicata before attempting a similar discussion relating to collateral estoppel.

Res judicata originated in the common law; in other words, it is a judicially created doctrine.[11] As such, it is open to different judicial interpretations from jurisdiction to jurisdiction, and, within one jurisdiction, from court to court. Generally speaking, the goal of the doctrine is to bring litigation to an end and to avoid repetitious lawsuits. The doctrine operates so as to bar relitigation of the same cause of action[12] by the parties involved in a prior case, or their privies,[13] where a court of

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9. The phrase "mass produced products" is used here to denote goods manufactured and sold in significant quantities pursuant to a single design or formula.

10. *See, e.g.*, Johnson v. United States, 576 F.2d 606 (5th Cir. 1978); Smiley v. State of South Dakota, 415 F. Supp. 870, 876 (D.S.D. 1976), *aff'd.*, 551 F.2d 774 (8th Cir. 1977) ("claim preclusion" is part of res judicata); Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969); California Optometric Ass'n. v. Lackner, 60 Cal. App. 3d 500, 131 Cal. Rptr. 744 (1976); O'Connor v. O'Leary, 247 Cal. App. 2d 626, 56 Cal. Rptr. 1 (1967); Corey v. Avco-Lycoming Div. Avco Corp., 163 Conn. 309, 307 A.2d 155 (1972), *cert. denied*, 409 U.S. 1116 (1973); Gomes v. Tyau, 57 Haw. 163, 552 P.2d 640 (1976); City of Evanston v. G. & S. Mortg. & Inv. Corp., 11 Ill. App. 3d 642, N.E.2d 331 (1973).

11. *See* United States v. LaFatch, 565 F.2d 81, 83 (6th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978); Expert Elec., Inc. v. Levine, 554 F.2d 1227, 1232 (2d Cir. 1977), *cert. denied*, 434 U.S. 903 (1977); Drickerson v. Drickerson, 546 P.2d 162, 169 (Alaska, 1976).

12. *See, e.g.*, United Fed'n of Teachers Welfare Fund v. Kramarsky, 451 F. Supp. 333 (S.D.N.Y. 1978); Rolando v. Farmers and Miners Bank of Ladd, 60 Ill. App. 3d 158, 376 N.E.2d 760 (1978); Knollwood Horizons, Inc. v. City of Freeport, 43 Ill. App. 3d 901, 357 N.E.2d 713 (1976); Middlekamp v. Hanewich, ___ Ind. App. ___, 364 N.E.2d 1024 (1977); Concrete Constructors, Inc. v. Manchester Bank, 117 N.H. 670, 377 A.2d 612 (1977).

13. *See, e.g.*, American Broadcasting Cos. Inc. v. Ali, 434 F. Supp. 1108 (S.D.N.Y. 1977), *aff'd.*, 573 F.2d 1287 (1977); Summerford v. Board of Retirement, County Employees' Retirement Ass'n., 72 Cal. App. 3d 128, 139 Cal. Rptr. 814 (1977); Bousson v. Mitchell, 84 Mich. App. 98, 269 N.W.2d 317 (1978); Xerox Corp. v. City of Kalamazoo, 76 Mich. App. 150, 255 N.W.2d 797 (1977).

competent jurisdiction[14] had previously issued a final judgment[15] on the merits.[16]

The issue of when a second case may be considered to be on the "same cause of action" has been extensively litigated. The resolution of this issue is not a matter of precision subject to the application of a mechanical formula.[17] However, various courts have indicated that they will consider the second case involving the "same cause of action" where it relates to the same subject matter,[18] claims,[19] legal issues,[20] or essential facts[21] involved in the first case. Other courts have stated that they would apply res judicata where a judgment in the second case would impair legal rights that were created in the first case,[22] or where the evidentiary basis of the second case is the same as that of the first.[23] Obviously, the court entertaining the second suit can not be prevented from applying the doctrine merely because the terminology employed in the second suit may be different than that employed in the first suit.[24]

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14. *See* Sekerez v. Lake Cty. Bd. of Comm'rs., ___ Ind. App. ___, ___, 358 N.E.2d 140, 143 (1976). If the court rendering the first judgment lacked *in personam* jurisdiction over the defendant, the judgment rendered against him or her would be void and could not form the base of a claim of res judicata.

15. *See, e.g.*, Gilbert v. Braniff Int'l Corp., 579 F.2d 411 (7th Cir. 1978); Cartolano by Tyrrell, 421 F. Supp. 526 (N.D. Ill. 1976); *In re* Marriage of Hight, 67 Cal. App. 3d 498, 136 Cal. Rptr. 685 (1977); Krofcheck v. Downey State Bank, ___ Utah ___, 580 P.2d 243 (1978).

16. *See, e.g.*, F.T.C. v. Food Town Stores, Inc., 547 F.2d 247 (4th Cir. 1977); Cabinet Craft, Inc. v. A. G. Spanos Enterprises, 348 So.2d 920 (Fla. D. St. Ct. App. 1977); People v. Riley, 72 Mich. App. 299, 249 N.W.2d 397 (1976); De Crosta v. A. Reynolds Constr. & Supply Corp., 41 N.Y.2d 1100, 396 N.Y.S.2d 357, 364 N.E.2d 1129 (1977).

17. *See* Expert Elec., Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977); Freeman v. Marine Midland Bank — N.Y., 419 F. Supp. 440, 448 (E.D.N.Y. 1976).

18. *See, e.g.*, National Tea Co. v. Confection Specialties, Inc., 48 Ill. App. 3d 650, 362 N.E.2d 1150 (1977).

19. *See, e.g.*, Mirin v. State of Nevada *ex. rel.* Pub. Serv. Comm'n., 547 F.2d 91 (9th Cir. 1976), *cert. denied*, 432 U.S. 906 (1977); Sworob v. Harris, 451 F. Supp. 86 (E.D. Pa.), *aff'd.*, 578 F.2d 1376 (1978); Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277 (1977); Lemons v. State, 570 S.W.2d 593 (Tex. Ct. App. 1978).

20. *See, e.g.*, Katzburg v. Krebs, 545 F.2d 104 (10th Cir. 1976); Rodriguez v. Beams, 423 F. Supp. 906 (S.D.N.Y. 1976); Kirchen v. Guarantee Nat'l Ins. Co., 422 F. Supp. 58 (E.D. Wis. 1976); Freeman v. Marine Midland Bank — N.Y., 419 F. Supp. 440 (E.D.N.Y. 1976).

21. *See, e.g.*, Himel v. Continental Ill. Nat'l Bank & Trust Co., 430 F. Supp. 651 (N.D. Ill. 1977); Boucher v. Bailey, 117 N.H. 590, 375 A.2d 1160 (1977). However, the doctrine of res judicata will not apply every time a second case between the same parties involves the same factual situation. *See* Cole v. First Dev. Corp. of America, 339 So.2d 1130, 1131 (Dist. Ct. App. Fla. 1976).

22. *See* Expert Elec., Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977).

23. *See, e.g.*, Middlekamp v. Hanewich, ___ Ind. App. ___, 364 N.E.2d 1024 (1977); Midwest Franchise Corp. v. Wakin, 201 Neb. 450, 268 N.W.2d 737 (1978); Waxwing Cedar Products, Ltd. v. Koennenke, 278 Ore. 608, 564 P.2d 1061 (1977). However, the mere fact that the evidence necessary to sustain the cause of action in the second case would have been admissible (if offered) in the first case, does not mean that the second case is barred by the doctrine of res judicata. *See* MPC, Inc. v. Kenny, 279 Md. 29, 33-34, 367 A.2d 486, 490 (1977).

24. *See, e.g.*, City of Chicago v. Harris Trust & Sav. Bank, 56 Ill. App. 3d 651, 371 N.E.2d 1182 (1977).

Similarly, the mere fact that the second suit is said to rely on a different legal theory than that relied on in the first will not necessarily preclude the application of the doctrine.[25]

The doctrine of res judicata is sometimes referred to as the doctrine of claim preclusion.[26] This appellation is employed because res judicata is thought to preclude subsequent litigation relating to *any* and *all* claims that are considered part and parcel of the general cause of action asserted in the first case. The doctrine, therefore, bars not only relitigation of issues that were actually decided in the first case, but also those that *could have* been raised and decided.[27]

Like the more general doctrine of res judicata,[28] collateral estoppel is a creature of the common law.[29] Hence, collateral estoppel (or, issue preclusion as it is sometimes referred to[30]) is also subject to different interpretations from jurisdiction to jurisdiction.[31] Generally speaking, collateral estoppel operates to bar relitigation of an issue[32] or fact[33] by parties to the prior action[34] (or, their privies), where a court of competent jurisdiction[35] has previously decided the issue in a final adjudica-

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25. *See* Mayer v. Distel Tool & Mach. Co., 556 F.2d 798 (6th Cir. 1977).

26. *See, e.g.*, American Ins. Co. v. Messinger, 43 N.Y.2d 184, 371 N.E.2d 401 N.Y.S.2d 36, 798 (1977).

27. *See, e.g.*, Pilla v. Alexander, 558 F.2d 509 (8th Cir.), *cert. denied*, 434 U.S. 971 (1977); Interstate Stores, Inc. v. Crowley, 558 F.2d 1046 (2d Cir. 1977); Black Grievance Comm. v. Philadelphia Elec. Co., 79 F.R.D. 98 (E.D. Pa. 1978); Ley v. Boron Oil Co., 454 F. Supp. 448 (W.D. Pa. 1978); United States v. State of Texas, 430 F. Supp. 920 (S.D. Tex. 1977); Molony & Rubien Constr. Co. v. Segrella, 118 R.I. 340, 373 A.2d 816 (1977); Adam v. Adam, ____ S.D. ____, 254 N.W.2d 123 (1977); Town of Waterford v. Pike Industries, Inc., 135 Vt. 193, 373 A.2d 528 (1977); Hammes v. First Nat'l Bank & Trust Co. of Racine, 79 Wis.2d 355, 255 N.W.2d 555 (1977); Leimert v. McCann, 79 Wis.2d 289, 255 N.W.2d 526 (1977).

28. *See* note 10 and accompanying text *supra*.

29. *See, e.g.*, Mobil Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977); Coplan Pipe & Supply Co., Inc. v. Central Bank & Trust Co., 362 So.2d 447 (Fla. Dist. Ct. App. 1978); Mitchell v. Bertolla, ____ La. ____, 340 So.2d 287 (1976); State v. Morlock, 87 Wash. 2d 671, 557 P.2d 1315 (1976).

30. *See, e.g.*, Dunlap v. City of Chicago, 435 F. Supp. 1295 (N.D. Ill. 1977).

31. Note the titles of the following law review articles: McGlinchey, *Collateral Estoppel in Texas*, 4 HOUSTON L. REV. 73 (1966); Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969); Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C.L. REV. 451 (1977); Comment, *Collateral Estoppel in Pennsylvania*, 10 DUQ. L. REV. 650 (1972); Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 85 LA. L. REV. 158 (1974).

32. *See, e.g.*, Eason v. Weaver, 557 F.2d 1202 (5th Cir. 1977); Williams v. Evans, 220 Kan. 394, 552 P.2d 876 (1976); Lemons v. State, 570 S.W.2d 593 (Tex. Ct. App. 1978); *cf.* W. L. Dev. Corp. v. Thalgott, 54 App. Div. 2d 901, 387 N.Y.S.2d 902, 903 (1976) (doctrine applicable if an identity of issues exists in both cases).

33. *See, e.g.*, Washington v. United States, 366 A.2d 457 (D.C. 1976); Colaneri v. McNab, 90 Misc.2d 742, 395 N.Y.S.2d 980 (Sup. Ct. 1975).

34. *See* Performance Plus Fund. Ltd. v. Winfield & Co., Inc., 443 F. Supp. 1188, 1191 (N.D. Cal. 1977); United States v. McNair, 439 F. Supp. 103, 107 (E.D. Pa. 1977), *aff'd.*, 571 F.2d 573 (3rd Cir.), *cert. denied*, 435 U.S. 976 (1978); Washington Suburban Sanitary Comm'n v. TKU Assocs., 281 Md. 1, 19, 376 A.2d 505, 514 (1977).

35. *See* Weaver v. Prince George's County, 34 Md. App. 189, 195-96, 366 A.2d 1048, 1052 (1976), *aff'd.*, 281 Md. 349, 379 A.2d 399 (1977).

tion[36] on the merits.[37] The party against whom the doctrine is asserted must have been fully represented in the first case[38] and must also have had a full and fair opportunity to litigate the issue at that time.[39] Various courts have stated that they will apply the doctrine only where the facts[40] and applicable legal principles[41] remain unchanged between the first and the second case. Other courts have stated that they will only apply the doctrine where the resolution of the issue in question was essential,[42] or necessary,[43] to support the prior judgment and would be decisive in the second case.[44]

It should be noted that in every products liability collateral estoppel suit brought to date, the plaintiff has sought to apply the doctrine offensively.[45] No defendant has sought to apply the doctrine defensively.[46] This one-sided application is not merely a matter of coincidence. As will be discussed below, the concept of privity, as it exists at the present time, appears to disallow the defensive use of collateral estoppel in products liability litigation. Additionally, the offensive use of collateral estoppel appears to be limited or barred in those states which follow the concept of mutuality.[47] Therefore, it may be stated as

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36. *See* Starbuck v. City of San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977); Rebco Dev., Inc. v. Superior Ct., 67 Cal. App. 3d 13, 16, 136 Cal. Rptr. 351, 352 (1977).

37. *See, e.g.*, Perrotta v. Irizarry, 430 F. Supp. 1274 (S.D.N.Y.), *aff'd.*, 573 F.2d 1294 (2d Cir. 1977); Blease v. Blease, 238 Ga. 651, 235 S.E.2d 21 (1977); W. L. Dev. Corp. v. Thalgott, 54 App. Div. 2d 901, 387 N.Y.S.2d 902 (1976).

38. *See, e.g.*, Weaver v. Prince George's County, 34 Md. App. 189, 366 A.2d 1048 (1976), *aff'd.*, 281 Md. 349, 379 A.2d 399 (1977).

39. *See, e.g.*, Speaker Sortation Systems, Div. of A-T-O, Inc. v. United States Postal Serv., 568 F.2d 46 (7th Cir. 1978); Wolfson v. Baker, 444 F. Supp. 1124 (M.D. Fla. 1978); Gilkey v. Chesapeake & Potomac Tel. Co. of W. Va., 419 F. Supp. 623 (S.D. W. Va. 1976).

40. *See* Inmates, D.C. Jail v. Jackson, 416 F. Supp. 119, 120 (D.D.C. 1976).

41. *See* State *ex. rel.* Flowers v. Dep't of Health and Social Servs., 81 Wis.2d 376, 387, 260 N.W.2d 727, 734 (1978).

42. *See* National Sav. & Trust Co. v. Rosendorf, 559 F.2d 837, 838-39 (D.C. Cir. 1977).

43. *See, e.g., In re* Transocean Tender Offer Securities Litigation, 427 F. Supp. 1211 (N.D. Ill. 1977); Kyreacos v. Smith, 89 Wash.2d 425, 572 P.2d 723 (1977).

44. *See, e.g.*, Hylan Flying Serv. Inc. v. State, 54 App. Div. 2d 278, 388 N.Y.S.2d 444 (1976); Stoughton v. State Farm Mut. Auto. Ins. Co., 54 App. Div. 2d 602, 387 N.Y.S.2d 323 (1976).

45. Offensive use of collateral estoppel occurs when the plaintiff seeks to preclude the defendant from litigating an issue which the defendant has previously litigated and lost against another plaintiff. Parklane Hosiery Co. v. Shore, ___ U.S. ___, 99 S. Ct. 645, 649 (1979). *See generally* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

46. Defensive use of collateral estoppel occurs when a defendant seeks to estop the plaintiff from asserting a claim which had previously been litigated unsuccessfully. Parklane Hosiery Co. v. Shore, ___ U.S. ___, 99 S. Ct. 645, 649 (1979).

47. The mutuality doctrine provides that neither party can use a prior judgement as an estoppel against the other unless both parties were bound by the same judgement. *Id. See also* RESTATEMENT OF JUDGEMENTS § 93 (1943).

Note that the mutuality doctrine as a "general rule" no longer applies under federal law. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 349-50 (1971); Parklane Hosiery Co. v. Shore, ___ U.S. ___, 99 S. Ct. 645, 649-51 (1979).

a general proposition that collateral estoppel may only be applied offensively under existing case law, and, even then, only in states that do not rigidly adhere to the rule of mutuality.

A. Privity

As noted previously, the doctrines of res judicata and collateral estoppel may be asserted only against actual parties to the prior case, or those in privity with said parties.[48] This rule is followed in the federal court system[49] as well as in every state jurisdiction.[50]

The rule of privity rests on due process considerations. Simply put, it would be unconstitutional, under the fifth and fourteenth amendments to the Federal Constitution, if a court were permitted to estop a party from denying the truth of a fact which was adjudicated in a prior trial in which the party had no notice, and hence did not participate in.[51]

Obviously, this reasoning is inapplicable when collateral estoppel is

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48. *See* note 34 and accompanying text *supra*. *See also* State v. Stauffer, 112 Ariz. 26, 536 P.2d 1044 (1975); Bricker v. Crane, ___ N.H. ___, 387 A.2d 321 (1978); Mundy v. Cincinnati Ins. Co., 141 Ga. App. 106, 232 S.E.2d 621 (1977); Murphy v. Rochford, 55 Ill. App. 3d 645, 371 N.E.2d 260 (1977); Browning v. West, 557 S.W.2d 848 (Tex. Ct. App. 1977).

Only parties *against whom* the doctrine of collateral estoppel is asserted must be in privity with the party who lost the prior action. *See, e.g.*, Simpson Timber Co. Inc. v. Aetna Cas. & Sur. Co., 19 Wash. App. 535, 576 P.2d 437 (1978); 860 Executive Towers, Inc. v. Board of Assessors, 53 App. Div. 2d 463, 385 N.Y.S.2d 604 (1976).

Parties who assert the doctrine of collateral estoppel, either offensively or defensively, may be perfect strangers to the first suit. For cases holding that a stranger to the first suit may use collateral estoppel offensively *see, e.g.*, People v. Superior Court, 44 Cal. App. 3d 494, 118 Cal. Rptr. 702 (1975); McGary v. Rocky Ford Nat. Bank, 523 P.2d 479 (Colo. Ct. App. 1974); Murphy v. Northern Colorado Grain Co., 30 Colo. App. 21, 488 P.2d 103 (1971).

For cases holding that a stranger to the first suit may use collateral estoppel defensively *see, e.g.*, Smith v. Sinclair, 424 F. Supp. 1108 (W.D. Okla. 1976); Garrigan v. Giese, 420 F. Supp. 68 (E.D. Mo. 1976); Mecham v. City of Glendale, 15 Ariz. App. 402, 489 P.2d 65 (1971); Morneau v. Stark Enterprises, Ltd., 56 Haw. 420, 539 P.2d 472 (1975); Klein v. Whitehead, 40 Md. App. 1, 389 A.2d 374 (1978); LaRose v. Casey, 570 S.W.2d 746 (Mo. Ct. App. 1978); Hardy v. Fleming, 553 S.W.2d 790 (Tex. Ct. App. 1977).

49. *See, e.g.*, Mosher Steel Co. v. N.L.R.B., 568 F.2d 436 (5th Cir. 1978); Gonzalez v. Firemen's Fund Ins. Co., 385 F. Supp. 140 (D.P.R. 1974).

50. *See* notes 10 and 11 and accompanying text *supra*. *See also* Exchange Nat'l Bank v. Holoman Bros., 177 La. 537, 148 So. 702 (1933).

51. Note the words of the court in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971):

> Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Id. (citations omitted). *Cf.* Expert Elec., Inc. v. Levine, 554 F.2d 1227, 1233 (2d Cir. 1977) (the privity prerequisite prevents a litigant from being bound by a prior judgment where he or she had no notice of the claim asserted therein and had no opportunity to present his or her argument in that case); Brousseau, *A Reader's Guide to the Proposed Changes in the Preclusion Provisions of the Restatement of Judgements*, 11 TULSA L.J. 305 (1976), wherein it was stated that the "party or privy" requirement is "indisputable as a matter of constitutional law. . . ." *Id.* at 327.

asserted against the same party that was the defendant in the prior lawsuit. In such a case, the party against whom collateral estoppel is being asserted had notice of the prior claim and participated in the adjudication process. However, when collateral estoppel is asserted against someone who, technically speaking, was not a party to the prior litigation, but had an interest therein, due process problems *do* arise. In such cases, the courts will apply the doctrine only if it can be found that the present party had such an intimate relationship or mutuality of interests with the party represented in the prior case as to justify a conclusion that both parties are in "privity of interest."

The term "privity" in this context, is an amorphous one.[52] More than one court has observed that the privity issue is best decided on a case by case basis.[53] Yet, some general rules do exist. For example, some courts have stated that privity may exist where two litigants have a mutual or successive relationship to the same property rights.[54] Other courts have stated that privity exists where the present litigant had an interest in the prior case and exercised some control over its outcome.[55] It should be noted, however, that a mere *similarity* of interests (as opposed to an identity of interests),[56] or common interests in the same question,[57] will not necessarily result in a finding of privity. Likewise, it has been held that merely because a litigant had an interest in the legal precedent set by the first case, such an interest does not, by itself, establish privity.[58]

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52. *See, e.g.*, Weiner v. Greyhound Bus Lines, Inc., 55 App. Div. 2d 189, 389 N.Y.S.2d 884 (1976).

53. *See, e.g.*, Crane Boom Lifeguard Co. v. Saf-T-Boom Corp., 362 F.2d 317 (8th Cir. 1966), *cert. denied*, 386 U.S. 908 (1967); San Manuel Copper Corp. v. Redmond, 8 Ariz. App. 214, 445 P.2d 162 (1968); Goetz v. Board of Trustees, Policemen's and Firemen's Retirement System, City of Wichita, 203 Kan. 340, 454 P.2d 481 (1969); McMenomy v. Ryden, 276 Minn. 55, 148 N.W.2d 804 (1967).

54. *See, e.g.*, Industrial Credit Co. v. Berg, 388 F.2d 835 (8th Cir. 1978); Price v. Worldvision Enterprises, Inc., 455 F. Supp. 252 (S.D.N.Y. 1978); Sosbee v. Alabama Farm Bureau Mut. Cas. Ins. Co., 56 Ala. App. 334, 321 So.2d 676 (1975); Kimbrough v. Routh Trucking Co., 241 Cal. App. 2d 401, 50 Cal. Rptr. 518 (1966); Osburn v. Stickel, 187 So.2d 89 (Fla. Dist. Ct. App. 1966); Country Mut. Ins. Co. v. Regent Homes Corp., 64 Ill. App. 3d 666, 380 N.E.2d 516 (1978); Bourgeois v. Sprague, 390 A.2d 464 (Me. 1978); Kayler v. Gallimore, 269 N.C. 405, 152 S.E.2d 518 (1967); Estate of Flynn, 479 Pa. 300, 388 A.2d 672 (1978).

55. *See, e.g.*, Mpiliris v. Hellenic Lines, Limited, 323 F. Supp. 865 (S.D. Tex. 1970), *aff'd.*, 440 F.2d 1163 (5th Cir. 1971); W.W. Chambers, Inc. v. Audette, 385 A.2d 10 (D.C. 1978); Mayhew v. Deister, 144 Ind. App. 111, 244 N.E.2d 448 (1969). *Cf.* Petersen v. Fee Intern, Ltd., 435 F. Supp. 938 (W.D. Okla. 1974); Rankin v. Frebank Co., 47 Cal. App. 3d 75, 121 Cal. Rptr. 348 (1975); Cowan v. Insurance Co. of North America, 22 Ill. App. 3d 883, 891, 318 N.E.2d 315, 321 (1974) (privity exists where the two litigants have an identical interest in the same property right); Glasscock v. Citizens Nat'l Bank, 553 S.W.2d 411 (Tex. Ct. App. 1977).

Note that the meaning of "privity" in the context of collateral estoppel law is not the same as that employed in the context of contract law. *See, e.g.*, Putman Mills Corp. v. U.S., 479 F.2d 1334 (Ct. Cl. 1973).

56. *See, e.g.*, Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978).

57. *See, e.g.*, Charvis v. Charvis, 529 S.W.2d 814 (Tex. Ct. App. 1975).

58. *See, e.g.*, Fabricius v. Freeman, 466 F.2d 689 (7th Cir. 1972).

By way of illustration, it has been held that where the Attorney General brought suit against an employer alleging discrimination, a judgment in favor of the employer did not bar a subsequent suit by the employer's employees. Even though the same allegations were the subject of both suits, the different plaintiffs represented different interests.[59] Conversely, it has been held that where an employee brought suit against his employer charging discrimination and the case was dismissed, the Equal Employment Opportunity Commission was not estopped from bringing a subsequent suit arising out of the same alleged instance of discrimination.[60] Although the same factual issue was present in both suits, the EEOC represented sufficiently different interests than those represented by the prior litigants. The EEOC represented a "societal interest," whereas the predecessor litigant, a private employee, was concerned solely with his own "private right," that is, his own individual interests.[61] In sum, the key to privity is identity of *legal interests.*[62] In this respect, the concept of privity differs from the overall doctrine of collateral estoppel where an identity of *factual issue* is the key.

To reiterate, the privity prerequisite will ordinarily not foreclose collateral estoppel's *offensive* application in products liability litigation because the defendant is usually the same party who participated in the prior adjudication in which the product was held to be defective. An exception to this general rule may be where "successor" businesses are involved; that is, where the former defendant has since been taken over by another business entity. If the successor business, which is the present day defendant, is owned by a different set of owners than the prior

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59. Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972). *See also* Trbovich v. UMW, 404 U.S. 528 (1972), wherein the Court noted that although the interests of individual miners in a suit brought under the Landrum-Griffin Act may be *related* to the interests represented by the Secretary of Labor in a suit brought under the same act, said interests were not "identical." *Id.* at 538-39. Therefore, the Court permitted the miners to intervene in an existent suit brought by the Secretary. *Id.* at 538-39.

60. Equal Employment Opportunity Com'n v. Eagle Iron Works, 367 F. Supp. 817, 821-22 (S.D. Iowa 1973).

61. *Id.* at 821-22.

62. *See, e.g.*, Gerrard v. Larsen, 517 F.2d 1127, 1133-35 (8th Cir. 1975) (beneficiaries under wrongful death statute in privity with the decedent); United States v. Webber, 396 F.2d 381, 386-88 (2d Cir. 1968) (sole shareholders in privity with corporation); Falk v. Falk Corp., 390 F. Supp. 1276, 1282-84 (E.D. Wis. 1975) (second wife in privity with deceased husband's estate); Klein v. Whitehead, 40 Md. App. 1, 389 A.2d 374, 383-84 (1978) (trustee in bankruptcy in privity with bankrupts); Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co., 294 Minn. 274, 277-78, 200 N.W.2d 45, 47-49 (1972) (corporate third-party defendant and plaintiff in previous action held to be in privity); Gilman v. Osborn, 78 N.M. 498, 500, 433 P.2d 83, 85 (1967) (in action to quiet title, grantees in privity with grantor); Jones v. Flannigan, 270 Or. 121, 124, 526 P.2d 543, 545 (1974) (father in individual capacity in privity with his position as administrator of deceased son's estate). *See generally* Vestal, *Claim Preclusion and Parties in Privity: Sea-land Services v. Gaudet in Perspective,* 60 IOWA L. REV. 973 (1975).

business, it could be argued that it would be unconstitutional to estop the new owners from denying the conclusive and prospective effect of a finding of fact rendered in a prior lawsuit of which they had no notice and in which they took no part.[63]

Collateral estoppel asserted defensively is in sharp contrast to the doctrine's offensive use. In the former case, privity does become a major consideration, because it must be determined if the present plaintiff is in privity of interest with the plaintiff in the prior adjudication so as to be bound by the prior court's finding that the product was not defective. Research has revealed no reported case that supports the proposition that two litigants are in privity of interest merely because they have used products of a similar design and have both suffered product related mishaps.[64] The existence of similarly designed products in the fact patterns, even when coupled with similar personal injuries, still is

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63. However, if the business entity which was the defendant in the seminal case, and which was the object of an asserted estoppel in the second case, has its own independent legal identity separate and distinct from that of its owners then it could be argued that the above described logic has no application. To wit, since the corporation was a party to the first suit, and the same corporation is the defendant in the second suit, said corporation did have a full opportunity to litigate the issue of a defect. In this scenario it would make no difference that the corporation might be owned by a different set of shareholders at the time of the second suit. After all, it is the *corporation,* a separate and distinct legal entity, which is the defendant in both cases.

On the other hand, this rationale would not necessarily apply where the first suit was against corporation X, and the second suit was against corporation Y, which might have bought corporation X's stock or assets in the interim between the suits. Since corporation Y, the defendant in the suit wherein the estoppel is alleged, was not a party to the first suit, it should not be bound by the findings therein unless the court finds that a privity of interest existed between the two corporations *at the time of the first suit.*

For a discussion of the successor corporations' liability in the products liability setting *see generally* Heitland, *Survival of Product Liability Claims in Assets Acquisitions,* 34 BUS. LAW 489 (1979); Comment, *Products Liability for Successor Corporations: A Break from Tradition,* 49 U. COL. L. REV. 357 (1978); Comment, *The Extension of Products Liability to Corporate Asset Transferees — An Assault on Another Citadel,* 10 LOY. L.A. L. REV. 584 (1977); Comment, *Extension of Strict Tort Liability to Successor Corporations,* 61 MARQUETTE L. REV. 595 (1978); Note, *Products Liability — Liability of Transferee for Defective Products Manufactured by Transferor,* 30 VAND. L. REV. 238 (1977); Note, *Postdissolution Product Claims and the Emerging Rule of Successor Liability,* 64 VA. L. REV. 861 (1978).

64. On this point *see* Olivarez v. Broadway Hardware, Inc., 564 S.W.2d 195 (Tex. Ct. App. 1978), wherein it was held that a retailer and a manufacturer of a single product, a pellet gun, were not in privity. Thus a judgement for the manufacturer on the issue of a defect would not preclude a subsequent suit against the retailer on a duty to warn theory. *Id.* at 200-01.

Actually, the *Olivarez* court did not have to address the issue of privity since it was clear that the two cases involved different theories of a product defect. *Id.* at 197, 199. If different theories are involved, then the cases simply do not share an identity of issue, even though they may both relate to the same product. In any case, if the *Olivarez* court held that two different parties in a single product's chain of distribution are not in privity, then one would imagine that the court would, *a fortiorri,* hold that two different consumers are not in privity simply because they have both used products of a similar design.

For a controversial analysis of the concept of privity in the multiple claimant collateral estoppel setting *see* Comment, *Nonparties and Preclusion by Judgement: The Privity Rule Reconsidered,* 56 CA. L. REV. 1098 (1968).

relevant only to the problem of an identity of issue,[65] not to an identity of interest.

Clearly, the two litigants described above represent different interests in that they are concerned *only* with their own personal injuries. The first litigant was not concerned with the second litigant's personal injuries at the time that the first case went to trial. Indeed, at that time, it is possible that the product related accident which spawned the second lawsuit had not yet occurred. Moreover, the second plaintiff was probably unconcerned with the first plaintiff's lawsuit and did not participate therein.

Accordingly, under existing case law, it cannot be said that different plaintiffs who have experienced personal injuries while using similarly designed products are in privity of interest so as to allow a defendant who was successful in the first case to assert collateral estoppel in the second case.

B. Mutuality

As previously mentioned, the rule of mutuality forecloses the offensive use of collateral estoppel in products liability litigation in a number of states, simply because the doctrine of privity forecloses its defensive use.[66] This conclusion is mandated by the nature of the rule of mutuality itself. Succinctly stated, mutuality disallows a litigant's offensive use of collateral estoppel unless the doctrine could have been used defensively against that litigant had the prior case gone the other way.[67] In reality, the concept of mutuality may be seen as simply the complement of the concept of privity.

In the past, many courts considered the doctrine of mutuality to be a *sine qua non* before they would apply collateral estoppel.[68] However, a

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65. *See* section III. *A. infra.*

66. *See* note 47 and accompanying text *supra.*

67. *See, e.g.,* Sosebee v. Alabama Farm Bureau Mut. Cas. Ins. Co., 56 Ala. App. 334, 321 So.2d 676 (1975); Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977); Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 498 P.2d 265 (1972); City of Mason v. Mason State Bank, 63 Mich. App. 288, 234 N.W.2d 489 (1975).

68. *See, e.g.,* New York & Cuba Mail S. S. Co. v. Continental Ins. Co. of New York, 32 F. Supp. 251 (S.D.N.Y. 1940); Hogan v. Bright, 214 Ark. 691, 218 S.W.2d 80 (1949); Montgomery v. Taylor-Green Gas Co., 306 Ky. 256, 206 S.W.2d 919 (1947); Stewart v. City of Springfield, 350 Mo. 234, 165 S.W.2d 626 (1942); Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 79 S.E.2d 167 (1953), *rehearing denied,* 240 N.C. 196, 81 S.E.2d 404 (1954); Kirby Lumber Corp. v. Southern Lumber Co., 145 Tex. 151, 196 S.W.2d 387 (1946); Tyrell v. Prudential Ins. Co. of America, 109 Vt. 6, 192 A.2d 184 (1937). Note also that the RESTATEMENT OF JUDGEMENTS § 93 also adhered to a strict mutuality rule.

Some modern courts still require mutuality. *See, e.g.,* Newport Div., Tenneco Chem., Inc. v. Thompson, 330 So.2d 826 (Fla. Dis. Ct. App. 1976); Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969); Howell v. Vito's Trucking & Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971); Atenico v. Vigil, 86 N.M. 181, 521 P.2d 646 (1974).

number of modern, liberal courts have favored greater flexibility in the application of the doctrine.[69] Other courts have gone still further and have greatly discounted the doctrine.[70] Indeed, the New York Court of Appeals has gone so far as to state that in the State of New York the doctrine of mutuality is now a "dead letter."[71]

The problems inherent in applying collateral estoppel to products liability litigation, while simultaneously disregarding the rule of mutuality, shall be discussed subseqently in this article. At this juncture it is enough to state that because the concept of privity prevents the defensive use of collateral estoppel in such litigation, the doctrine of mutuality, in effect, prevents its offensive use. Because many commentators have noted that the "modern trend" is to do away with the requirement of mutuality,[72] the balance of this article shall rest on the presumption that it is legally possible to apply collateral estoppel offensively in products liability litigation.

II. Issues in the Application of Collateral Estoppel to Products Liability Litigation

A. Federal Collateral Estoppel

Erie Railroad Co. v. Tompkins[73] teaches us that except in matters governed by the United States Constitution or by federal statutes, the law to be applied by federal courts in diversity of citizenship cases is the

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69. *See, e.g.*, Pennington v. Snow, 471 P.2d 370, 377 (Alaska 1970) (generally, mutuality not a requirement, but question to be considered in each case is whether waiving of mutuality is unfair); Foltz v. Pullman, Inc., 319 A.2d 38, 41 (Del. Super. Ct. 1974) (mutuality applied only insofar as it is consistent with the public policy considerations behind collateral estoppel and res judicata); Morneau v. Stark Enterprises, Ltd., 56 Haw. 420, 423, 539 P.2d 472, 475 (1975) (mutuality not required defensively); Matter of Evans, ___ Iowa ___, 267 N.W.2d 48, 51 (1978) (no requirement of mutuality for defensive use of doctrine); Shubeck v. Ondek, 167 N.J. Super. 121, 400 A.2d 544, 546-48 (1979) (mutuality one factor to be considered in application of collateral estoppel); Bates v. Devers, 214 Va. 667, 672, 202 S.E.2d 917, 921 (1974) (no mechanical application of doctrine of mutuality of estoppel); Kyreacos v. Smith, 89 Wash. 2d 425, 428-29, 572 P.2d 723, 724-25 (1977) (mutuality waived in certain circumstances). *See also* RESTATEMENT (SECOND) OF JUDGEMENTS § 88, Comment and Reporter's Note (Tent. Draft, No. 2, 1975).

70. *See, e.g.*, Parklane Hosiery Co., Inc. v. Shore, ___ U.S. ___, 99 S. Ct. 645 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (*Parklane* allows offensive use of collateral estoppel absent mutuality, while *Blonder-Tongue* abandoned the mutuality requirement for defensive use); Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942); M.P.C., Inc. v. Kenny, 279 Md. 29, 367 A.2d 486 (1977); Paradise Palms Community Ass'n. v. Paradise Homes, 89 Nev. 27, 505 P.2d 596 (1973); Sanderson v. Balfour, 109 N.H. 213, 247 A.2d 185 (1968); Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329 (1970); *In re* Ellis, 460 Pa. 281, 333 A.2d 728 (1975).

71. B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967).

72. *See generally* Note, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521 (1976); Note, *Collateral Estoppel-Demise of Mutuality in Washington?*, 44 WASH. L. REV. 449 (1969); Jeffrey, *Collateral Estoppel — The Doctrine of Mutuality: A Dead Letter*, 47 NEB. L. REV. 640 (1968); Gibson, *Civil Procedure-Abandonment of the Mutuality Requirement*, 22 ARK. L. REV. 491 (1968).

73. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

law of the state.[74] Accordingly, there is no "general federal common law,"[75] at least as far as diversity cases are concerned. Yet, as already observed, collateral estoppel is a common law doctrine. Hence, the application of the doctrine in federal courts gives rise to numerous questions.

For example, although the federal courts have entertained many products liability lawsuits, the vast majority of these cases have been heard by dint of diversity jurisdiction. In such a case, not only will the substantive state law of products liability be applicable, but it appears that, generally speaking, state law will also be controlling on the issue of collateral estoppel.[76] It should, however, be noted that if the first case (wherein the product was held to be defective or non-defective) turned on federal law, the applicability of the doctrine of res judicata could be a matter of federal law in the second case, notwithstanding the fact that the second case is in the federal court system merely by dint of diversity.[77]

In limited circumstances,[78] it is possible to bring a personal injury products liability suit in the federal courts under substantive federal law. For example, the federal courts have developed a limited common law of products liability jurisprudence applicable in admiralty cases.[79] It appears that in such actions the federal courts have followed the con-

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74. *Id.* at 64, 78.

75. *Id.*

76. *See* section III. *A.* 2. *infra;* Semler v. Psychiatric Institute of Washington, D.C., Inc., 575 F.2d 922, 927 (D.C. Cir. 1978); St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583, 585 (4th Cir. 1973); Ritchie v. Landau, 475 F.2d 151, 154, (2d Cir. 1973); Gambocz v. Yelencsics, 468 F.2d 837, 841 n.14 (3rd Cir. 1972); Hackler v. Indianapolis & S.E. Trailways, Inc., 437 F.2d 360, 362 (6th Cir. 1971); Breeland v. Security Ins. Co., 421 F.2d 918, 921 (5th Cir. 1969); Clarke v. Volkswagen of America, Inc., 419 F. Supp. 74, 75 (S.D. Iowa 1976); Freeman v. Marine Midland Bank — N.Y., 419 F. Supp. 440, 446 (E.D.N.Y. 1976); Falk v. Falk Corp., 390 F. Supp. 1276, 1280 (E.D. Wis. 1975); Chrysler Corp. v. Lakeshore Commercial Fin. Corp., 389 F. Supp. 1216, 1220-21 (E.D. Wis. 1975), *aff'd.*, 549 F.2d 804 (7th Cir. 1977); Gonzalez v. Fireman's Fund Ins. Co., 385 F. Supp. 140, 146 (D.P.R. 1974). *See also* Comment, *Civil Procedure — State Law of Res Judicata Applied in Federal Court Exercising Diversity Jurisdiction,* 9 CUMBERLAND L. REV. 569, 573 (1978).

77. *See* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964). However, one would imagine that it would be a very rare products liability case indeed that would be in federal court by dint of diversity, where a prior case involving the same issue turned on federal law. Obviously, if the prior case turned on federal law, so should the second. Hence, one would expect the second case to be in federal court as a result of a federally created right and not through the vehicle of diversity jurisdiction.

78. These limited circumstances refer to "matters governed by the Federal Constitution or by Acts of Congress." Erie R.R. Co. v. Thompson, 304 U.S. 64, 78 (1938).

79. *See, e.g.,* JIG the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (5th Cir. 1975), *cert. denied,* 424 U.S. 954 (1976); McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965); Streatch v. Associated Container Transp., Ltd., 388 F. Supp. 935 (C.D. Cal. 1975); Houston-New Orleans, Inc. v. Page Eng'r. Co., 353 F. Supp. 890 (E.D. La. 1972); Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971). *See generally* McCane, *Maritime Products Liability,* 18 HAST. L.J. 831 (1967); Casenote, *Products Liability — Strict Products Liability*

ceptual lead of the majority of the state courts. Hence, as a majority of state courts have gradually recognized a cause of action sounding in strict liability,[80] federal courts entertaining admiralty products liability cases have likewise recognized the doctrine.[81]

The incidence of personal injury products liability suits governed by substantive federal law may increase in the near future. In keeping with

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in Admirality, 44 J. AIR LAW AND COM. 649 (1979); Note, *Admirality — Products Liability — The Contract-Tort Question,* 50 TULANE L.R. 955 (1976).

Additionally, pursuant to the Consumer Product Safety Act, 15 U.S.C. § 2051-81 (1976) a consumer may bring a federally created cause of action in district court for injuries sustained by reason of an intentional violation of a rule or order issued by the Consumer Product Safety Commission, 15 U.S.C. § 2072(a) (1976). The creation of this federal cause of action was not meant to replace the existing state causes of action that injured consumers may rely on, nor was it intended to replace limited federal common law causes of action such as those provided in admiralty product liability cases. Pursuant to this federal cause of action, it has been judicially held that the "injury" necessary to the establishing of a suit may be a personal, as opposed to a commercial, injury. Tiesler v. Martin Paint Stores, Inc., 76 F.R.D. 640, 642 (E.D. Pa. 1977). However, this statutorily created right seems to have been discounted to date by plaintiffs' attorneys, inasmuch as research has revealed no reported decisions where a personal injury suit brought under this act has resulted in a verdict. For a general discussion of the act *see* Note, *The Consumer Product Safety Act & Private Causes of Action for Personal Injury: What Does a Consumer Gain?,* 30 BAYLOR L. REV. 115 (1978).

At present, it is unclear whether one may bring a personal injury products liability action for a violation of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2301-12 (1976). Although § 2310(d)(1) of the Act does provide for a cause of action where the Act has been violated, it is unclear if this includes causes of action for personal injury. *See* 15 U.S.C. § 311(b)(2) (1976). While at least one commentator has concluded that it does, there is no case law supporting this conclusion. *See* Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor,* 13 CALIF. W.L. REV. 391, 422 (1977). *But see* Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case,* 44 FORD L. REV. 273, 289 (1975). *See generally* Brickley, *The Magnuson-Moss Act — An Analysis of the Efficacy of Federal Warranty Regulations as a Consumer Protection Tool,* 18 SANTA CLARA L. REV. 73 (1978); Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties,* 55 N.C.L. REV. 835 (1977).

Moreover, research has revealed no cases holding that a federal personal injury cause of action is created due to a violation of other federal statutes such as the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301-92 (1976). *See* Pacific Trading Co. v. Wilson & Co., 547 F.2d 367, 370 (7th Cir. 1976), where it was stated that "the statute does not provide a cause of action for private parties suing for civil damages. . . ." *Accord,* American Home Prods. Corp. v. Johnson and Johnson, 436 F. Supp. 785 (S.D.N.Y. 1977), *aff'd.,* 577 F.2d 160 (2d Cir. 1978); Broward County v. Eli Lilly & Co., 329 F. Supp. 364 (S.D. Fla. 1971); Cross v. Board of Supervisors, 326 F. Supp. 634 (N.D. Cal. 1968), *aff'd.,* 442 F.2d 362 (9th Cir. 1971); Clairol Inc. v. Suburban Cosmetics and Beauty Supply, Inc., 278 F. Supp. 859 (N.D. Ill. 1968).

80. *See* RESTATEMENT (SECOND) OF TORTS § 402A. *See also* 2 Frumer & Friedman, *supra* note 6, at § 16A(3); PROD. LIAB. REP. (CCH) ¶ 4070 (1977). For a general discussion of the gradual recognition of strict products liability *see Note,* Massachusetts Strict Products Liability Law: Alternate Route, Same Destination, 14 NEW ENGLAND L. REV. 237 (1979).

81. *See* Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977), wherein it was stated that "strict products liability actions have become sufficiently well-established to justify its being incorporated into the law of admiralty." *Id.* at 1134. The *Pan-Alaska* Court cited the following cases as being in accord with its proposition: Lindsay v. McDonnel Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972); Ohio Barge Line, Inc. v. Dravo Corp., 326 F. Supp. 863 (W.D. Pa. 1971); Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969).

this possibility it should be noted that several products liability bills have been introduced in Congress,[82] and that the Department of Commerce recently published its Draft Uniform Products Liability Law.[83] Note, however, that none of the congressional bills seems to be on the verge of passage and, furthermore, that the Department of Commerce's draft uniform law is, in its original form, merely a suggested statute which the various states may either adopt or reject. To what extent, if any, the federal government will ultimately preempt existing state products liability law remains to be seen.

In a personal injury products liability action brought in federal court pursuant to a substantive federal products liability law,[84] it would appear that federal collateral estoppel law is applicable. This conclusion seems warranted in light of several cases holding that where substantive federal law is involved, the federal courts may apply their own interpretation of the doctrine of collateral estoppel.[85]

It may generally be observed that the limited federal common law of collateral estoppel embodies many of the principles embraced by the more liberal state courts. For example, under the federal standard, an important consideration when determining whether to apply collateral estoppel is the litigant's opportunity to have had a full and fair hearing in the first case.[86] Additionally, it has been stated that the doctrine will be applied by federal courts where the identical issue was actually litigated in the prior suit and its resolution therein was essential in order to reach the judgment rendered.[87] The Supreme Court has observed

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82. *See, e.g.*, H.R. 1675, 96th Cong., 1st Sess. (1979); H.R. 12470, 95th Cong., 2nd Sess., 124 CONG. REC. 3392 (daily ed. 1978); H.R. 6300, 95th Cong., 1st Sess., 123 CONG. REC. 3258 (daily ed. 1977); S. 403, 95th Cong., 1st Sess., 123 CONG. REC. 1185 (daily ed. 1977); S. 527, 95th Cong., 1st Sess., 123 CONG. REC. 1735 (daily ed. 1977).

83. 44 Fed. Reg. 2996 (1979).

84. *See* notes 78-81 and accompanying text *supra*.

85. *See* Heiser v. Woodruff, 327 U.S. 726, 731-32, *rehearing denied*, 328 U.S. 879 (1946); Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir.), *rehearing denied*, 514 F.2d 1072, *cert. denied*, 423 U.S. 908 (1975); Williams v. Ocean Transp. Lines, Inc., 425 F.2d 1183, 1188-90 (3rd Cir. 1970). *See also* Freeman v. Marine Midland Bank — N.Y., 419 F. Supp. 440, 446 (E.D.N.Y. 1976) (federal limited common law of collateral estoppel applies to second case even though the first case was heard in a state court, as long as the first case dealt with claims decided under federal bankruptcy law).

86. *See, e.g.*, Speaker Sortation Systems v. United States Postal Service, 568 F.2d 46 (7th Cir. 1978); Butler v. Stover Bros. Trucking Co., 546 F.2d 544 (7th Cir. 1977); Dunlap v. City of Chicago, 435 F. Supp. 1295 (N.D. Ill. 1977); Gilkey v. Chesapeake and Potomac Tel. Co., 419 F. Supp. 623 (S.D.W. Va. 1976). *See also* Comment, *Civil Procedure — Collateral Estoppel — Affirmative Application in Multiple Claimant Situations*, 19 DEPAUL L. REV. 410 (1969).

87. *See* Gulf Oil Corp. v. Fed. Power Comm., 563 F.2d 588, 602 (3d Cir. 1977); *In re* Piper Aircraft, 551 F.2d 213, 218-19 (8th Cir. 1977); *In Re* Botany Industries, Inc., 463 F. Supp. 793, 795 (E.D. Pa. 1978); United States v. State of Wash., 459 F. Supp. 1020, 1083 (W.D. Wash. 1978); Greenberg v. Cutler-Hammer, Inc., 452 F. Supp. 1387, 1390 (E.D. Wisc. 1978); Ligon v. State of Maryland, 448 F. Supp. 935, 946 (D. Md. 1977); United States v. Anaconda Co., 445 F. Supp. 486, 495 (D.D.C. 1977); Ham v. Aetna Life Ins. Co., 293 F. Supp. 876 (N.D. Okla. 1968).

that federal trial courts have broad discretion in determining when the doctrine should be applied, but that the doctrine should generally be avoided where its application would be unfair to a litigant.[88] Therefore, it would appear that the application of the doctrine is dependent upon numerous public policy considerations.[89]

B. Public Policy Considerations

It has been said that the very heart of res judicata is public policy,[90] and that public policy demands that the doctrine be enforced.[91] Among the public policy arguments advanced in support of the doctrine are that it: (1) promotes judicial economy;[92] (2) forces litigants to economize on lawsuits;[93] (3) engenders public respect for the courts;[94] (4) helps establish certainty in legal relations;[95] and, (5) adds stability to social institutions.[96] In short, res judicata is said to be a practical doctrine[97] which aids in the avoidance of inconsistent judicial decisions[98]

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88. In Parklane Hosiery Co., Inc. v. Shore, ___ U.S. ___, 99 S. Ct. 645 (1979), a stockholder's class action was brought for the alleged issuance of a materially false and misleading proxy statement by a corporation. Before the class action came to trial, the Securities and Exchange Commission sued the same defendants alleging the same facts. The SEC was granted a declaratory judgment which was affirmed by the Court of Appeals. The stockholders in the original action then moved for a partial summary judgment arguing that the corporation was collaterally estopped from relitigating the issues resolved against them in the SEC action. The motion was denied in the United States District Court, but was reversed by the Court of Appeals. The United States Supreme Court granted certiorari.

Justice Stewart, after discussing the merits and drawbacks of the use of offensive collateral estoppel in the federal courts, concluded that trial courts should be given broad discretion in determining when to apply the doctrine. He stated that: "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Id.* at 651-52. The Court then determined that the arguments against the use of offensive collateral estoppel were unpersuasive in the present case, and therefore affirmed the Court of Appeals' decision.

89. *See* Parklane Hoisery Co. v. Shore, ___ U.S. ___, ___, 99 S. Ct. 645, 649 (1979); Johnson v. United States, 576 F.2d 606, 615 (5th Cir. 1978).

90. *See* Parish v. Maryland & Va. Milk Producers Ass'n., 437 F. Supp. 623, 626 (D. Md. 1977).

91. *See* Corey v. Avco-Lycoming Div., Avco Corp., 163 Conn. 309, 316-17, 307 A.2d 155, 160 (1972), *cert denied,* 409 U.S. 1161 (1973).

92. *See* Mitchell v. Carter, 545 S.W.2d 869, 871 (Tex. Ct. App. 1976).

93. *See* Dawkins v. Mabisco, Inc., 549 F.2d 396, 397 (5th Cir.), *cert denied,* 433 U.S. 910, *rehearing denied,* 434 U.S. 882 (1977). *Cf.* Mills v. Freeman, 294 F. Supp. 119, 125 (D. Md. 1968) (the doctrine prevents piecemeal litigation).

94. *See* Johnson v. United States, 576 F.2d 606, 609-10 (5th Cir. 1978), *citing,* Southwest Airlines Co. v. Texas International Airlines, 546 F.2d 84, 94 (5th Cir. 1977).

95. *See* Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 578, *rehearing denied,* 415 U.S. 986 (1974); *In re* Transocean Tender Offer Securities Litigation, 427 F. Supp. 1211, 1215 (N.D. Ill. 1977).

96. *See* Johnson v. United States, 576 F.2d 606, 609-10 (5th Cir. 1978), *citing,* Southwest Airlines Co. v. Texas International Airlines, 546 F.2d 84, 94 (5th Cir. 1977).

97. *See* Weiner v. Greyhound Bus Lines, Inc., 55 App. Div. 2d 189, 191, 389 N.Y.S.2d 884, 886 (1976).

98. *See* Adam v. Adam, ___ S.D. ___, ___, 254 N.W.2d 123, 130 (1977).

and serves the common good of society.[99] Inasmuch as its application is a function of public policy, various courts have noted that public policy may likewise demand that, on occasion, res judicata be rejected.[100]

The application of collateral estoppel is also a function of public policy.[101] Hence, it has been said that the doctrine helps achieve judicial economy[102] by limiting the relitigation of particular issues.[103] Obviously, many of the public policy arguments that justify the application of res judicata[104] have equal application to the doctrine of collateral estoppel.

Unfortunately, although numerous courts have observed that the doctrine of collateral estoppel is a creature of public policy, none of the three courts that saw fit to apply it offensively in products liability litigation chose to discuss the policy considerations that argue for or against the doctrine's application.[105] Accordingly, the question of whether policy considerations should encourage or discourage the application of collateral estoppel to a products liability setting is one that remains unresolved.

The following sections present a brief synopsis of such policy considerations. However, it should be noted that said synopsis is intended merely to supply a starting point for a more in-depth analysis. It is hoped that future courts might speak to the concepts mentioned herein when addressing issues inherent in the application of collateral estoppel to products liability litigation.

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99. *See, e.g.*, School Dist. No. 1 v. Snowflake Union High School Dist., 100 Ariz. 389, 414 P.2d 985 (1966).

100. *See* USM Corp. v. Standard Pressed Steel Co., 453 F. Supp. 743, 747 (N.D. Ill. 1978); Freeman v. Marine Midland Bank — N.Y., 419 F. Supp. 440, 448 (E.D.N.Y. 1976).

101. *See* Note, *Comparative Negligence in California: Multiple Party Litigation*, 7 PAC. L.J. 770, 791 (1976).

102. *See, e.g.*, Dunlap v. City of Chicago, 435 F. Supp. 1295, 1298 (N.D. Ill. 1977) (collateral estoppel preserves judicial economy by preventing relitigation of the same issue and deters possibility of conflicting judgments on same issue). *Cf.* Parklane Hosiery Co. v. Shore, ___ U.S. ___, ___, 99 S. Ct. 645, 650-51 (1979) (while defensive use of collateral estoppel promotes judicial economy by providing a plaintiff with strong incentive to join all potential defendants in the first action, offensive use of the doctrine will likely increase the total amount of litigation by giving a plaintiff incentive to refrain from intervening in the first action in hope that the first action by another plaintiff will result in a favorable judgment). *But see* Brown v. Globe Tools & Eng'r Co., 337 So.2d 894, 899 (La. Ct. App. 1976) (the interest of judicial economy should not bar a party's right to be heard).

103. *See* United States v. LaFatch, 565 F.2d 81, 83 (6th Cir. 1977), *cert. denied*, 434 U.S. 971 (1978); Wittenberg v. United States, 304 F. Supp. 744, 746 (D. Minn. 1969); Vezina v. Continental Cas. Co., 66 Cal. App. 3d 665, 670, 136 Cal. Rptr. 198, 200-01 (1977); Blake v. Norman, 37 N.C. App. 617, 625, 247 S.E.2d 256, 261 (1978); State v. Drake, 16 Wash. App. 559, 563, 558 P.2d 828, 831 (1976).

104. *See* notes 90-100 and accompanying text *supra*.

105. *See, e.g.*, Ezagui v. Dow Chemical Corp, 598 F.2d 727 (2d Cir. 1979); Grant v. Parke, Davis & Co., 544 F.2d 521 (7th Cir. 1976); Vincent v. Thompson, 50 App. Div. 2d 211, 377 N.Y.S.2d 118 (1975).

1. Policy Considerations Supporting the Application of Collateral Estoppel

The basic policy considerations that justify the imposition of collateral estoppel in *non*-products liability cases are of course also applicable to products liability cases. Thus, the imposition of an estoppel in a products liability setting will economize the courts' time as well as that of the litigants and their respective counsel.[106] Indeed, the imposition of such an estoppel might leave the issue of causation as the only defense for a manufacturer to rely on, thereby encouraging a massive settlement spree on the part of defendants.[107] Hence, application of the doctrine would obviously lessen the workload on the courts by a noticeable degree.

Obviously, one would hope that the basic argument in support of the application of an estoppel is that the interests of justice are best served thereby.[108] This argument has application to the products liability setting. In the products liability context, one may argue that the application of the doctrine serves the interests of justice because it "guarantees" compensation to all plaintiffs who can prove causation. If collateral estoppel is not applied, a certain number of plaintiffs may be expected to lose their respective suits, if for no better reason than the law of averages. The application of an estoppel in such circumstances would prevent such an injustice from ever occurring.

Moreover, there are special reasons which support the imposition of an estoppel in products liability cases which have no bearing in non-products liability settings. For example, the noticeable difference between the resources available to the average plaintiff's counsel and the average defendant's counsel in products liability actions supports the applicability of an estoppel. In fact, it can not only be persuasively argued that there may exist a disparity between such resources, but that opposing counsel are occasionally on diametrical ends of the "time,

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106. For cases holding that this is a valid policy consideration supporting the applicability of an estoppel *see* notes 92, 93 and 102 and accompanying text *supra.*

107. Of course, such a "fear induced" settlement spree would ultimately result in higher consumer prices. *See* Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal.2d 453, 105 P.2d 436 (1944) (Traynor, J., concurring) where Justice Traynor stated that:

> Even if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for *the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.*

Id. at 461, 150 P.2d at 440-41 (emphasis added).

108. The various public policy reasons advancing the use of res judicata, which are discussed in notes 90-100 and accompanying text *supra,* may be viewed as being in parity with those supporting the application of collateral estoppel. The arguments suggest that use of either doctrine promotes justice in general.

money and resources'' scale. Whereas many plaintiffs' counsel are retained on a contingent fee basis and have little or no technical and engineering support staff, many defendants' counsel enjoy the relative luxury of spending as much time on a case as they desire, and, in addition, have the manufacturer's experts, design engineers and test facilities at their disposal.

The marked difference in resources available to counsel arguably justifies the application of collateral estoppel. It may be suggested that if a plaintiff who proceeds against a major manufacturing defendant can overcome all of the aforementioned litigation obstacles and still prove that the product in question was defective, then a defect must surely exist.[109] In light of the substantial obstacles that plaintiffs' counsel must encounter in each individual suit, it may be argued that it is simply unfair to require successive plaintiffs to prove in repeated instances that the product in question is defective.

Lastly, it may be argued that the imposition of liability by operation of an estoppel may ultimately encourage safer product design and better quality control practices. Simply put, since the application of an estoppel would result in a massive penalty for issuing a defective product into the marketplace, manufacturers would take every possible step to prevent product defects. To do otherwise would simply not make sound business sense.[110] This argument would continue to the effect that society would ultimately experience fewer product related injuries and deaths through the application of an estoppel. In this regard, collateral estoppel could be viewed as a judicial tool, which, in one major stroke, would accomplish a noticeable degree of social engineering.

2. Policy Considerations Rejecting the Application of Collateral Estoppel

The primary argument against the application of collateral estoppel is that its application is manifestly unjust in light of the fact that the doctrine can only work in favor of plaintiffs.[111] This proposition can hardly

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109. However, determination of when a product is defective is subject to interpretation. *See* section III. *B. supra* for a discussion of intrinsically and extrinsically determined defects.

110. For an interesting discussion of how the *primary* imposition of liability pursuant to a liability without fault standard (as opposed to a secondary imposition of liability, based on a prior case which may have been governed by any number of standards, including the "liability without fault" standard) may eventually stimulate greater safety in product design, *see* Holford, *The Limits of Strict Liability for Product Design and Manufacture,* 52 TEX. L. REV. 81, 87 (1973).

111. *See* Parklane Hosiery Co. v. Shore, ___ U.S. ___, ___, 99 S. Ct. 645, 651 (1979) (offensive use of collateral estoppel creates a situation where "potential plaintiffs will have everything to gain and nothing to lose" if judgment in the first case by another plaintiff was against defendant); Currie, *supra* note 7, at 285-89; Note, *supra* note 45, at 1036-37; Comment, *Civil Procedure — Offensive Assertion of a Prior Judgement as Collateral Estoppel — A Sword in the Hands of the Plaintiff?,* 52 N.C.L. REV. 836, 845-46 (1974).

be quarreled with. A related argument would be that the mechanical imposition of an estoppel would undoubtedly result in a certain number of plaintiffs being unjustly enriched. As long as it is possible for a jury to make a mistake, a chance exists that an entire group of people who have suffered product-related injuries may be compensated through the imposition of collateral estoppel even though the product in question is really not defective.[112] Obviously, this anomalous result would have the ultimate effect of unjustly forcing consumers to subsidize foolish and reckless conduct, such as using a can of spray paint near a lit cigarette,[113] through the imposition of higher product prices.

Another argument against the application of collateral estoppel to products liability litigation is that it could spawn a massive increase in the number of lawsuits initiated each year.[114] One may anticipate that the number of lawsuits filed subsequent to injuries which are related to a certain product would increase after it has become a matter of common knowledge among lawyers that the product has been judicially declared to be defective. Whereas in the past a certain percentage of such cases would have been thought of as simply too weak to justify the initiation of a lawsuit, if an estoppel were to lie this percentage would no doubt decrease. After all, the product defect would already have been proven and all that a subsequent plaintiff would be required to do would be to make a showing that the particular defect caused his or her injury.[115] Moreover, it could be argued that the imposition of an estop-

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112. In deciding whether to apply an estoppel in an individual case, the judge should be particularly sensitive of and vigilant for any signs or suggestion of jury error in the seminal case being relied upon as the basis for the estoppel. The recent decision of Katz v. Eli Lilly & Co., No. 75-C-1244 (E.D.N.Y., Memorandum and Order Nov. 29, 1979), is a novel and commendable example of such judicial sensitivity.

Katz was a DES case and the issue was whether the defendant had a right to depose the jurors in a prior case being relied upon by the plaintiff in the present case for a possible estoppel. In the prior case, there was reason to believe on the basis of informal statements allegedly made by certain of the jurors in that case that they had reached their verdict through compromise. The *Katz* court held that "where the original judgment is questioned on the ground that it was based on a compromise verdict, a court must in fairness provide a litigant every opportunity to explore the basis for a defense to offensive use of the judgment as collateral estoppel against it." *Id.* slip op. at 10.

It is suggested herein that the *Katz* ruling is a correct one. Where a jury verdict in a products liability case is relied upon for the purpose of asserting a prospective estoppel, all reasonable efforts should be undertaken to discern whether said verdict can meet the exacting requirements that the imposition of an estoppel in such a case justify. If this entails the taking of the jurors' depositions, so be it. Said depositions will not affect the seminal case in any event. The massive implications that the imposition of an estoppel entail justify this novel and extraordinary procedure.

113. *See* example in section III. *B. infra.*

114. *See* Parklane Hosiery Co. v. Shore, ___ U.S. ___, ___, 99 S. Ct. 645, 650-51 (1979) (offensive use of collateral estoppel will likely increase total amount of litigation).

115. If this causation requirement is not met, then of course the case may still result in a defendant's verdict, notwithstanding the fact that the estoppel has resulted in a finding of an absolute defect. Collateral estoppel's application resolves only one issue (*i.e.*, defect), not "liability." *See* note 139 *infra.*

pel could significantly lighten the plaintiff's burden on this issue as well.[116]

A further argument against the application of collateral estoppel to mass produced products liability litigation is that deleterious economic effects will result thereby. It is not beyond the realm of possibility that a certain number of assembly line jobs, marketing positions and the like, may be eliminated as a result of an entire product line being declared defective. Indeed, if the product in question happens to be produced by a small company, it is possible that the company itself may be forced out of business. Furthermore, it may be argued that the application of the doctrine may eventually lessen the amount of product selection which American consumers would otherwise enjoy. To wit, a certain number of companies may be discouraged from introducing new product designs into the market for fear that if one jury concludes that the product is defective, the entire product line will be jeopardized.[117]

Finally, the very state of products liability law may argue against the

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116. The following example illustrates this proposition:

Imagine that a products liability case is brought which relates to a certain drug. Imagine further that the plaintiff's theory in said case is that the drug is defective because it causes an extraordinarily high percentage of its users to suffer hardening of the arteries. To complete our scenario, imagine that the plaintiff in this case proves that he or she had a perfectly healthy arterial system before the drug was taken, but *after* taking the drug the plaintiff suffered hardening of the arteries and an eventual stroke. Hence, the case results in a plaintiff's verdict.

Thereafter, a second case may be brought by another plaintiff who also claims that the drug was defective for the same reason. However, in this case, imagine that the plaintiff's arterial system was in terrible shape *before* he or she took the drug. As it turns out, this plaintiff, in contrast to the prior one, took very little exercise, had a high cholesterol diet, was overweight and smoked cigarettes. Hence, in this case it is the defendant's position that notwithstanding any qualities its product is alleged to have, the plaintiff's arterial problems were caused solely by himself or herself, and not by the drug.

If an estoppel were to lie in the second case, the jury would be instructed that the product is definitely defective, and they must consider it as such notwithstanding the absence of any evidence on this issue, because it has been found to cause hardening of the arteries in an extraordinarily high percentage of its users. "Coincidentally," the jury will soon be informed that the plaintiff *happens* to have suffered from *exactly* this malady. Obviously, the estoppel-based instruction on the issue of a product defect will influence the jury on the issue of causation. It could be argued that in such a case the estoppel effectively lightens the plaintiff's burden on the issue of causation and results in substantial prejudice to the defendant.

Assuming that the technical prerequisites relating to an estoppel have been satisfied, the trial judge may still want to employ a careful balancing test to see if the probative value of the estoppel on the issue of a defect is outweighed by the prejudice that may result to the defendant on the issue of causation. Since the applicability of an estoppel is an evidentiary question (the estoppel takes the place of independent evidence on the issue it relates to), pursuant to well-established principles, it may be argued that *even where* there is no technical obstacle preventing its application, the trial judge should have discretionary authority to bar same, if its probative value is outweighed by its prejudicial effect. *See* International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 459 (1st Cir. 1963), *cert. denied,* 375 U.S. 820 (1963) (where prejudice quotient is high, evidence with a significant probative thrust may be inadmissible).

117. Indeed, it has been noted that even without the applicability of collateral estoppel, the occasional attachment, of liability without fault in some product liability cases has already led to "a decline in consumer freedom of choice." Thibault v. Sears, Roebuck & Co. ____N.H.____,

doctrine's application to the mass produced product setting. Serious commentators have observed that products liability law is currently in a state of "crisis."[118] The rapid transformation that this area of the law has undergone in recent years has left in its wake a great deal of confusion and apparent contradiction. Indeed, at a recent annual meeting of the American Bar Association, one speaker indicated that because the current state of the law does not provide manufacturers with rules or guidelines to aid them in product design, the existing "law" has now become part of the overall products liability problem rather than part of the solution.[119]

Query if products liability concepts are currently stable and uniform enough to justify the creation of "permanent defects" which, once pronounced, will be considered conclusive in all subsequent fact patterns involving the same product? Some might suggest that this question should at present be answered in the negative.[120] In light of the fact that

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____, 395 A.2d 843, 846 (1978). *See* Kroll, *Products Liability — A Reasonable Exception — The Ultimate Goal,* 25 DRAKE L. REV. 828, 836-41 (1976) on the economic effects of expanding liability.

118. *See, e.g.,* Bivins, *The Products Liability Crisis: Modest Proposals for Legislative Reform,* 11 AKRON L. REV. 595 (1978); Henderson, *Statutory Reform of Products Liability: The Gathering Storm,* THE BRIEF, Spring, 1978, at 5.

Note also that Congress has recently observed: "The product liability crisis, in its basic terms, involves people's jobs, consumer prices, and the very survival of many small businesses." *Products Liability Insurance: Hearings Before the Subcomm. on Capital, Investment and Business Opportunities of the Comm. on Small Businesses,* 95th Cong., 1st Sess., Part I, at 9 (April 4, 1977) (Joint Statement of Reps. Pattison, Pease, Pritchard, Steers and Whalen).

119. *See* 7 PROD. SAFETY & LIAB. REP. (BNA) No. 34, at 651 (remarks of Charles W. Babcock, Jr., August 24, 1979).

120. Note, for example, that the Illinois law of products liability recently underwent a substantial change concerning the relevance and probative impact that compliance with the "state of the art" has in a design defect case. Under an "old line" of cases, starting with Cunningham v. MacNeal Memorial Hospital, 47 Ill.2d 443, 266 N.E.2d 897 (1970), it was thought that compliance with the state of the art (showing compliance with government regulations concerning the product's design or showing that no alternative designs were available which were practical, at the time in question) was irrelevant in a design defect case sounding in "strict products liability." *See, e.g.,* Walker v. Trico Manufacturing Co., 487 F.2d 595, 600 (7th Cir. 1973) (federal court, applying Illinois law, states that compliance with the state of the art may not be a defense in a strict liability design defect case, *citing, MacNeal*).

However, the more modern Illinois rule, as articulated in the recent case of Rucker v. Norfolk & W. Ry. Co., ____ Ill.2d ____, ____ N.E.2d ____, Docket Nos. 51315, 51335 (decided 10/19/79), is that such compliance is not only relevant, but may argue against the finding of a defect, and moreover, even if a defect is found, such evidence may still argue against the imposition of liability because it may prove that the defect did not create an "unreasonably dangerous" condition.

Obviously, it would be improper to impose an estoppel in a post-*Rucker* case which would be based on a pre-*Rucker* finding of a design defect, wherein the defendant was discouraged (or prevented entirely) from offering into evidence the fact that it complied with the state of the art. Simply put, the standard of adjudging "design defects" has undergone substantial change in the interim. Moreover, it may cogently be argued that if such an "about face" in the Illinois law of product liability is possible, it may also be possible in the New York law, or the Georgia law, etc., as well. *See, e.g.,* the various state statutes referred to in note 3 *supra.* Query if it would be wise to impose an estoppel today, pursuant to a finding of a product defect which was rendered yesterday,

numerous courts have observed that collateral estoppel is not a rigid doctrine to be mechanically applied in every circumstance where the technical prerequisites to an estoppel may be present,[121] it might be suggested that the current revolutionary state of products liability law alone argues against applying collateral estoppel at this time.

III. ANALYSIS OF COLLATERAL ESTOPPEL IN THE PRODUCTS LIABILITY SETTING

A. Identity of Issue

1. Identity of Product

Identity of issue is the pivotal concept in any collateral estoppel case. In the context of a products liability—collateral estoppel suit, this concept will ordinarily translate into a requirement that the particular cases in question involve identical products and identical defects. This requirement does not mean that the cases must share similar or common factual circumstances in every respect before an estoppel can apply; rather, there need only be an identity of facts relating to the particular issue for which the moving party is seeking to assert an estoppel.

It must be remembered that collateral estoppel is a doctrine of issue preclusion, unlike res judicata, which is a doctrine of claim preclusion.[122] Collateral estoppel, therefore, is intended to be dispositive only of the particular issue to which it is applied. It is not intended, by itself, to be dispositive of the entire case.

A hypothetical example may be helpful in conveying the concept of identity of issue. Imagine a case involving a disposable syringe which is designed for use on diseased cattle. Each syringe is supposed to contain 100cc of vaccine. Because of an improperly constructed mold, however, an entire lot of the product is released wherein the interior diameter of each syringe is substantially wider than specified; hence, each syringe in this lot contains 150cc of vaccine.

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if the standard for finding such "defects" might undergo substantial change tomorrow? Some might answer that question in the negative.

121. It has been held that collateral estoppel is an equitable principle which should be used carefully, to avoid injustice. *See, e.g.*, Parklane Hosiery Co. v. Shore ___ U.S.___, 99 S. Ct. 645 (1979); U.S. v. Creek Nation, 476 F.2d 1290 (Ct. Cl. 1973); Commonwealth v. Studebaker, 240 Pa. Super. Ct. 37, 362 A.2d 336 (1976).

Other courts have stated that the doctrine is not to be applied blindly or rigidly. *See, e.g.*, Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); People v. Seltzer, 25 Cal. App. 3d Supp. 52, 101 Cal. Rptr. 260 (1972); 860 Executive Towers, Inc. v. Board of Assessors, 53 App. Div. 463, 385 N.Y.S.2d 604 (1976).

Yet other courts have stated that the doctrine represents only a judicial policy, not an absolute rule. *See, e.g.*, Kelley v. Trans Globe Travel Bureau, Inc., 60 Cal. App. 3d 195, 131 Cal. Rptr. 488 (1976); State Div. of Dep't of Treas. v. Estate of Raseman, 18 Mich. App. 91, 170 N.W.2d 503 (1969).

122. *See* notes 26, 30 and accompanying text *supra*.

Imagine, further, that two of the syringes are purchased by two dairy farmers, thousands of miles removed from one another. Each dairy farmer has in his herd a cow suffering from the illness that the vaccine is supposed to combat. The diseased cows are quite dissimilar to one another physiologically, representing different breeds with separate and distinct medical and hereditary characteristics.

To complete the scenario, assume that both dairy farmers use the improperly constructed syringes on their respective cows — only to have them die shortly thereafter. Autopsies reveal conclusively that both animals died from overdoses of the vaccine contained in the syringes. If one dairy farmer sues the manufacturer and factually establishes that the syringe was defective because it contained fifty percent more fluid than it should have, a strong legal argument can be presented in support of the other dairy farmer's right to rely on collateral estoppel, in a subsequent suit, on the issue of a product defect.

A *complete* identity of facts (*i.e.,* condition of cow, age, breed, *etc.*) would not be necessary in order to apply the doctrine of collateral estoppel on the limited issue of the defective nature of the second syringe. Since the first dairy farmer conclusively proved, through the use of empirical evidence, that the syringe was defective, the second dairy farmer should be allowed to rely on the conclusive nature of *that* factual finding. As prerequisites to the doctrine's application, the second farmer would have to establish: (1) that the syringe he used came from the same production lot as the syringe involved in the first suit (*i.e.,* had the same potential volume) and, (2) that his syringe was filled in a like manner to the first syringe (*i.e.,* both were filled to capacity with vaccine).

Notwithstanding the overall factual dissimilarities between the two cases, collateral estoppel may apply because the cases are exactly identical as to the *limited issue* of a defective product. Both cases involved syringes that were defectively manufactured in *exactly* the same regard. It can be established that the syringes had exactly the same specifications because they were made with the use of a single mold and both came from a single production lot. Moreover, both had the same amount of vaccine. Therefore, the factual similarities present as to the limited issue of a product defect justify an issue preclusion, that is, an estoppel.

a. Williams v. Lawrence-David, Inc.

Similar to the syringe hypothetical, the case of *Williams v. Lawrence-David, Inc.*[123] involves the threshold issue of an identity of product.

123. 271 Or. 712, 534 P.2d 173 (1975).

Dissimilar to our hypothetical, however, in *Williams* an identity of product was not shown to exist. Hence, the *Williams* court declined to apply an estoppel. An examination of the facts will show the soundness of the court's decision.

The plaintiff, Williams, worked in a factory which produced plywood. Because of the nature of Williams' job, he came in repeated contact with a certain kind of glue used in the manufacture of plywood. Even though he routinely wore a pair of gloves manufactured by the defendant which were designed to protect against glue and other job related nuisances and dangers,[124] Williams experienced skin punctures and splinters on almost a daily basis. After a period of time, Williams developed a certain skin malady which was diagnosed as dermatitis. Several years thereafter he brought a products liability suit against the defendant.

At trial, there was some testimony showing that the dermatitis could have been caused either by the plywood glue or by the glove itself. Although the case is not exactly clear on this point, it appears that Williams' theory was simply that the glove was defective either because it did not prevent the glue from causing the dermatitis or because the glove *itself* caused the condition. In any event, Williams maintained that the trial court should apply an estoppel on the issue of a product defect. The estoppel was to have been based on an earlier case, known as the *Krall* case,[125] brought by a co-worker against the same glove manufacturer.

Suffice it to say that the *Williams* trial court declined to apply an estoppel and the jury returned a verdict for the defendant. The Oregon Supreme Court affirmed the decision[126] and articulated several reasons for holding as it did.

First, the court observed that there was no evidence indicating that the gloves worn by this plaintiff were identical with those worn by the plaintiff in *Krall*. Moreover, there was even a lack of evidence that the two pairs of gloves came from the same carton or production lot.[127] Sec-

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124. *Id.* at 714-18, 534 P.2d at 174-76.

125. The *Krall* case resulted in a plaintiff's verdict, but the court did not issue a written decision. Moreover, it appears that no substantial records of any kind relate to the case. This author has been informed by the counsel for the defendant in the *Williams* case that:

> [t]here was no written opinion nor memorandum of law supplied by either of the parties for the court on trial of the *Krall* case. [The case merely involved] a situation where the plaintiff Krall had sufficient evidence to connect the gloves to his hand condition to justify the case being submitted to the jury for consideration. [T]he jury in that case returned a $10,000 verdict which was paid without a motion for a new trial being filed or an appeal taken.

Letter from Donald E. Hershiser, attorney for defendant in *Williams*, to author (March 2, 1979).

Hence, it is nearly impossible to learn of the exact nature of the case upon which the *Williams* plaintiff relied on the issue of an estoppel.

126. Williams v. Laurence-David, Inc., 271 Or. 712, 534 P.2d 173 (1975).

127. The court noted:

ond, there was evidence indicating that a physiological difference of note existed between the former plaintiff and the present one; specifically, it was observed that while Krall had reacted positively to a "patch test" conducted with a single glove, Williams had reacted negatively to the same test. Third, it was observed that while Williams had worn short sleeve shirts at work and had suffered from a skin "rash" caused by splinters, there was no indication from the prior case that Krall had ever had similar reactions. Finally, it was noted that there was significant evidence in Williams' case indicating that his dermatitis might have been caused by the plywood glue itself rather than by any alleged defect in the gloves.[128]

The first reason given by the court, relating to the lack of evidence as to an identity of product, should be considered determinative with respect to the collateral estoppel issue. As was stated in the opening passages of this section, the prerequisite of identity of issue in a products liability — collateral estoppel setting can be satisfied only where the two cases involved precisely the same product insofar as the defect is concerned. Although such a showing could easily be made in the syringe hypothetical through empirical evidence (as to the non-conforming dimensions peculiar to both syringes), in *Williams*, the plaintiff failed to present sufficient evidence on this issue,[129] and hence an estoppel did not lie. In accord with the *Williams* court on this point was the court in *Schamber v. Johnson & Johnson.*[130]

b. Schamber v. Johnson & Johnson

Schamber was a birth control pill case in which the plaintiff claimed that an alleged defect in the product "Ortho-Novum" caused her to suffer a stroke. After the case against the drug manufacturer was presented to the jury, it returned a verdict for the defendant. As in the *Williams* case, the plaintiff claimed on appeal that the trial court wrongfully declined to collaterally estop the defendant manufacturer on the issue of a product defect. The case that the appellant relied upon on this point was *Ahern v. Johnson & Johnson.*[131]

In this case there was testimony that Mr. Krall (the former plaintiff) wore rubber gloves bearing the same brand insignia as those worn by the plaintiff. There was no evidence, however, that the gloves worn by him were identical with those worn by the plaintiff or that they came from the same carton or case lot.

Id. at 723, 534 P.2d at 178.

128. *Id.*

129. Indeed, for all that the *Williams* plaintiff demonstrated, the glove defect in the *Krall* case could have been a physical flaw (such as a hole in the glove), peculiar *solely* to the glove involved in that case. Obviously, if *Krall* did involve such a physically flawed product, product identity would not have existed unless the *Williams* plaintiff proved that his glove had exactly the same physical flaw.

130. 1 Civil 42584, (Cal. Ct. App., First App. Dist., Div. 3, filed April 24, 1979).

131. 1 Civil 38079 (Cal. Ct. App., First App. Dist., Div. 1, filed March 16, 1977).

It should be noted that the real question in the *Schamber* case was not whether the birth control pill could cause blood clotting, since there was little question that it could do so on occasion.[132] Rather, as the court observed, "[t]he real question . . . [was] whether Ortho properly discharged its duty to warn the appellant of the known side effect of thromboembolic disease."[133] The particular warnings that were called into question were those which accompanied the product in May of 1971. *Ahern*, on the other hand, had involved a 1969 version of Ortho-Novum.

Primarily because the warnings involved in the *Ahern* suit were issued earlier than the *Schamber* warnings, and were substantially different therefrom, the *Schamber* court held that collateral estoppel should not apply.[134] This holding was proper. To repeat, identity of issue cannot exist if identity of product does not exist.[135]

2. Identity of Defect

Aside from an actual identity of product, other points may speak to the question of an identity of issue. For example, an identity of issue can only exist where the trial record in the seminal case (upon which the estoppel, if it lies, shall be based) is definite as to the exact theory of a product defect. In other words, even if both cases involve precisely the same type of product, an identity of issue may still not exist (and an estoppel will not lie) unless it is clear that both cases also involve an identical theory as to a product defect. The pending case of *Lagana v. A. H. Robins Co.*[136] is illustrative of this point.

Lagana involved an interuterine device which allegedly became embedded in the plaintiff's uterus. The plaintiff claimed that the product was "defective in both design and manufacture, unreasonably dangerous, unsafe, unfit, and improper for the purpose or purposes for which it was to be used. . . ."[137] The issue of collateral estoppel arose

132. Notwithstanding this, the Food and Drug Administration, mindful of the fact that drugs are *unavoidably* unsafe products, continued to approve of Ortho-Novum's marketing. As the *Schamber* Court observed: "The FDA concluded (that despite the evidence indicating that birth control pills can cause blood clotting), since no drug can be absolutely safe, the ratio of benefits to risk was sufficiently high to justify a finding that the pill was safe." Schamber v. Johnson & Johnson, 1 Civil 42584, slip op. at 3 (Cal. Ct. App., First App. Dist., Div. 3, filed April 24, 1979).

133. *Id.* at 6.

134. *Id.* at 10-11. It should also be noted that the change in the warnings related directly to the subject of blood clotting. Obviously, if the warnings were changed on some other topic, but remained the same on the topic of clotting, product identity would not have been an issue.

135. However, even if product identity *did* exist, one still suspects that the *Schamber* Court would not have applied an estoppel. To wit, as the court noted, it is the public policy of California not to apply collateral estoppel in multiple claimant negligence suits. As was denominated in section II. *B. supra,* strong arguments can be made supporting such a rule.

136. No. 75-C-1413 (E.D.N.Y., filed August 26, 1975).

137. Lagana v. A. H. Robins Co., No. 75-C-1413 (E.D.N.Y., August 13, 1979) (order denying summary judgment, at 2).

when the plaintiff brought a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment. In this motion, the plaintiff claimed that a prior judgment against the defendant, rendered by a Kansas court,[138] estopped the defendant from denying "liability."[139]

The defendant had two theories as to why an estoppel should not lie. The first involved a choice of law question which was not resolved by the court, since it found the second argument controlling.[140] The second argument was directed towards the requirement of an identity of issue between the cases.

In the seminal case, *i.e.*, the Kansas action, the plaintiff claimed that the product perforated her uterus and failed to prevent an unplanned pregnancy. She alleged that the product was: (1) "unreasonably dangerous"; (2) "not fit for the purpose for which it was designed"; (3) "not of merchantable quality"; (4) accompanied and/or promoted through the use of "false and misleading statements"; and, (5) manufactured, tested, and marketed in a "grossly and wantonly negligent" fashion.[141] The jury was charged on theories of "negligence,

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138. Deemer v. A. H. Robins Co., Nos. C-26420 and C-30649 (Kan. Dist. Ct., Sedgwick Cty., March 3, 1975).

139. Lagana v. A. H. Robins Co., No. 75-C-1413 (E.D.N.Y., August 13, 1979) (order denying summary judgment at 8-9). It should be noted that the court observed that the plaintiff misconstrued the reach of the doctrine of collateral estoppel, insofar as she apparently thought that it determines the ultimate issue of "liability" in a products liability case. The most that the doctrine can accomplish in such a setting, the court observed, is to resolve the question of a *defect*. Other questions, such as causation, which, if decided adversely to the plaintiff would result in a finding of *no* liability, remain unanswered by operation of an estoppel. Hence, the doctrine does not determine "liability" in such cases. *Id.* at 8-9.

140. The first theory was that the law of the state that issued the original judgment should be controlling on the question of a future estoppel. Because the offensive use of collateral estoppel would be prevented under Kansas law, the theory continued the federal district court, sitting in a diversity action in which New York law would ordinarily be applied, was to adopt a compatible construction, notwithstanding the fact that mutuality had been abandoned under the substantive New York law of collateral estoppel.

The *Lagana* court noted that there was a "paucity of New York decisional law on [this] precise issue." *Id.* at 5. What few cases that did exist seemed to fall on both sides of the fence. Even though there was at least *one* New York case which apparently answered this question against the defendant, the *Lagana* court stated that it would be "reluctant to deny the defendant his day in court . . . [w]ithout direction from New York's highest court." *Id.* at 7. "Fortunately," the court continued, "we can avoid, at least for the present time, this difficult decision." *Id.* at 7-8. The court further decided that even if New York law on the question of mutuality was controlling, an estoppel did not lie under the defendant's alternative argument. *Id.* at 8.

As more products liability-collateral estoppel cases are litigated in the coming years, there will undoubtedly be a body of case law created on the precise issue outlined above. At present, however, there appears to be no products liability-collateral estoppel cases that have resolved this question, although the question has received some attention in other contexts. *See, e.g.*, Hart v. American Airlines, Inc., 61 Misc. 41, 304 N.Y.S.2d 810 (N.Y. Sup. Ct. 1969) (mass accident case wherein the collateral estoppel law of forum, and not that of original jurisdiction, was held applicable).

141. Lagana v. A. H. Robins Co., No. 75-C-1413 (E.D.N.Y., August 13, 1979) (order deny-

willful and negligent misrepresentation, and fraud,"[142] and returned a plaintiff's verdict. However, said plaintiff's verdict was a general one. Hence, the *Lagana* court was unable to determine exactly what issue the Kansas jury resolved in the plaintiff's favor.[143]

The record in the Kansas case left the following questions unanswered: Was the product involved "defective" simply because it did not prevent the pregnancy experienced therein? Was there a breach of warranty for the same reason? Was the product negligently designed? Was the product non-negligently designed, but accompanied by misrepresentations? Was fraud committed? Was the product tested in a negligent manner? Was the product of merchantable quality?

The *Lagana* court held that an estoppel could not lie, simply because it could not determine if an identity of defect, and hence, an identity of issue, existed between the case before it and the Kansas case. For example, if the Kansas judgment was based on a jury finding that the product was defective simply because it did not prevent the plaintiff's unplanned pregnancy, then, as the *Lagana* court noted, the judgment would be irrelevant to the present suit since no such claim was involved therein. Similarly, if the Kansas judgment was based on a finding that the product was defective because it was accompanied by misrepresentations which were relied upon by that plaintiff to her detriment, then that case would only have significance to *Lagana* if the latter suit involved similar claims. In other words, because the *Lagana* court was unable to determine exactly what issue or issues concerning the concept of a product "defect" were decided by the Kansas court and exactly how those issues were decided, it could not determine if the two cases shared an identity of issue. The *Lagana* court therefore concluded that an estoppel based upon the Kansas judgment "cannot be permitted."[144]

It is suggested that the *Lagana* court's conclusion was correct. One cannot pronounce that an identity of issue exists unless one knows exactly what issue was resolved in the seminal case.[145] The careful attorney should therefore be vigilant for a vague record in the case being relied upon for an estoppel.

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ing summary judgment, at 9), *citing*, Deemer v. A. H. Robins Co., Nos. C-26420 and C-30649 (Kan. Dist. Ct., Sedgwick Cty., March 3, 1975) *Id.* at 10.

142. *Id.* at 10.

143. Lagana v. A. H. Robins Co., No. 75-C-1413 (E.D.N.Y., August 13, 1979) (order denying summary judgment, at 9-10).

144. *Id.* at 12.

145. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969), where it was stated that in order to invoke collateral estoppel "[t]here must be an identity of issue which has been necessarily decided in the prior action and is decisive of the present action. . . ." *Id.* at 71, 298 N.Y.S.2d at 960. *See also* Matter of Merrill, 594 F.2d 1064 (5th Cir. 1979); Hartford Nat'l Bank and Trust Co. v. Willard, 175 Conn. 384, 398 A.2d 1186 (1978); Commonwealth Edison Co. v. Property Tax Appeal Bd., ___ Ill. App.3d ___, 384 N.E.2d 504 (1978); Roush v. Roush, 589 P.2d 841 (Wyo. 1979).

3. Proving an Identity of Issue: The Mechanics

Assuming that the seminal case is sufficiently specific in describing the nature of the product defect to support a claim of estoppel in a subsequent suit alleging the same defect, it would then be the plaintiff's burden to offer evidence which tends to prove that the two cases involved an identical product. Such evidence may be of a testimonial, documentary, or demonstrative nature. For example, in our hypothetical syringe case, the plaintiff could subpoena or depose the defendant's employees, thereby eliciting testimony from them which might tend to prove that the second syringe was produced in exactly the same manner as the first. Alternatively, the plaintiff could serve a document request on the defendant seeking production records and other business documents which might tend to prove the same fact. Lastly, the plaintiff could simply secure the first syringe, or a description of it rendered in the prior case, and demonstrate in court that a comparison of the two syringes shows them to be identical.

Ordinarily, identity of product should not be proven "through the back door," *i.e.*, identity of product should not be proven by reference to any other legal construct, such as causation. An example will better illustrate this point. Imagine that in the second syringe case the defendant claims it changed its production practices after the first syringe was produced, so that the second syringe only contained a 66 percent pure vaccine solution. Of course, this would mean that although the second syringe may have contained 150cc of liquid, it only contained 100cc of vaccine. The other 50cc might have been some neutral base, such as distilled water. In such a case, the party asserting the estoppel should not be allowed to prove an identity of product merely by stating: "If my syringe didn't contain more than 100cc of vaccine, then why did my cow die of a vaccine overdose?"

This query speaks to the issue of causation rather than to the issue of product identity. There might be any number of reasons why the plaintiff's cow died of a vaccine overdose. For example, the defendant may have proof that the second farmer's inexperienced farm-hand was unaware of the recommended dosage, and hence, he or she administered *two* perfectly non-defective syringes to the cow in question at the same time. Obviously, this evidence, if uncontradicted, would explain the overdose.

Where perfectly locigal alternative explanations exist for the injury, "back door proof," such as on the issue of causation, should not be admitted to prove product identity.[146] It must be remembered that the

146. There may be rare situations in which identity of product might conceivably be proven through the use of causation evidence (although perhaps not solely through the use of such evidence). For example, imagine a case involving a man-made chemical compound that is used as a

burden of proof on this issue rests on the party asserting the estoppel.[147] This burden should ordinarily be met through the use of affirmative evidence. Moreover, if the "back door" method of proof on the issue of product identity were to be allowed, there would need to be a factual finding on the issue of causation before there was a factual finding on the exact nature of the product used. Such a procedure would be illogical — simply because a court generally cannot issue a factual finding on the issue of causation before it has been determined exactly what type of product was used.

The factual finding on the issue of an identity of product, similar to other factual findings, should ordinarily be rendered by the jury.[148] This might mean that the trial should be conducted in a bifurcated manner, so that the issue of product identity would be submitted to the jury before any other issue.[149] After the jury has considered all of the

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feed supplement. Because the compound is a synthetic, it is not found in nature. Imagine further that only one company uses this particular supplement, and that the company releases a production lot of feed which contains one hundred times the normal amount of the supplement. Thereafter, the farmers who purchased feed from this company experience the loss of numerous domesticated animals which were allegedly fed the product. The animals die as a result of experiencing a particular type of adverse chemical reaction known *only* to be caused by *this compound.*

Suppose, further, that a farmer brings a products liability suit against the feed company and establishes that the feed contained an excess of the supplement. Subsequently, a second farmer may bring suit and may allege that collateral estoppel applies on the issue of a product defect. Even if the farmer has no proof whatsoever that he even bought, let alone used, feed from this particular company, it could persuasively be aruged that he should be allowed to prove product identity by conclusively proving that his animal died as a result of experiencing this one, peculiar type of adverse chemical reaction. Simply put, since there is no other known explanation for this type of adverse reaction, and since the defendant was the only company using this particular synthetic compound, it may be said that proof of causation here equals proof of product identity. Of course, this analysis would be totally inapplicable if it is merely shown that several companies used this supplement or that the supplement was a naturally occurring compound. Hence, if the defendant could show that this compound was found in poison mushrooms that are known to grow on the second plaintiff's land, product identity could not properly be proven in this fashion.

147. *See* Gale v. Transamerica Corp., 65 Ill. App. 3rd 553, 382 N.E.2d 412 (1978); Vastel, *Procedural Aspects of Res Judicata/Preclusion,* 1 U. TOLEDO L. REV. 15, 35 n.71 (1969). Once the moving party (*i.e.,* the party asserting the estoppel) has demonstrated that an identity of issue does exist, the burden then falls on the party resisting the estoppel to show why it should not lie. *See, e.g.,* Schwartz v. Public Adm'r., 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); State Farm Fire & Cas. Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976).

148. For a general proposition that factual findings are to be made by the jury *see, e.g.,* Michaud v. Gurney, 168 Conn. 431, 362 A.2d 857 (1975); Hastings Mut. Ins. Co. v. Croydon Homes Corp., 73 Mich. App. 699, 252 N.W.2d 558 (1977); Evarts v. Forte, 135 Vt. 306, 376 A.2d 766 (1977); Ball v. Smith, 87 Wash.2d 717, 556 P.2d 936 (1977).

149. Note that this procedure was recently used in a New York State DES trial where product identity was an issue. *See* Bichler v. Eli Lilly & Co., No. 15600/74 (N.Y. Sup. Ct., New York Cty., 1979) (the case resulted in a $500,000 verdict for the plaintiff; a notice of appeal has been filed).

Usually bifurcation is used so as to separate the issues of liability and damages. *See, e.g., In re* Master Key Antitrust Litigation, 528 F.2d 5 (2d. Cir. 1975); Tilley v. International Harvester Co., 208 Kan. 75, 490 P.2d 392 (1971); Fields v. Volkswagen, 555 P.2d 48 (Okla. 1976); Hamilton v. Gallo, ___ Pa. Super. Ct. ___, 334 A.2d 692 (1975). However, there seems to be no reason why this procedure cannot be used whenever it will economize the court's time, as well as that of the

evidence on this point and has rendered its finding thereon, the judge may rule whether an estoppel properly lies. If an estoppel does not lie, the plaintiff would then be required to prove a product defect on his or her own, without relying on the former adjudication. If an estoppel does lie, the plaintiff may then proceed to the next issue in the case.

It may be possible for a judge to rule on the issue of product identity without the aid of a jury. Such a factual finding by the trial judge, on an issue that relates to a question of law (that is, the application of an estoppel) would not be unique. For example, judges often reach factual conclusions regarding the qualifications of a proposed expert before a decision is reached on the legal question of the admissibility of the proposed expert's testimony.[150] Depending on the rules of civil practice of the forum, and depending on the complexity of the evidence that is to be offered on this issue, it is conceivable that a judge, sitting as the sole trier of fact, may wish to entertain a preliminary hearing on the issue of product identity, solely for the purpose of determining whether an estoppel lies.

It is submitted that such a product identity hearing, whether it is held before a jury or a judge, be conducted in the following manner. First, the plaintiff shall offer evidence that the products involved are identical.[151] Thereafter, the defendant should be allowed to offer rebuttal evidence. At the close of the evidence, if it has not been proven that the two cases involve precisely identical products, an estoppel should *not* lie.

When establishing product identity for the purpose of collateral estoppel, a higher standard of proof should be employed than that

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litigants. *See generally* Note, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis,* 46 MINN. L. REV. 1059 (1962).

150. *See, e.g.,* Fuentes v. Reilly, 590 F.2d 509 (3d Cir. 1979); Maatschappij Voor Industriele Waarden v. A. O. Smith Corp., 590 F.2d 415 (2d Cir. 1978); Arc Elec. Co., Inc. v. Esslinger-Lefler, Inc., 121 Ariz. 501, 591 P.2d 989 (1979); Travelers Indem. Co. v. Armstrong, ___ Ind. App. ___, 384 N.E.2d 607 (1979); Francisco v. Parchment Medical Clinic, P.C., 86 Mich. App. 583, 272 N.W.2d 736 (1978); Carrols Equities Corp. v. Villnave, 57 App. Div. 2d 1044, 395 N.Y.S. 2d 800 (1977); Sears v. Cooper, 574 S.W.2d 612 (Tex. Ct. App. 1978); Maxwell v. McCaffrey, ___ Va. ___, 252 S.E.2d 342 (1979). Likewise, a finding of fact on the question of product identity *for the purposes of an estoppel* need not be considered conclusive for the purposes of prosecuting a regular, non-collateral estoppel, products liability suit, in the event that the estoppel is not applied. In other words, if the plaintiff cannot meet the burden of proof required on the issue of product identity *for the purpose of an estoppel,* that does not mean that he or she will have to abandon the suit. The suit can continue, since the plaintiff may be able to satisfy the different (and lower) burden of proof on the issue of product identity that is required for the purpose of prosecuting a regular, non-collateral estoppel, product liability claim. *See, e.g.,* Ghazoul v. International Management Services, Inc., 398 F. Supp. 307, 309 (S.D.N.Y. 1975) (parties are not bound by the court's finding of fact on the issue of the commission of a tort, *for one purpose, i.e.,* the attachment of long arm jurisdiction, when it comes to making another factual finding on the same issue *for another purpose, i.e.,* the attachment of liability).

151. As stated previously, this evidence should be of a direct and affirmative nature in almost all cases. *See* section III. *A.* 1. *supra.*

employed on the issue of product identification in a non-collateral estoppel case. This rule is suggested simply out of fairness to defendants. Since the imposition of an estoppel will foreclose the defendant from offering any evidence to rebut the plaintiff's claim that the product is defective, it seems fair that the plaintiff should be required to prove "by clear and convincing proof," as opposed to merely a "preponderance of the evidence," that the product in question was *precisely* the same as the product in the former suit.[152]

If the plaintiff is able to prove by clear and convincing evidence that the product he or she used is precisely the same as the product used in the first case, the court should then reach the second step of the overall formula that is suggested herein for resolving products liability—collateral estoppel suits. This second step should be a determination as to whether the seminal case resulted in a *precise* finding that the product was indeed defective.

B. Intrinsic v. Extrinsic Defects

In our first hypothetical example involving the syringe, there was no doubt whatsoever that the product was defective. The finding of a product defect rested on empirical and precise evidence that related solely to the product itself. If excess vaccine was present in the syringe, which excess could be measured through use of determinate measuring procedures, it would universally be understood that the product was defective. Similarly, if such a measurement revealed no excess vaccine, it would universally be understood that the vaccine was not defective. The finding of a product defect in this case involved neither concepts nor factual findings extrinsic to the product itself. Hence, the findings of an intrinsic product defect, resting on empirical and precise evidence,

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152. Such a rule would not be peculiar to this setting. In many other areas of the civil law the party advancing a given proposition is required to show by "clear and convincing" evidence that his or her position is correct. *See, e.g.*, Taylor v. Godsey, ___ Ala. ___, ___, 357 So.2d 979, 981 (1978) (personal acknowledgement on a written document can be impeached only by evidence that is clear and convincing); Dobison v. Bank of Hawaii, ___ Haw. ___, ___, 587 P.2d 1234 (1978) (fraud must be proved by clear and convincing evidence); Wolford v. James E. Kolls Inv. Co., Inc., 61 Ill. App. 3d 405, 408, 377 N.E.2d 1314, 1317 (1978) (evidence to support decree for specific performance must be clear and convincing); Central State Bank v. Hudik-Ross Co., Inc., 164 N.J. Super. 317, 319, 396 A.2d 347, 350 (1978) (for court to grant reformation of contract, proof must be clear and convincing evidence that reformation reflects original intention of parties); Birtrong v. Coronado Bldg. Corp., 90 N.M. 670, 672, 568 P.2d 196, 198 (1977) (adverse possession must be proven by clear and convincing evidence); Krueger's Estate v. Ropp, 282 Or. 473, 478, 579 P.2d 847, 850 (1978) (oral contract to devise land must be proven so that truth of facts appears highly probable, by clear and convincing evidence); Souza v. O'Hara, ___ R.I. ___, ___, 395 A.2d 1060, 1061 (1978) (proof of common law marriage must be by clear and convincing standard); *In re* Estate of Kamesar, 81 Wis.2d 151, 159, 259 N.W.2d 733, 737 (1977) (proof of undue influence in making of will must be by clear, satisfactory, and convincing evidence).

is the most accurate and reliable finding on the question of a "defect" in all of products liability litigation.

For numerous reasons which will be discussed, in detail, in subsequent sections of the article (not the least of which is minimizing the incidence of erroneous findings of a product "defect"), it is suggested herein that collateral estoppel should only be applied where the seminal case involved an intrinsic product defect, whose existence can be determined through the use of empirical and precise evidence.

1. Duty to Warn Cases

Perhaps an example will better illustrate the preceeding point. Imagine a case involving a can of spray paint. The paint is flammable and the manufacturer has printed a warning on the side of the can which reads as follows: "CAUTION, DO NOT USE NEAR FIRE OR FLAME." Thousands upon thousands of such spray paint cans are manufactured monthly. Subsequently, a consumer purchases a can of this particular manufacturer's paint, reads the label, and uses the product in a room where someone is smoking a cigarette. The consumer might have reasoned that it was not improper to use the product under these circumstances because he or she might have interpreted the warning to mean that the product should not be used only where an *open* fire or flame is present. To complete the scenario, imagine that the cigarette causes the paint fumes being sprayed from the can to ignite, thereby transforming the can of spray paint into an uncontrollable torch. Before the consumer can safely discard the can, the flames cause him or her to suffer skin burns.

After the accident, the consumer might bring a products liability cause of action against the manufacturer of the product. Such a suit would turn on the concept of the manufacturer's duty to warn. In most states this case would be governed by a reasonableness standard.[153] In other words, the warning would only be considered inadequate if it did not *reasonably* apprise the consumer of the product's dangers,[154] which

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153. *See, e.g.*, Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264, 1274-75 (5th Cir. 1974) (no difference between breach of implied warranty and strict liability when absence of proper warning is the issue); Smith v. E. R. Squibb & Son, ___ Mich. ___, 273 N.W.2d 476 (Mich. Sup. Ct. 1979) (duty to warn governed by reasonableness whether theory is negligence, implied warranty, or strict liability); *accord*, Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969); Freuhauf Trailer Div. v. Thornton, ___ Ill. App. ___, 366 N.E.2d 21 (1977).

154. *See, e.g.*, Burton v. L.O. Smith Foundry Products Co., 529 F.2d 108 (7th Cir. 1976) (test in strict liability for failure to warn is failure to meet *reasonable* exceptations of ordinary user); Teagle v. Fischer & Porter Co., 89 Wash. 2d 149, 570 P.2d 438 (1977) (under strict liability, test whether warning is unsafe is whether ordinary user would *reasonably* expect to be warned of any particular danger involved in use of the product).

dangers the product manufacturer should have made all *reasonable* efforts to discover.[155]

The plaintiff will probably not claim that the manufacturer failed to take those reasonable steps which it should have taken in order to learn that its product could be ignited by a cigarette. The manufacturer probably knew that not only could a cigarette ignite the paint, but that a cigar, pipe, soldering iron, electric space heater, toaster, or other high-intensive heat source could just have easily ignited it. The question in this case is not whether the manufacturer made a reasonable effort to learn of the product's propensities, but rather, whether the manufacturer communicated those propensities to the consumer in a manner that was reasonably calculated to apprise the consumer of the danger to be avoided.

The plaintiff's position in this case will be that the warning "CAUTION, DO NOT USE NEAR FIRE OR FLAME" was insufficient because it did not apprise him or her, acting as a reasonably prudent and intelligent consumer, that the product should not be used in a room that contained a lit cigarette. The plaintiff will further contend that if he or she had known that a cigarette could cause the paint to ignite, he or she would not have used the product in the fashion described. In essence, the consumer will argue that the insufficient warning on the label rendered the product defective, and that the defect was the proximate cause of the injury.

The manufacturer in our hypothetical case will take the position that the consumer should have understood the warnings to mean that the product could not safely be used in the presence of a lit cigarette. The manufacturer will argue that the warning was adequate, and that the product was non-defective. The manufacturer will further argue that the plaintiff's misuse of the product was the proximate cause of injury.

This case, as opposed to our earlier hypothetical involving a syringe, does not involve an intrinsic defect. First, this case does not involve objective and empirical evidence that the warning was inadequate. On the contrary, it merely involves a number of different opinions on the adequacy of the warning. The plaintiff (and perhaps his or her expert witness) will merely get on the stand and say that they opine the warnings to be misleading and otherwise inaccurate. The defendant (and perhaps its expert witness) will likewise merely take the stand and pre-

155. For cases holding that a manufacturer must make a reasonable effort to learn of its product's propensities so that a comprehensive warning may be issued *see, e.g.*, Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978); Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975); Peterson v. B/W Controls, Inc., 50 Ill. App. 3d 1026, 366 N.E.2d 144 (1978); McLaughlin v. Sears, Roebuck & Co., 111 N.H. 265, 281 A.2d 587 (1971).

sent a contrary point of view. This warning, dissimilar to the excess in the syringe involved in our hypothetical, cannot be empirically and precisely "measured" to see if it conveys the appropriate message to the consuming public.

Moreover, this case involves concepts and factual findings that are extrinsic to the product itself. It is impossible to determine if all 50,000 spray paint cans manufactured with this warning were defective (which would be the result of applying an estoppel) because under the substantive standard that governs the imposition of liability in this case it must be determined that the warning was "unreasonable" in some respect before it can be held defective. Yet, whether the warning was "unreasonable" must necessarily be a function of all of the circumstances surrounding the product's use. Such a finding will inevitably vary from factual setting to factual setting, from jury to jury, and from product user to product user. As to any given ten product users (or juries, *etc.*) some may find the warning to have been adequate (*i.e.*, reasonable and hence non-defective) and some may find the warning was inadequate. There is no such thing as a "sure" finding of a product defect in this case (such as that which would artificially and improperly be proclaimed if collateral estoppel were to apply) because it is certain that different juries and different product users would reach different conclusions as to the "reasonableness" of this warning.[156] In such a duty to warn case collateral estoppel should not apply.

This analysis does not dictate that collateral estoppel can never be applied to a duty to warn case. For example, imagine a case involving a small gasoline engine such as the kind commonly found on lawnmowers and chain saws. Imagine further that the engine comes with a warning that informs the consumer that gas should not be poured into the gas tank unless the engine has been off for at least "10" minutes. This cooling off time might be necessary because the tank is in close proximity with the engine's red-hot pistons. If the warning was misprinted so that, the "0" was omitted, and the warning advised consumers to wait for only "1" minute, this warning could be considered intrinsically defective. In this case there would be no question that in order to safely fill the gas tank the engine must have cooled off for more than "1" minute. This fact could be proven empirically and precisely with the use of the

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156. On this score note that the RESTATEMENT (SECOND) OF JUDGEMENTS § 88(4) (Tent. Draft No. 2, 1975) suggests that where an issue has been decided by a number of courts, and inconsistent conclusions have been reached, an estoppel, based on any one of those judgements would be improper. However, at least one commentator has suggested that a distinction should be drawn between situations actually involving inconsistent verdicts, and those that only present a possibility of such an anomaly. *See* Note, *Res Judicata: The Shield Becomes a Sword. Prior Adjudication of Negligence Bars Relitigation of that Issue by Other Plaintiffs in Subsequent Actions Based on Same Accident,* 1964 DUKE L. REV. 402, 404.

defendant's own product test data. There is no need in such a case to examine concepts and factual findings extrinsic to the warning in order to determine that it is defective.

In the above hypothetical, if an explosion occurred, and the plaintiff proved that the warnings were inadequate (which should not be difficult), collateral estoppel could be applied to subsequent suits. In such suits, all that a plaintiff would need to prove in order to recover would be product identity[157] and a causal connection between the defect and the accident.[158]

2. Design Defect Cases

Similar to most duty to warn cases, most design defect cases do not involve intrinsic defects. Again, perhaps the use of an example will better illustrate the point. Imagine a design defect case involving oil drill rigging used to drill exploratory oil wells. In the course of designing the product, the design engineer made hundreds, if not thousands, of individual design decisions. These decisions were rendered after considering all of the pertinent data relating to the product's efficiency, cost, safety, "down-time," target market, *etc.* Assume that out of all of the numerous individual product design decisions, thirty were made because safety was the primary and overriding consideration. Finally, suppose that these thirty design decisions resulted in the product having thirty distinct safety features, such as a safety guard or latch.

The product is then marketed and used for a number of years without incident.[159] During this period of time it can be said that the thirty safety features on the product have accomplished that which they were supposed to accomplish; they have prevented product induced injuries. Imagine, however, that five years after the product was first designed and sold, a product related injury *does* occur and the accident victim files suit against the manufacturer.

The plaintiff in this suit, similar to most plaintiffs in design defect cases, will allege that the product should have had a "thirty-first" safety guard.[160] That is, the plaintiff will claim that the design was defective because it lacked the one feature that would have prevented his or her injury. The plaintiff will further allege that the lack of this additional safety device rendered the product unreasonably dangerous.

In response to the plaintiff's allegations, the manufacturer will state

157. *See* section III. *A.* 1. *supra.*

158. *See* note 115 and accompanying text *supra.*

159. In this author's experience, most design defect cases involve such a fact pattern. This is of course to be contrasted with cases involving assembly line errors and/or physically flawed products. In such situations, the product defect manifests itself shortly after the product is released.

160. *See generally* W. PROSSER, THE LAW OF TORTS § 96 (4th ed. 1971).

that while it is true that an additional safety feature might have prevented the plaintiff's injury, the overall product design was reasonably safe. The manufacturer will contend that it cannot be held liable merely because it was possible to make the product *marginally* more safe.[161] Indeed, the manufacturer will argue that it is *always* possible to make any product marginally safer by adding one more safety device. The manufacturer will contend that liability can only attach if its design did not reflect a reasonable and justifiable trade-off between product safety and utility.[162]

In most states, a product's design can only be considered defective if one of the following facts is shown: (1) the product posed an *unreasonable* danger;[163] (2) the product was dangerous beyond the *reasonable* expectations of the average consumer;[164] or, (3) the manufacturer did not take all *reasonable* steps necessary to develop a safer and yet practical design alternative.[165] Thus, the jury in this case will be bombarded with extensive conflicting evidence on the cost of the "thirty-first" safety guard, the design consequences of placing the guard on the rigging, the guard's effect on the product's utility, and the total effect of placing all such similar guards on the product.

This case, similar to the spray paint case but dissimilar to the syringe case, does not involve an intrinsic product defect. Because the finding of a defect turns on the extrinsic concept of the design's "reasonableness," it will necessarily vary from one jury, or set of circumstances, to another. While one jury may conclude that the utility of the oil drill rigging outweighed its danger, so as to render it *reasonably* dangerous, and hence not defective, another jury might opine to the contrary. It would

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161. For cases supporting this proposition *see, e.g.*, Mitchell v. Ford Motor Co., 533 F.2d 19, 20 (1st Cir. 1976) (manufacturer under no duty to adopt safest possible design, only reasonably safe design); Woody v. Combustion Engineering, Inc., 463 F. Supp. 817, 820-21 (E.D. Tenn. 1978) (product need not be absolutely safe, only as safe as is reasonably possible under the present state of the art); Caterpillar Tractor Co. v. Gonzales, 562 S.W.2d 573, 578-79 (Tex. Ct. App. 1977) (possible design alternatives, standing alone, are insufficient to establish liability).

162. *See generally* PROSSER, *supra* note 160.

163. *See, e.g.*, Union Supply Co. v. Pust, ___ Colo. ___, 583 P.2d 276, 281-82 (1978) (for design defect, product must be in defective condition and unreasonably dangerous); *accord*, Hunt v. Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1978); Braun v. General Motors Corp., 579 S.W.2d 766 (Mo. Ct. App. 1979); Thibault v. Sears, Roebuck & Co., ___ N.H. ___, 395 A.2d 843 (1978); Kennedy v. Custom Ice Equipment Co., Inc., 271 S.C. 171, 246 S.E.2d 176 (1978).

164. *See, e.g.*, McCullough v. Beech Aircraft Corp., 587 F.2d 754, 759-60 (5th Cir. 1979) (defective product is one that does not meet the reasonable expectations of the ordinary consumer); *accord*, Lamon v. McDonnel Douglas Corp., 91 Wash.2d 345, 588 P.2d 1346 (1979).

165. *See, e.g.*, Micallef v. Miehle Co. Div. of Miehle-Gross Dexter, Inc., 39 N.Y.2d 376, 385, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115, 121 (1976) (manufacturer must make reasonable effort to develop a safe, yet practical design). *See also* Schell v. AMF, Inc., 567 F.2d 1259 (3d Cir. 1977); Cepeda v. Cumberland Engineering Co., Inc., ___ N.J. ___, 386 A.2d 816 (1978); Johnson v. Clark Equipment Co., 274 Or. 403, 547 P.2d 132 (1976); Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974).

be improper to hold, by operation of an estoppel, that this product is definitely defective as to all users and in all circumstances merely because one jury, responding to a single plaintiff's claim relating to a single set of facts, thought that the design was "unreasonable." The same principle should apply to all extrinsically decided design defect cases, whether they relate to oil drill rigging, pacemakers, toaster-ovens or some other product.

Of course, this does not mean it is impossible for a design defect case to involve an intrinsic product defect. For example, a case might arise where a product design engineer misplaces a decimal point in the course of designing a new line of modern furniture. As a result of this inadvertent design error, an entire line of furniture may be produced using a chrome tubing that is only one-tenth its required thickness. In any lawsuits that may be brought following the release of such a product, objective and scientific evidence could be introduced proving that the chrome tubing was only one-tenth the thickness required to support an average person's weight. In such a case there is no need to look to concepts and factual findings outside of the product in order to determine that the defect exists.[166] Such an intrinsic design defect case may provide the basis of an estoppel.

The distinction between intrinsic and extrinsic product defect cases shall be returned to subsequently in this article. At this juncture, however, it might be most fruitful to examine how the concepts discussed to date (identity of product, identity of defect, the mechanics of proving issue identity, *etc.*) relate to the only *series* of collateral estoppel case decided to date which all center upon one product, the drug Quadrigen.

> In this regard note the following observation:
> There is no absolute or objective standard of safety which will be true for all product designs. It is for this reason that a product design is not considered defective unless it is *un*reasonably dangerous to its user. . . . The process of product design assessment is essentially subjective and involves a sophisticated balancing of numerous factors. The evaluation process is a subjective balancing of the product's dangers and its utility.

Strause & Hedden, *Liability for Product Design in Ohio — A First Step Towards a Solution,* 11 AKRON L. REV. 663, 665-66 (1978). *See also* Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products,* 29 MERCER L. REV. 465 (1978); Kroll, *supra* note 117; Walkowiak, *Product Liability Litigation and the Concept of Defective Goods: "Reasonableness" Revisited?* 44 J. AIR L. & COMMERCE 705 (1979).

166. Note the words of the court in Sutor v. San Angelo Foundry & Machine Co., 406 A.2d 140 (N.J. 1979): "Thus, if one purchased a bicycle whose brakes did not hold because of an improper design, the manufacturer's responsibility would be clear without more." *Id.* at 150. Such a bicycle, similar to the modern furniture described in the text above, would be intrinsically defective. A finding of a product defect in such cases does not require resort to factual findings or concepts unrelated to the physical product itself. Such design defects may be thought of as representing "inadvertent design choice errors," as opposed to conscious design choices, which, when adjudged with hindsight, are thought to be "unreasonable."

C. *The Quadrigen Cases*

In contrast to our earlier discussion of *Williams* and *Schamber,*[167] which were simple cases capable of being decided on the basis of product identity alone, the Quadrigen cases (*Grant v. Park, Davis & Co.,*[168] *Vincent v. Thompson,*[169] and *Ezagui v. Dow Chemical Corp.*[170]) involve very complex fact patterns and legal propositions.

What is particularly noteworthy about the Quadrigen cases is that collateral estoppel was applied by either the trial or appellate court in each case. In two of the cases, *Vincent* and *Grant,* the trial court applied collateral estoppel on the basis of a finding rendered in yet another Quadrigen case, *Tinnerholm v. Parke, Davis & Co.*[171] However, in *Vincent* the trial court's ruling on that issue was eventually reversed on appeal, while in *Grant* the trial court's ruling on this issue was never challenged by the defendant because the trial itself resulted in a defendant's verdict.[172] In the most recent case, *Ezagui,* the trial court, relying on *Vincent,* declined to apply an estoppel, only to have the appellate court rule that an estoppel properly lies. In so holding, the *Ezagui* appellate court relied not on any of the Quadrigen cases mentioned above, but on an entirely separate case, *Parke, Davis & Co. v. Stromsodt.*[173]

The apparent lack of agreement exhibited by the various courts handling the Quadrigen cases is indicative of the difficulty and confusion surrounding the application of collateral estoppel to products liability litigation generally. It is with the hope of remedying the current state of confusion existing in this area that courts are urged to adopt the guidelines presented herein as to when, and under what conditions or circumstances, collateral estoppel should be applied to prospective products liability suits, particularly those involving mass produced products.

1. Tinnerholm v. Parke, Davis & Co.

Tinnerholm v. Parke, Davis & Co.[174] was the seminal case for the assertions of estoppel in *Vincent* and *Grant.* In *Tinnerholm,* the plaintiff was administered an injection of Quadrigen[175] at the age of three

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167. *See* section III. *A.* 1. *supra.*

168. 544 F.2d 521, [1976] PROD. LIAB. REP. (CCH) ¶ 7848 (7th Cir. 1976).

169. 50 App. Div. 2d 211, 377 N.Y.S.2d 118 (1975).

170. 598 F.2d 727 (2d Cir. 1979).

171. 411 F.2d 48 (2d Cir. 1969).

172. Apparently, the jury returned a defendant's verdict because there was convincing evidence presented that, in fact, Quadrigen was not administered to the infant in question and that some other brand of a similar drug was used.

173. 411 F.2d 1390 (8th Cir. 1969).

174. 411 F.2d 48 (2d Cir. 1969).

175. *Id.* at 50.

months. Shortly thereafter, the infant experienced a very high fever (108° F.), which, it was hypothesized, caused damage to the infant's brain. The brain damage rendered the child mentally retarded and partially paralyzed.[176]

Tinnerholm was primarily a design defect case[177] relating to the manufacturer's decision to modify a pre-existing three-in-one combination drug, known as Triogen, which offered protection against diptheria, pertussis and tetanus, so as to create a four-in-one combination drug which also offered protection against polio. When this design change was enacted, benzethonium chloride was substituted for merthiolate as the vaccine's preservative. The plaintiff's theory was that the new preservative, benzethonium chloride, *enhanced* the already existent possibility that recipients of the drug would suffer an adverse reaction thereto.[178]

The theory as to how the new preservative enhanced the possibility of an adverse reaction may be summarized as follows. First, one starts with the presumption that the pertussis component of the drug, whether administered by itself, in a three-in-one combination drug such as Triogen, or in a four-in-one combination drug such as Quadrigen, has a certain propensity to cause the very adverse reactions suffered here: *viz.*, high fever, convulsions, and brain damage.[179] Unfortunately, there is nothing medical science can do at present to remedy this.[180] The plaintiff's theory was that the benzethonium chloride caused the most toxic part of the pertussis organism, the endotoxin, to become

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176. *Id.* at 52-53. *See also* the lower court's opinion, 285 F. Supp. 432, 440 (S.D.N.Y. 1968).

177. In certain important respects, however, *Tinnerholm* was also a duty to warn case. Because it has been the design defect aspect of *Tinnerholm* that has been the claimed basis of an estoppel in future cases, only the design defect aspect of the case shall be analyzed herein.

Note that *Tinnerholm* was decided at the trial level in 1968 (1969 at the appellate level), before the concept of design defect was generally recognized as a separate and distinct theory of products liability law. The case was couched in the relatively uninformative (and somewhat outdated) terminology of warranty and negligence. Suffice it to say that modern day readers need not be bound by the older terminology of this relatively ancient (when compared to modern developments in products liability law) case. Thus, what the *Tinnerholm* court labeled a breach of warranty shall be more accurately called a design defect here.

178. *See* Tinnerholm v. Parke, Davis & Co., 285 F. Supp. 432, 439-40 (S.D.N.Y. 1968).

179. As the trial court observed: "The occurrence of encephalopathies following administration of vaccines containing a pertussis component has been long known but the specific element that causes this explosive assault to the brain has not been discovered. . . ." *Id.* at 444. The appellate court also noted this fact when it stated: "Because of the complex nature of the pertussis bacteria and the inability to isolate the toxin in order to inactivate it, reactions to pertussis vaccine are not uncommon. . . . Rarely, reactions associated with the disease itself, such as convulsions, high fever, or even brain hemorrhage and mental retardation occur." Tinnerholm v. Parke, Davis & Co., 411 F.2d 48, 50-51 (2d Cir. 1968).

180. Liability would not have attached if the court found that the plaintiff experienced a regular nonenhanced pertussis reaction. As the trial court noted:

> [T]he fact that an encephalopathy can be caused by pertussis vaccine would not mean that liability would be incurred . . . in the instant case. Rather, the finding . . . [of liabil-

separated, or "leak," from the rest of the pertussis cell, thereby leaving it as a free flowing agent which could more readily attack the body.[181] The existence of such a free flowing agent, it was hypothesized, enhanced the possibilities of an adverse reaction. This theory was hotly contested by the defendant at trial. The defendant maintained that there was no scientific evidence to support the theory and that the injuries, including the plaintiff's brain damage, were either the result of an allergic reaction to the drug, or simply a singular, nonenhanced, pertussis reaction.[182]

At trial the plaintiff's key evidence in support of this theory was expert opinion testimony rendered by several witnesses who opined that benzethonium chloride did have the "leakage" effect outlined above.[183] Additionally, the plaintiff relied heavily on some literature which suggested that this might be possible.[184] What the plaintiff's case lacked, however, was any empirical evidence that the benzethonium chloride did, in fact, cause the pertussis endotoxin to "leak." Moreover, although there was some statistical evidence that the use of Quadrigen, with benzethonium chloride, did occasionally result in higher incidence of fever among drug recipients, there was no evidence whatsoever that the incidence of brain damage actually increased when Quadrigen was substituted for Triogen.[185]

On the defendant's side, the proof adduced was similarly lacking. More specifically, the defendant failed to produce any hard and fast scientific evidence to support its contention that benzethonium chloride did not, in fact, cause the endotoxins to leak.[186] All that the defendant could muster was expert opinion testimony to the effect that this phenomenon did not occur. Of course, from an evidentiary point of view (as opposed to jury impact) this expert testimony had the same probative value as the plaintiff's expert testimony. Hence, the *Tinnerholm* trial, lacking as it did scientific or statistical evidence on either

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ity here] is precidated on the fact that by manufacturing Quadrigen in the method chosen by the defendant, the chances of contracting an encephalopathy were enhanced.
285 F. Supp. 432, 444.

181. *Id.* at 440.

182. *Id.*

183. *Id.* at 444-45.

184. *Id.*

185. There was some evidence that the use of benzethonium chloride may have had an effect on the vaccine's potency, from production lot to production lot. *Id.* at 444-45. Potency, in this setting, refers to the vaccine's ability to do the job it is intended to do. However, evidence on benzethonium chloride's affect on potency should be distinguished from evidence on its propensity to cause brain damage.

186. *Id.* However, within the next seven years (by the time that the next "leaking" endotoxin case, *Vincent,* was heard) a method was developed whereby this theory could be put to the test. *See* Vincent v. Thompson, 50 App. Div. 2d 211, 221, 377 N.Y.S.2d 118, 127 (1975). This scientific test, which largely disproved the "leaking" endotoxin theory, shall be discussed subsequently. *See* section III. C. 2. *infra.*

side, turned into a classic battle of the ligitants' "hired guns"; *i.e.*, their paid expert witnesses, each of whom offered his or her own "considered opinion."

The plaintiff emerged the victor in this battle of the experts.[187] However, the lack of precise, reliable and scientific evidence offered during trial had a telling effect on the trial court's eventual written opinion. For example, the trial court did not find that benzethonium chloride definitely causes pertussis endotoxins to leak. Indeed, there was no evidence upon which so certain a finding could have been based. Rather, the court found that it is "reasonable to conclude" that the benzenthonium chloride has this effect.[188] Similarly, the court did not find that this case definitely involved fever and/or brain damage actually caused by the allegedly leaked endotoxins, as opposed to an allergenic reaction or a regular and statistically predictable pertussis adverse reaction to the vaccine. Rather, the court found that it was "reasonable to conclude . . . with reasonable . . . certainty or probability" that such was the case.[189] Indeed, the court apparently sensed that its opinion, based solely on the rather weak evidence presented during trial, left something to be desired. Hence, in a somewhat defensive posture, the court explained that its findings need not "meet the standards of the laboratorian" before it may hold for the plaintiff.[190]

Such a case, involving imprecise and non-empirical evidence relating to an unproven theory, should not form the basis of an estoppel. As previously noted, collateral estoppel should only apply to intrinsic product defects, supported by empirical and precise evidence. Here, the lack of such empirical and precise evidence is manifest. While our judicial system may reflect a societal judgment that empirical and precise evidence is not necessary for the purpose of deciding a single products liability claim,[191] as is evidenced by the *Tinnerholm*

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187. Tinnerholm v. Parke, Davis & Co., 285 F. Supp. 432, 445 (S.D.N.Y. 1968). The correctness of the *Tinnerholm* conclusion is not here under attack. Rather, the question addressed here is the propriety of basing a future estoppel on the findings rendered in *Tinnerholm*. The guideline suggested here is that if a case is to provide the basis of a future estoppel, the case must be examined carefully to see if the findings rendered reflect that degree of certainty required in the products liability-collateral estoppel setting.

188. *Id.* at 440.

189. *Id.*

190. *Id.*

191. *See* Halloran v. Virginia Chemicals, Inc., 41 N.Y.2d 386, 388, 361 N.E.2d 991, 993, 393 N.Y.S.2d 341, 343 (1977), wherein it was stated that in New York State all that a plaintiff has to do is exclude "all causes of the accident not attributable to the defendant [and] the factfinder may, *even if a particular defect has not been proven,* infer that the accident could only have occurred due to some defect in the product. . . ." (emphasis added).

Of course, it could not seriously be argued that such a showing, while perhaps sufficient to allow recovery in an individual case, may be the basis of an estoppel. Indeed, under this standard, no real *defect* need be proven. All that an individual plaintiff need do under this rule is "explain

decision,[192] a similar degree of imprecision and inexactitude can not be tolerated for the purpose of applying an estoppel. In such a setting, society and our legal system are justified in positing that if an estoppel is to lie at all it must be based on sterner stuff. Too much is at stake and the possibility of a massive injustice is too great to allow otherwise.

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away" other possible causes of the accident, and then the jury may "infer" that the product is defective. This is far from an empirical showing of a product defect.

Similarly, under the standard developed in Barker v. Lull Engineering Co., Inc., 20 Cal.3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), all that a plaintiff must do to present a prima facie case of defective design is to show that an injury occurred while using the product. The burden then shifts to the defendant to prove that the design was not defective. Findings resulting from the utilization of this standard should not ordinarily be allowed to form the basis of an estoppel. In such cases it could persuasively be argued that there was not so much a prima facie showing that the product was defective as much as there was simply an absence of a showing to the contrary.

If a *Barker* standard is used in the seminal case, and that case is later relied upon as forming the basis of an alleged estoppel in a state that has adopted a substantially different standard, then the estoppel should be rejected because an identity of issue is not present. The original finding of a product "defect" based on a *Barker* standard presents an entirely different issue than a finding of a product defect in a state that employs a "reasonable care in design" standard. Where different legal standards are used by different courts, the findings of one court should not form the basis of an estoppel in a different court. *See, e.g.,* Costello v. Pan Am World Airways, 295 F. Supp. 1384 (S.D.N.Y. 1969); *In re* Gygi, 273 Or. 443, 541 P.2d 1392 (1975). *See also,* Rachal v. Hill, 435 F.2d 59, 63-65 (5th Cir. 1970) (significant differences in procedural law between forums, which differences might reasonably be expected to change the outcome of the litigation, should foreclose the opportunity of an estoppel); and, RESTATEMENT (SECOND) OF JUDGEMENTS § 88(2), Comment (Tent. Draft No. 2, 1975).

192. Indeed, it may be argued that this degree of inexactitude *must* be tolerated in such cases, simply because we can not consume all of our resources in an attempt to achieve perfection in the handling of individual personal injury lawsuits.

Along these lines, it may be observed that *Katz*, discussed at note 112 *supra*, indirectly endorses the basic theme of this article (*i.e.*, that a different kind of inquiry, and a different degree of certainty, is required in a collateral estoppel-products liability case, as opposed to a "run of the mill" products liability case, involving a single plaintiff's claim). This becomes clear when one realizes that all of the counsel in *Katz*, including the court, agreed that whatever the jurors' depositions revealed, they would have no bearing whatsoever on the case to which they directly related, *Bichler*. These depositions could have bearing *only* on prospective cases, such as *Katz*, wherein the *Bichler* finding of a product "defect" was the basis of an asserted estoppel. In other words, even if the depositions of the *Bichler* jurors revealed conclusive information indicating that a compromise verdict was rendered, this information would not affect the conclusion reached in that *single* products liability case. The information *would*, however, affect the prospective weight of the *Bichler* jury's finding. *Hence, one standard concerning the question of the validity of a verdict would be employed for the purpose of deciding a single products liability claim, and an entirely different standard would be employed for the purpose of deciding whether that verdict may support a future estoppel.*

Similarly, in this article, it has been urged that one standard of certainty and precision may suffice for the purpose of deciding a single products liability action, while a different, more exacting standard, is required where that finding is sought to be relied upon for the purpose of an estoppel. Hence, it was observed herein that while the *Tinnerholm* Court's "finding" that benzethonium chloride caused pertussis endotoxin "leakage" *might have* sufficed for the purpose of rendering a plaintiff's verdict in said case, said "finding" was not of a quality which justified its being relied upon for the purpose of a prospective estoppel. In fact, subsequent developments bore this out, since after the *Tinnerholm* decision was rendered it was discovered that benzethonium chloride did *not* have the effect that the plaintiff's experts in *Tinnerholm* claimed it had. *See* Section III. C. (1) and (2), *supra*.

2. Vincent v. Thompson

The fact pattern in *Vincent v. Thompson*[193] was substantially different from that in *Tinnerholm*. However, because both cases involved injections of Quadrigen and eventual personal injuries suffered by the recipient, the plaintiff in *Vincent* requested the court at the outset of the trial to charge the jury that Quadrigen was a defective drug, and that they may consider it as such notwithstanding the lack of any evidence thereon. The trial court granted the plaintiff's request,[194] and the trial resulted in a plaintiff's verdict in the sum of $3,000,000.

On appeal the defendant maintained that the trial court's application of the estoppel was erroneous in two respects. First, the defendant maintained that the factual differences between the cases rendered an estoppel inapplicable.[195] Second, the defendant maintained that the discovery of new scientific evidence subsequent to the *Tinnerholm* trial largely negated the "leaking" endotoxin theory, and hence, made the application of an estoppel especially unfair in this instance.[196] The appellate court agreed with the defendant and reversed.[197]

The important factual differences between the cases spoke not to the issue of product identity since it was uncontested that both cases involved similarly designed drugs, but rather, to the issue of causation. The particular circumstances surrounding the plaintiff's vaccination in *Vincent*, and the nature of the injuries suffered therein, left substantial doubt as to whether one actually had anything to do with the other. First of all, the Quadrigen recipient in *Tinnerholm* was an infant, while the recipient in *Vincent* was 13 years of age.[198] Second, *Tinnerholm* involved a post-vaccinal fever which preceded the infant's brain damage, whereas in *Vincent* there was no fever at all following the injection, and, instead of suffering brain damage, the *Vincent* plaintiff suffered a transverse myelitis (paralysis caused by inflammation of the spinal cord). Such an injury, it was agreed at trial, had never been associated with pertussis vaccine before,[199] whether the endotoxins therein had "leaked," as alleged, or not. Quite the contrary, there was testimony at trial that the myelitis could have been caused by the very accident that

193. 50 App. Div. 2d 211, 377 N.Y.S.2d 118 (1975).
194. *See* Vincent v. Thompson, 79 Misc.2d 1029, 361 N.Y.S.2d 282 (Sup. Ct. 1974).
195. *See* Vincent v. Thompson, 50 App. Div.2d 211, 218, 377 N.Y.S.2d 118, 125 (1975).
196. *Id.* at 220-23, 377 N.Y.S.2d at 127-30.
197. *Id.* at 223, 377 N.Y.S.2d at 130.
198. *Id.* at 218, 377 N.Y.S.2d at 125.
199. *Id.* at 219, 377 N.Y.S.2d at 126. Note, however, that it could have been possible for the myelitis to have been caused by a reaction to the polio component of Quadrigen. However, the plaintiff never claimed that this component of the vaccine was "an improper component of Parke, Davis' product." *Id.*

prompted the plaintiff's doctor to administer Quadrigen to her in the first place — her stepping on a rusty nail.[200]

The appellate court found that these differences between the cases spoke to a lack of identity as to the "ultimate issue"[201] in each one. Additionally, the court was influenced by the fact that a scientific procedure had been developed after *Tinnerholm* which could be used to test the accuracy of the original "leakage" theory articulated therein. This test was developed by "a pediatric immunologist, who testified that [the test] . . . negated the defective pertussis theory utilized by [the *Tinnerholm*] court. . . ."[202] The *Vincent* court reasoned that the factual difference between the cases and the discovery of this new "precise kind of evidence"[203] argued against the operation of an estoppel.

As mentioned previously, the *Vincent* court's conclusion on the applicability of an estoppel was correct.[204] However, the articulated reasoning of the court on the question of an identity of issue was not completely satisfactory. Technically speaking, an identity at issue did exist, because both *Tinnerholm* and *Vincent* involved exactly the same product design and benzethonium chloride was present in the drug in both instances. The factual differences between the cases spoke not so much to identity of issue, as the *Vincent* court implied, but to the relevancy of the issue involved in *Tinnerholm* to the *Vincent* case.

The *Tinnerholm*-type defect, or so the plaintiff therein theorized, caused fever and eventual brain damage. However, the *Vincent* fact pattern did not involve either fever or brain damage — but a transverse myelitis. Hence, the *Tinnerholm* defect, even if it did exist, was simply irrelevant to the *Vincent* case. Merely because a product is found to contain a particular defect does not mean that an estoppel should lie in all future cases, whether that particular defect is relevant to the current fact pattern or not. Even though a product may have a definite and empirically proven defect, an estoppel should not lie unless it was that particular defect that caused the plaintiff's injuries.

Once again, perhaps the use of an example will better illustrate this point. Let us return to the small gasoline engine hypothetical. In that case the reader will recall that the defect was a misprint in the product's warnings; instead of stating that a "10" minute waiting period was necessary before filling the gas tank, the warning stated that only "1" minute need elapse. There is no question that this was a defect, and yet,

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200. *Id.* at 213, 377 N.Y.S.2d at 121.
201. *Id.* at 219, 377 N.Y.S.2d at 126.
202. *Id.* at 221, 377 N.Y.S.2d at 127.
203. *Id.* at 221, 377 N.Y.S.2d at 128.
204. Indeed, pursuant to the controlling New York law on the issue, the estoppel could have been denied on the grounds of significant new evidence alone. Schwartz v. Public Adm'r, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 730, 298 N.Y.S.2d 955, 961 (1961).

an estoppel based on this one defect will not lie in all future cases without regard to the fact patterns therein. Imagine a case in which the plaintiff did not attempt to fill the gas tank after using the engine. Rather, he or she filled the gas tank when the engine was "cold," and yet, the gas still ignited. In this case the gas tank might have exploded because it was being filled in a garage wherein another person was using a blow torch. The plaintiff's theory of a product defect in such a case would relate to the lack of a warning concerning product use near a blow torch, not to the misprint involved in the prior case. The defect involved in the prior case should be considered irrelevant in the latter case so long as it is undisputed that the engine was not "hot" when the plaintiff poured the gas. Pursuant to this rationale it could be argued that the *Vincent* court's ultimate rejection of a *Tinerholm*-based estoppel should have been based on the concept of relevancy, and not on the concept of identity of issue.[205]

3. Grant v. Parke, Davis & Co.

The *Grant v. Parke, Davis & Co.*[206] trial was held after the *Vincent* trial court had applied collateral estoppel, but before that court's decision was reversed on appeal. Hence, the plaintiff in *Grant* requested that a *Tinnerholm*-based estoppel be issued, and cited the *Vincent* trial court's opinion as authority. This request was granted by the court. Unlike *Vincent,* the *Grant* trial resulted a defendant's verdict. Although the trial court issued no written opinion, it appears from the appellate opinion that the jury based its verdict on evidence that the plaintiff's injuries were the result of a *regular* pertussis reaction (as opposed to an enhanced pertussis reaction) as well as on other evidence that, in fact, this plaintiff did not receive Parke-Davis' brand of four-in-one vaccine, but another manufacturer's brand.[207]

The *Grant* appeal, in essence, had to do with various evidentiary questions unrelated to collateral estoppel. The defendant, having been successful at trial, apparently did not wholeheartedly challenge the trial court's decision to apply an estoppel. Likewise, the appellate court did not undertake careful analysis of the issue. Suffice it to say that the appellate court found no reversible error in the trial court's evidentiary

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205. Additionally, it may be observed that the *Tinnerholm* defect related to the product's design. Generally speaking, it is suggested herein that such defects should not form the basis of an estoppel. However, in *Tinnerholm* it is difficult to tell if the "leakage" theory (whether or not it was accurate) truly involved an intrinsic design defect. The record is unclear on this point.

206. 544 F.2d 521, [1976] PROD. LIAB. REP. (CCH) ¶ 7848 (7th Cir. 1976).

207. *Id.*, [1976] PROD. LIAB. REP. (CCH) ¶ 7848, at 15, 600. It appears that the administering physician's testimony, and his office records, indicated that another brand of four-in-one vaccine was used. Of course, any brand vaccine, as long as it had a pertussis component, could have caused a pertussis reaction.

rulings and, accordingly, it affirmed the jury's verdict for the defendant. For the purpose of this analysis, the only aspect of *Grant* that we need to be concerned with relates the following query: Why did the trial court issue an estoppel before it was even established that Quadrigen, and not some other brand of drug, was used?

The trial court probably reasoned that it could charge the jury that although it may consider Quadrigen defective, it must keep an open mind concerning the question of the drug's actual use in this fact pattern. It is suggested that this procedure is to be avoided. Charging a jury on the issue of a defect, when product identity has not been determined, poses a substantial possibility of unfair prejudice to the defendant. It is unfair to the defendant to charge the jury that it must decide which product, among several, was actually used, while at the same time telling the jury that product "X" is definitely defective because it causes the injury that the plaintiff "coincidentally" suffers from. The better procedure is to bifurcate the trial and address the issue of product identity initially.[208]

4. Ezagui v. Dow Chemical Corp.

The *Ezagui v. Dow Chemical Corp,*[209] opinion is a lengthy and complex one. Therefore, similar to *Grant,* only that portion of the *Ezagui* opinion which addressed the issue of an estoppel will be analyzed here.

At the *Ezagui* trial, the plaintiff moved for an estoppel based largely on the *Tinnerholm* case.[210] The trial court, however, relying on the appellate court's decision in *Vincent,* denied the estoppel[211] Thus, it was incumbent upon the plaintiff at trial to independently prove that a defect existed in Quadrigen. The trial court concluded that the plaintiff had failed to meet this burden, and as a result dismissed the plaintiff's action at the close of her case.[212]

On appeal, the Second Circuit held that although *Vincent* precluded an estoppel on the "leakage" issue, it did not preclude an estoppel on the question of defective warnings. Such an estoppel, the *Ezagui* court

208. *See* note 148 and accompanying text *supra.*

209. 598 F.2d 727 (2d Cir. 1979).

210. The plaintiff's motion papers at trial on the question of an estoppel concluded: "The facts in the instant case are virtually identical with the facts in the *Tinnerholm* case. The issues are identical with the issues in the *Tinnerholm* case and the doctrine of collateral estoppel should be applied." Appellant's Appendix at 87-88a.

211. The trial court held: "Collateral estoppel should not be employed here in view of [the] substantial showing of a subsequently discovered test establishing that *Tinnerholm's* factual foundation is now demonstrably untrue. . . ." *Id.* at 155a. "Avoiding the necessity of trying in full the issue of whether Quadrigen was a defective product, is indeed a tempting result for this trial judge. Justice requires, however, that the issue be reexamined, whatever the cost in time and effort." *Id.* at 154a.

212. Ezagui v. Dow Chemical Corp., 598 F.2d 727, 730 (2d Cir. 1979).

reasoned, could be based on the case of *Stromsodt v. Parke, Davis & Co.*[213] The *Ezagui* court wrote:

> [In *Stromsodt*] the Eighth Circuit explicitly held that the package insert (*i.e.*, product warning) was inadequate in light of the frequency and severity in adverse reactions associated with Quadrigen and reported to Parke-Davis. This holding in no way depended on the ["leakage"] theory. Accordingly, *Vincent v. Thompson, supra,* does not bar reliance on *Stromsodt* to estop collaterally Parke-Davis from denying that the package inserts supplied with Quadrigen were inadequate in that they failed to apprise doctors administering the vaccine of the known hazards attendant upon such use.[214]

Accordingly, the Second Circuit reversed the trial court and ordered that a new trial be held. The Second Circuit also advised the lower court that the plaintiff would be entitled "to an order collaterally estopping Parke-Davis from denying the inadequacy of the warnings contained in Quadrigen package inserts."[215]

While the *Vincent* and *Grant* trial courts each applied an estoppel on the question of a design defect, *Ezagui* is the only products liability—collateral estoppel case decided to date to which has applied an estoppel on the question of a defective warning. Primarily for this reason,[216] it is suggested herein that the *Ezagui* holding was improper.

As already noted, the question of whether a given set of product warnings is defective relates to concepts and factual findings extrinsic to the product itself.[217] Different consumers and different juries may reach different conclusions regarding a single product warning. Indeed, this fact was expressly recognized by the *Stromsodt* court when it observed that while Quadrigen's warnings were found to be inadequate in the

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213. 257 F. Supp. 991 (D.N.D. 1966), *aff'd.*, 411 F.2d 1390 (8th Cir. 1969).

214. Ezagui v. Dow Chemical Corp., 598 F.2d 727, 732-33 (2d Cir. 1979). Curiously, although in this regard the *Ezagui* court opined that the Quadrigen warnings were inadequate, the court also concluded that a *prima facie* showing of negligence was made out against the administering physician, because he "failed to comprehend and act in light of the hazards attendant upon the use of Quadrigen as reported in the [warnings]. . . ." *Id.* at 737. Query whether a *prima facie* showing of negligence on the administering physician's part would presuppose that the package insert provided the physician with an adequate amount of information? Conversely, would the conclusion that the inserts were inadequate *preclude* a *prima facie* showing of negligence against the doctor? The *Ezagui* court never answered these questions. However, the entire *Ezagui* opinion, fraught as it is with many syllogistically questionable aspects, shall not be reviewed here.

215. *Id.* at 733.

216. It should be noted that in *Ezagui,* similar to *Grant,* product identity was an issue. However, again similar to *Grant,* the *Ezagui* court did not opine that the issue should be decided prior to deciding whether an estoppel lies. *Id.* at 732-33. As already mentioned, it is suggested herein that the better procedure is to determine exactly what product was used before determining whether that product should be declared defective by operation of an estoppel. *See* section III. *A.* 1. *supra.*

217. *See* section III. *B. supra.*

case at hand, the warnings might prove to be sufficient in *other* fact patterns, involving *other* administering physicians.[218] Query: If the *Stromsodt* court itself recognized that the warnings it considered to be defective need not be considered inadequate in all fact patterns for all time, should a subsequent court "overrule" the *Stromsodt* court on this point? Because the meaning and the adequacy of a given warning is almost always a function of the person who is reading it and the circumstances in which he or she is acting, the better rule would appear to be that in most cases the relative adequacy of warnings should be adjudged on a case by case basis. Indeed, even the *Stromsodt* court appears to have implied that such should be the rule. Unfortunately, the *Ezagui* court never addressed this fundamental issue in its opinion.

D. The Validity of the Intrinsic-Extrinsic Distinction

Some of the justifications for limiting the application of collateral estoppel to intrinsic defects have been mentioned previously. However, those opposed to the "intrinsic" — "extrinsic" distinction might argue that it reduces itself to an argument that collateral estoppel should *never* be applied to any type of case that turns on the concept of "reasonableness."[219] However, the guidelines suggested in this article should not be understood as disallowing the application of collateral estoppel to *all* such cases. Rather, it is suggested that due to the basic difference between the nature and magnitude of the interests involved in products liability—collateral estoppel cases, as opposed to "run of the mill" collateral estoppel cases, this distinction should only apply to the products liability setting.

The run of the mill collateral estoppel case will usually involve the interests of a very limited number of litigants and potential litigants. For example, in the typical automobile negligence case, only the negligent driver's interests are affected adversely. Similarly, in mass disaster cases, such as aircraft crashes, only the interests of the commercial defendant (including its stockholders) are affected adversely. However, in the products liability—collateral estoppel case, the interests affected adversely will include not only the commercial defendant's (including its stockholders), but also those of its employees. If an entire product line is judicially declared to be defective, it may mean that all future

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218. The *Stromsodt* court noted: "It is arguable that the warning [in question] might suffice to put an unusually sophisticated medical man on notice. . . . [B]ut certainly it is a matter of common knowledge that there are thousands of rural communities in this country where [only general practitioners practice]." Stromsodt v. Parke, Davis & Co., 411 F.2d 1390, 1400 (8th Cir. 1969).

219. Of course, such cases are found in all areas of the law. For example, a trustee can be held liable to the beneficiaries of the trust if he makes unreasonable investments. *See, e.g., In re* Bank of New York, 35 N.Y.2d 512,323 N.E.2d 700, 364 N.Y.S.2d 164 (1974).

production of the product may have to be halted. On occasion, this may result in the loss of a certain number of assembly line and marketing jobs. Of course, this is not to say that in every instance where a product is judicially declared to be defective thousands of factory workers will lose their employment, but the possibility of increased unemployment cannot be entirely discounted.[220]

Even without counting the economic consequences that such cases may have,[221] the magnitude of interests affected in a products liability—collateral estoppel case, when compared with those affected in the run of the mill collateral estoppel case, are mind boggling. In a mass produced product case millions of individual products may be involved. If a product line is judicially declared for all time and in all fact patterns to be defective, innumerable products liability claims may be filed. Whereas the potential number of suits arising out of a bus crash is absolutely limited by the number of people actually involved in that isolated and singular accident, the number of potential lawsuits arising out of a judicially declared product defect is not so limited. After the product is first held to be defective, additional suits may be filed every day of the week for months and even years. Indeed, once the product has been injected into the stream of commerce in sufficient numbers, product related accidents allegedly caused by the judicially declared defect may occur with a certain degree of frequency for the next decade or two.

If collateral estoppel *is* applied in mass produced product cases, hundreds and perhaps thousands of plaintiffs may find their interests affected in a positive fashion. What percentage of these plaintiffs will have been unjustly enriched because, *as to them,* the *extrinsically* "defective" warning in question was perfectly clear? That question cannot be answered. Similarly, hundreds and perhaps thousands of shareholders and employees will be affected adversely by the application of the doctrine. What percentage of the time will this group of people experience an injustice because the particular jury deciding the seminal case incorrectly concluded that a set of product warnings were "unreasonable?" Again, this question cannot be answered. It is suggested that our inability to answer these questions argues against the application of the doctrine to products liability cases involving extrinsic defects.

Yet, the retort to this argument against applying collateral estoppel is clear. It may be argued that if collateral estoppel is not applied to products liability litigation involving extrinsic defects because of the magnitude of the interests involved, then collateral estoppel should never be

220. For other possible negative consequences flowing from the application of the doctrine of collateral estoppel to products liability litigation, as well as several positive consequences, *see* section II. *B. supra.*

221. *Id.*

applied to any case that turns on a "reasonableness" standard and which involves similar interests. Surely, it may be argued, the magnitude of interests involved in a large class action case (which turns on a "reasonableness standard") can approach a collateral estoppel-products liability case. The question may be asked: Why differentiate the two?

The answer to this question is that in the collateral estoppel-products liability case, the possibility of imprecision and inconsistency present when adjudging extrinsic "defects" cuts *only one way,* that is, against the defendant. This one-sidedness is mandated by the privity requirement. In the class action case the possibility of imprecision and inconsistency present when liability turns on extrinsic concepts and factual findings can work in favor of the defendant just as easily as it can work in favor of the plaintiffs. If in the class action situation the jury makes a mistake, that mistake may benefit either litigant.[222]

This basic rule does not apply to collateral estoppel—products liability litigation involving extrinsic defects. Hence, while it may be true that all litigation involving such "extrinsic" concepts, such as "reasonableness," bears a similarity to Russian Roulette, at least in the class action setting both sides use the same revolver. To apply collateral estoppel to products liability litigation involving extrinsic defects would be to force the defendant to play with a "live" revolver while permitting the plaintiff to play with a revolver loaded with blanks.

CONCLUSION

There *may* be a place for the doctrine of collateral estoppel in products liability law. However, if such a niche does exist, it has not been defined by existing case law. Indeed, if there is one thing that the cases decided to date have in common, it is that none of them presented a scholarly and detailed analysis of the many and varied issues that arise when the doctrine is applied to mass produced products litigation.[223]

It is hoped that the analysis and proposal outlined herein will aid the bench and bar in formulating a prospective guideline as to when, how, and under what circumstances collateral estoppel may be applied. In

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222. *See* note 5 and accompanying text *supra.*

223. While many different issues involved in the doctrine's application were discussed herein, counsel would do well to recognize that it would have been impossible to analyze *all* of the questions and problems that may arise in any given case. It must be borne in mind that this topic simply does not lend itself to an absolute and all inclusive "rule." Hence, here, as in nearly every area of the law, a case by case approach to the issue would constitute the wisest course of action.

sum, the guideline suggested herein is that the doctrine can only be applied if the seminal case involved an intrinsic defect, the finding of which was supported by empirical and precise evidence. While it may appear to some that this yardstick is a stringent one, it must be remembered that the consequences of applying the doctrine to this type of litigation will be dramatic from a legal, as well as an economic and sociological standpoint. Hence, although it may be argued that this guideline is demanding, it is not undeservedly so.

The Federal Discovery Rules: A Look at New Proposals

PAUL PERLMAN

Discovery abuse is one of the most vexing problems confronting judges and attorneys involved with federal trial litigation. In this article, Attorney Perlman analyzes three current proposals for the revision of the federal discovery process. Specifically, the author centers his analysis on the redefinition of the scope of discovery, the function of the pretrial conference, and the role of various discovery devices and sanctions. Throughout the article Attorney Perlman discusses the advisability of the proposed changes while inserting his own suggestions for remedying the discovery dilemma.

In 1938, the Federal Rules of Civil Procedure initiated an era of liberal discovery.[1] The federal discovery rules, currently Rules 26 through 37, underwent extensive reorganization and amendment in 1970.[2] By 1970, courts had expanded the original meaning of the rules and added a judicial gloss to their interpretation. This reworking of the rules by the courts was extensive enough to necessitate a comprehensive amendment of the discovery rules by the Supreme Court.[3]

In the nine years since the amendment of the discovery rules, it has become apparent that problems remain. Discovery is still abused by parties who seek not to gain needed information, but rather to delay

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1. *See* Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement concerning Amendments of the Discovery Rules, 48 F.R.D. 487 (1970). [Hereinafter cited as Advisory Committee Notes].

2. Blair, *A Guide to the New Federal Discovery Practice,* 21 DRAKE L. REV. 58 (1971). Although the discovery rules were amended from time to time prior to 1970, the amendments were relatively minor and narrowly focused. Advisory Committee Notes, *supra* note 1, at 487.

3. Blair, *supra* note 2, at 58.

and harass opponents.[4] The rules have again been expanded by the courts beyond their literal meaning, in the same manner as had occurred before the 1970 amendments.[5] The current rules do not provide guidance in resolving certain common discovery problems.[6]

These discovery problems have been the focus of recent proposals to amend the discovery section of the Federal Rules of Civil Procedure. The Chief Justice of the United States has appointed an Advisory Committee on Civil Rules[7] to formulate proposals for amending the rules.[8]

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4. In United States v. I.B.M. Corp., 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969), for example, the plaintiff produced 26,000,000 pages of documents and the defendant produced 4,000,000 pages. In addition, the defendant produced 60,000,000 pages of documents for private parties. The parties took 1,270 depositions in the case. National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and the Attorney General* 42 (1979).

Interrogatories, as well as documents and depositions, are used to place undue burdens on opposing parties. In United States v. Diapulse Manufacturing Company of America, 41 F.R.D. 46 (D. Conn. 1966), the government filed about 10,000 interrogatories with the defendant. The court ruled that the interrogatories were entirely too voluminous and made a question-by-question review of the interrogatories.

5. For example, the courts have placed duties on parties answering interrogatories which are not explicitly provided for in Rule 33. *See* notes 131-43 and accompanying text *infra*. Moreover, courts have upheld sanctions for discovery violations in instances where Rule 37 does not provide explicitly for sanctions. *See* notes 213-28 and accompanying text *infra*.

6. For example, although Rule 26(e) provides for supplementation of originally incorrect or subsequently untrue answers to discovery, it does not deal with the situation where answers were originally true but have been rendered incomplete by new information. FED. R. CIV. P. 26(e) provides:

> *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> 1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
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> 2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
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> 3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at anytime prior to trial through new requests for supplemention of prior responses.

This lack of clarity has been the cause of confusion by the courts in applying the Rule. *See* notes 158-66 and accompanying text *infra*.

Another problem which is dealt with only implicitly by the rules is the "dumping" of documents in response to a Rule 34 request. Courts have struggled to react to this form of discovery abuse. *See* notes 184-97 and accompanying text *infra*.

7. The Advisory Committee on Civil Rules reports to the Committee on Rules of Practice and Procedure, a committee of the Judicial Conference of the United States. *See* Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure,* 77 F.R.D. 613, 616 (March 31, 1978) [hereinafter cited as *1978 Preliminary Draft*].

8. The Advisory Committee released a preliminary draft of proposed amendments to the discovery rules in March, 1978. *1978 Preliminary Draft, supra* note 7, at 613. These proposed

The American Bar Association Section on Litigation has drafted suggested changes to eight of the thirteen discovery rules.[9] A proposal for a local variation of Rule 34 has been drafted by the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation.[10]

This article will examine the current state of discovery and the federal discovery rules. Suggested amendments to several of existing discovery rules will be offered. In the course of this analysis, many of the proposals made by the Advisory Committee on Civil Rules,[11] the ABA, and the Second Circuit will be discussed.

For the purpose of analysis, this article will first discuss proposals for controlling the scope and volume of permitted discovery. Then, specific discovery devices, including sanctions, will be examined and recommendations will be offered for making the use of these devices more efficient and equitable. The proposals in each of the two sections of this article can be implemented independently. Therefore, even if the procedures recommended for controlling discovery are not accepted, the proposals for altering specific discovery devices will nevertheless serve to improve the mechanics and fairness of discovery within the context of present control procedures.

I. CONTROL OF DISCOVERY

A. Scope of Discovery

Rule 26 of the Federal Rules of Civil Procedure defines the scope of discovery. It provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ."[12]

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amendments were circulated for comment to the bench and bar. Public hearings were held in Los Angeles and Washington. Reaction to the proposed amendments resulted in modifications being made in the proposals. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure,* 99 S. Ct. Adv. Sh. No. 8 (Feb. 1979) [hereinafter cited as *1979 Preliminary Draft*].

9. ABA Section of Litigation Special Committee for the Study of Discovery Abuse, Proposed Changes in the Federal Discovery Rules (1st ed. 1977) [hereinafter cited as *ABA Section of Litigation Proposal*].

10. Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, *Proposed Local Rule* (April 10, 1978) (unpublished) [hereinafter cited as *Second Circuit Proposal*].

11. Although the Advisory Committee on Civil Rules has modified its March, 1978 proposals *(1978 Preliminary Draft, supra* note 8), both the March, 1978 and February, 1979 drafts of the proposed amendments will be referred to throughout this article where they present issues of competing policy. However, these proposals will be discussed only to the extent that they contribute to the analysis; no attempt will be made to examine them comprehensively.

12. FED. R. CIV. P. 26(b)(1) [emphasis added].

The ABA and the Advisory Committee on Civil Rules have proposed amendments to the above language in Rule 26(b)(1) defining scope. Under the ABA proposal, discovery may be undertaken which is "relevant to the issues raised by the claims or defenses of any party."[13] A pretrial discovery conference, which would be held after the answer to the complaint is filed, is provided under this proposal if requested by one or both parties.[14] The primary purpose of the pretrial conference would be to formulate a statement of the issues in the case and to plan a discovery schedule.[15]

The ABA Section of Litigation felt that a major source of discovery abuse is the practically unlimited scope of discovery. The example is given of an antitrust suit. Under the present Rule 26 language, discovery would be allowed into the practices of an entire business or industry; it would not be limited to the industry practices at issue in the particular case. The ABA Committee believed that a change in language from "subject matter" to "issue" would at least serve the purpose of putting courts on notice that they are not to favor giving the most expansive possible discovery in each case.[16]

In the 1978 Preliminary Draft, the Advisory Committee on Civil Rules rejected the ABA Section on Litigation's proposed amendment and substituted one of their own. The Advisory Committee recommended amending Rule 26(b)(1)[17] by deleting the words "subject matter involved in the pending action, whether it relates to the."[18] Discovery would therefore be allowed where it is "relevant to the claim or defense of any party."[19] In the 1979 Preliminary Draft, the Advisory Committee decided to continue to reject the Section on Litigation proposal; they also chose to reject their own 1978 proposed amendment, leaving Rule 26(b)(1) in its present form.[20]

In its current form, Rule 26(b)(1) allows very broad discovery.[21] In *Alliance To End Repression v. Rochford,*[22] the District Court for the

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13. ABA Section of Litigation Proposal, *supra* note 9, at 2.

14. *Id.* at 4.

15. *Id.* Two additional purposes would be to: (1) set limitations on discovery and (2) allocate expenses of discovery.

16. *Id.* at 3. Weyman Lundquist, chairman of the ABA Section of Litigation, gives a second example of abuse caused by present Rule 26(b)(1). In a suit which challenged the N.F.L.'s reserve clause, discovery was permitted into the method of management and the financial affairs of all twenty-six N.F.L. teams on the theory that the subject matter was "football and the business of conducting it." Lundquist & Schechter, *The New Relevancy: An End to Trial by Ordeal,* 64 A.B.A. J. 59, 60 (1978).

17. *See* note 12 and accompanying text *supra.*

18. *1978 Preliminary Draft, supra* note 7, at 623.

19. FED. R. CIV. P. 26(b)(1).

20. *1979 Preliminary Draft, supra* note 8, at 3-5.

21. *See* note 12 and accompanying text *supra.*

22. 75 F.R.D. 441 (N.D. Ill. 1977).

Northern District of Illinois interpreted Rule 26(b)(1) as allowing any discovery which is relevant to the subject matter. The plaintiff in *Alliance* brought suit against the government for engaging in unconstitutional surveillance. The plaintiff sought all files in the possession of the defendant which contained information about the plaintiffs. Many of these files contained information about other organizations and about individuals who were not members of the plaintiff organization. The court allowed discovery of these files since the plaintiff had been affiliated or associated with many of the individuals and organizations. In so holding, the court stated, "[t]his Court notes that the scope of discovery in civil cases is extremely broad. Relevancy objections, while permissible, will not be sustained where the discovery sought is relevant to the subject matter."[23]

Rule 26(b)(1) does not limit discovery to information relevant to the issues in the pleadings.[24] In *K. S. Corp. v. Chemstrand Corporation,*[25] a purchaser who sued a manufacturer and a competitor for violating the antitrust laws served interrogatories on the manufacturer. An objection to these interrogatories was filed[26] on the ground that the information sought was not confined to the scope of the plaintiff's complaint. In a decision which upheld some objections while overruling others, the court stated:

> I shall not discuss the extent to which the information called for by the various interrogatories relates directly to issues raised by the pleadings, because I do not think the pleadings should be the sole determinant of permissible discovery . . . Rather, the problem is to permit a litigant to obtain whatever information he may need to prepare adequately for the issues that may develop, ...[27]

Although discovery is not limited by the issues as set forth *in the pleadings,* the scope of discovery has been delineated by the United States Supreme Court by reference to the issues *in the case.* In *Oppenheimer Fund, Inc. v. Sanders,*[28] the Court decided a number of pro-

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23. *Id.* at 444. Other courts have expressed the expansiveness of the scope of discovery in even stronger terms. *See, e.g.,* Miller v. Doctor's General Hospital, 76 F.R.D. 136, 138-39 (W.D. Okla. 1977), where the court declared that: "[R]elevancy is broadly construed at the discovery stage of litigation and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." *See also* Flour Mills of America, Inc. v. Pace, 75 F.R.D. 676 (E.D. Okla. 1977); Payne v. Howard, 75 F.R.D. 465 (D.D.C. 1977).

24. 4 MOORE'S FEDERAL PRACTICE ¶ 26.53(1) (2d ed. 1979).

25. 203 F. Supp. 230 (S.D.N.Y. 1962).

26. Under Rule 33 before the 1970 amendments, the responding party had to file notice of objections with the court. A hearing was then scheduled to consider the objections. Blair, *supra* note 2, at 69.

27. K.S. Corp. v. Chemstrand Corporation, 203 F. Supp. 230, 232 (1962).

28. 437 U.S. 340 (1978).

cedural questions in a class action in which the plaintiff class sued the defendant fund to recover money that was paid for shares in excess of their value. The plaintiff sought to discover the names of all shareholders who had purchased their shares for a certain value. The Court defined the scope of discovery as information which was relevant to actual or potential *issues* in the case. The Court stated, "[t]he key phrase in this definition — 'relevant to the subject matter involved in the pending action' — has been construed broadly to encompass any matter that bears on . . . *any issue* that is or may be in the case."[29] The names of shareholders were found not to be relevant to any issue in the case; therefore discovery was denied. However, it was held that having a list of shareholders' names is a prerequisite to giving notice under Rule 23(d) and the defendant was ordered to compile the names under that rule.[30]

It is unlikely that any formulation of the scope of discovery can be precise since a rule must express the scope in a way general enough to embody the liberal spirit of the discovery provisions. Any such general statement of scope can be expected to be a fertile basis of challenge for parties dissatisfied with discovery.[31] Therefore, even the present statement of scope in Rule 26(b)(1) is, and will continue to be the subject of a certain amount of litigation.[32]

While there may be litigation to determine the proper scope of discovery under the current Rule 26(b)(1), the changes recommended by the ABA Section of Litigation and the Advisory Committee in its 1978 Preliminary Draft will result in even more litigation. Both proposals alter the present language of the rule. When the definition of scope is changed in any way, regardless how minor the change, parties will seek to have the courts interpret the provisions to their benefit. When presenting its proposal, the ABA Section of Litigation skirted this problem by concluding that "the parties should be able to agree upon their definition [of scope]."[33] If it is true that parties challenge the scope of discovery whenever there are tensions over discovery,[34] there is no reason to believe that parties will learn to agree as to scope under the amended rule. The changed language of the provision will make it easier

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29. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 351 (1978) (emphasis added).

30. *Id.* at 350.

31. "Relevance, it develops, is by far the most elusive and disputed question in the whole gamut of discovery problems. . . . [T]here is no set of words that will encapsulate the concept of relevance, and the task of defining it will be impossible." Therefore, lawyers will challenge relevance any time there is tension between the parties. Rosenburg, *Ninth Annual Postgraduate Conference of the Columbia Law School Alumni Association,* 45 F.R.D. 479, 490 (1968).

32. *See* W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 127 (1st ed. 1968).

33. ABA Section of Litigation Proposal, *supra* note 9, at 3.

34. *See* Rosenberg, *supra* note 31, at 490-91.

for parties to invent new arguments with respect to the proper scope of discovery.[35]

The Advisory Committee on Civil Rules recognized the problem of increased litigation that would be wrought by the ABA Section of Litigation's amendment. "[I]t (the Advisory Committee) fears that the introduction of a new term in the place of a familiar one will invite unnecessary litigation over the significance of the change."[36] In light of that recognition, it is anomolous that the Advisory Committee would exchange one amendment for another. Under the 1978 Preliminary Draft, the words "subject matter" were deleted from Rule 26(b)(1).[37]

The Advisory Committee's 1979 Preliminary Draft, which leaves current Rule 26(b)(1) unchanged,[38] is a more sensible approach. Although the Advisory Committee does not discuss its reason for withdrawing the 1978 proposed amendment, perhaps the Committee members realized after receiving comments that their proposal would result in the very disadvantage they were seeking to avoid through rejection of the ABA Section of Litigation's proposal. While the present statute is unclear in application and even though the courts have sometimes interpreted Rule 26(b)(1) to define the scope with reference to the issues in the case, the courts have, since 1970, interpreted the Rule so as to give some guidance to litigants.[39] Given the imprecision inherent in any definition of scope of discovery in a liberal discovery system, it would be counterproductive to alter the present definition. It might take the courts nine more years to interpret the new Rule to its present level of refinement. As the following discussion will indicate, there are other means of controlling the extent of discovery.[40]

A potential increase in litigation is not the sole reason for leaving Rule 26(b)(1) in its present form. Adoption of the ABA proposal would necessitate an early definition of the issues[41] and would have the effect of a return to common law writ pleadings.[42] In order to define the issues at an early stage, parties would file motions for more definite

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35. Parties will contend that the language change in Rule 26(b)(1) must serve some purpose. Since there will be no existing cases interpreting the new language, parties will be free to litigate novel interpretations.

36. *1978 Preliminary Draft, supra* note 7, at 627.

37. *Id.* at 623.

38. *1979 Preliminary Draft, supra* note 8, at 3-5.

39. *See* notes 22-30 and accompanying text *supra.*

40. *See* notes 49-108 and accompanying text *infra.*

41. The ABA Section of Litigation Proposal would reach a definition of issues after the answer to the complaint was filed. The issues would be defined in a permissive discovery conference. ABA Section of Litigation Proposal, *supra* note 9, at 4.

42. *See* Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition,* 78 F.R.D. 267, 275 (1978); *see also* Savell, *Basic Use of Discovery Procedures — Some Practical Problems,* 3 FORUM 197 (1968).

statements under Rule 12(e).[43] Rule 12(e) would need to be amended, since present motions for more definite pleadings are allowed only when a more precise statement of the issues is needed in order to file a responsive pleading.[44]

Allowing discovery on all topics relevant to the subject matter of the suit serves the useful purpose of allowing the issues to be narrowed only as the parties learn more facts about the case. This procedure helps insure that parties will not lose cases merely because their initial pleadings were inaccurate or incomplete due to a lack of information. To the extent that parties are allowed to modify their claims and answers as they obtain new information, the case is more likely to be decided on the merits, rather than on procedural technicalities.

Discovery serves an important role in defining the issues, especially in the early stages of a case.[45] In *Hickman v. Taylor,*[46] the United States Supreme Court noted:

> Under the prior federal practice [before the federal rules], the pretrial functions of notice-giving, issue-formulation and fact revelation were performed primarily and inadequately by the pleadings. The various instruments of discovery now serve (1) as a device along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties ....[47]

If the ABA Section of Litigation proposal is adopted and issues are solidified by the pleadings at the outset of the case, discovery will not serve the purpose of enabling the parties to gain a realistic sense of what issues are actually contested in the litigation. Since discovery will not be available to identify new issues and discard issues which have no factual bases, the issues in a case will be determined by the fortuity of information available to the parties before the commencement of the litigation.

It would be possible to limit discovery to the issues in the case if there were a preliminary period during which discovery could be gathered on all topics relevant to the nature of the case. After preliminary discovery, issues could be defined and discovery limited to the issues identified. This design would require two definitions of scope — one definition for the preliminary discovery and a second more restrictive definition for discovery following issues identification. Such a two-tier system of

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43. FED. R. CIV. P. 12(e).

44. *Id.*

45. *See, e.g.,* Harlem River Consumers Cooperative, Inc., v. Associated Grocers of Harlem, 64 F.R.D. 459, 462 (S.D.N.Y. 1974); GLASER, *supra* note 32 at 11; 4 MOORE'S FEDERAL PRACTICE ¶ 26.53(1) (2d ed. 1976); Rosenburg, *Sanctions to Effectuate Pretrial Discovery,* 58 COLUM. L. REV. 480 (1958); Becker, *supra* note 42, at 274.

46. 329 U.S. 495 (1947).

47. *Id.* at 500-01.

discovery, but without the dual definition of scope, will be proposed in the following section of this article.[48]

B. Pretrial Discovery Conference

One of the most difficult problems in controlling the amount of discovery is deciding whether a party who is proceeding in a reasonable manner not designed to harass the other party should nevertheless have his efforts at discovery limited and controlled by the court. Under the Federal Rules, it is often emphasized that almost unbridled discovery will be allowed as long as certain procedures are followed.[49] The following statement from *Hickman v. Taylor*[50] has been cited frequently for that proposition:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

In determining the amount of discovery that should be allowed, two competing policies must be balanced.[51] First, there is a great interest in deciding cases on their merits. To serve this end, parties should theoretically be able to discover all facts in the possession of the other party. When both parties know all the facts, it is likely that the party who is favored by each relevant fact will bring that fact to the attention of the court. Second, our judicial system is based upon the assumption that the truth is most likely to be adduced when two adversaries, each representing their client's self-interest, are allowed to act as partisan advocates rather than neutral fact finders. To the extent that adversaries are compelled to disclose the "cards" in their hand to their opponent, the pure form of the adversary system is compromised.

The adversary system derives its strength from the incentive of self-interest, much the same way as a free market economy derives its

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48. *See* notes 85-108 and accompanying text *infra.*

49. *See, e.g.,* Kennelly, *Pretrial Discovery — The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can be Counterproductive,* 21 TRIAL LAW. GUIDE 458, 478 (1978).

50. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

51. *See* GLASER, *supra* note 32, at 8; Rosenburg, *supra* note 31, at 481.

strength from the self-interest of the economic units.[52] However, few would contend that some limits on the tactics used by members of a free market should not be placed on the participants in order to curb unfair and excessively aggressive tactics. The same type of limits are generally accepted as necessary in an adversary legal system.[53]

When the policy of reaching the merits conflicts with the policy of giving the adversary system its full reign, the pureness of the adversary system should be sacrificed to the extent that it is based on surprising the opponent. Chief Justice Vanderbilt once stated: "The fundamental premise of the federal rules is that a trial is an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons."[54] Even before the federal rules were in use, it was recognized that controls on the adversary system were essential. In denouncing the unchecked use of the adversary system, Roscoe Pound stated:

> The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet, but it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum . . . . The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point . . . . It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport . . . . The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to the spirit when their interests are served by evading it.[55]

Thus, since reaching the merits is to be preferred over preserving the option of adversaries to hide information for the purpose of surprise, discovery should not be limited if the result of the limitation is to permit a party to conceal information until trial for merely tactical reasons.

This is not to say, however, that discovery should never be limited. The United States Supreme Court in *Hickman v. Taylor* qualified its

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52. *See generally* J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (2d ed. 1969).

53. The most necessary and most widely accepted limitation on the pure adversary system is the law prohibiting perjury. Rules of evidence, procedure, and professional ethics also serve to limit the excesses which might be indulged in within a pure adversary system.

54. GLASER, *supra* note 32, at 22.

55. R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 273, 281-82 (1964).

broadly worded approval of expansive discovery in a passage which is usually omitted by commentators advocating the broadest possible discovery:

> But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence *when the inquiry touches upon the irrelevant* or encroaches upon the recognized domains of privilege.[56]

When discovery borders on the irrelevant, parties' time and effort is wasted, with no corresponding information gathering benefit being realized. "[P]ractical considerations dictate that the parties should not be permitted to roam in shadow zones of relevancy . . . ."[57]

Discovery for its own sake yields no benefits. Before the Federal Rules of Civil Procedure were amended in 1970, the Advisory Committee on Civil Rules invited the Columbia Law School Project for Effective Justice to conduct a field survey of pretrial discovery.[58] The Advisory Committee believed that certain aspects of discovery practice were not accurately represented in the reported cases; accordingly, a field survey would help determine the actual practices under the pre-1970 rules.[59] After compiling the results of the survey, author William Glaser concluded that the judicial system was improved by discovery only to the extent that discovery provided new information to the parties:

> But aside from informational gains, the judicial process is not improved in the ways that were hoped. Settlements are not increased, cases are not shorter and better focused, surprise is not reduced, evidence and witnesses are not introduced more sparingly, and appeals are not diminished.[60]

Glaser's conclusion is supported by statistics from the field survey. First, the quality of trials, as perceived by counsel, did not improve as discovery increased.[61] The quality of trials was judged to be better in

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56. 329 U.S. 495, 507-08 (1947) (emphasis added). The Federal Rules of Civil Procedure referred to in this passage are the pre-1970 rules.

57. Broadway & Ninety-Sixth Street Realty Co. v. Loew's Inc., 21 F.R.D. 347, 352 (S.D.N.Y. 1958).

58. *See* Advisory Committee Notes, *supra* note 1, at 489.

59. *Id.*

60. GLASER, *supra* note 32, at 114. Although Glaser's conclusion is based on statistics of pre-1970 discovery practice, these are the latest available statistics. To the extent that these results are a function of the nature of discovery and not of the particular rules governing discovery, they could be viewed as being descriptive of present day discovery practice.

61. GLASER, *supra* note 32, at 110 (Table 26). No claim with respect to the level of statistical significance was made by the Columbia Law School Project or by Glaser.

cases when neither counsel used discovery than when both counsel used discovery.[62] Second, the *parties'* satisfaction with the outcome of their case was not a function of the use of discovery by their counsel.[63] Parties whose counsel used discovery were about as satisfied as parties whose counsel did not employ discovery. Predicitably, the satisfaction of the parties was largely determined by who won the case.[64] Third, discovery seemed to have the effect of encouraging rather than reducing appeals. When both parties used discovery, thirty-four percent of the cases were appealed; when only one party employed discovery, thirty percent of the cases were appealed.[65] Finally, the use of discovery was not found to induce settlements. Nineteen percent of all cases in the study which used discovery went to trial, while only ten percent of the non-discovery cases reached trial.[66]

Since discovery is most useful in providing information for the parties, and since discovery does not in itself result in better administration of justice, the discovery rules should permit discovery where it is most likely to result in informational gains and deny it where it is less likely to fulfill informational purposes or where it is being sought for purely tactical reasons. The issue warrants an examination of whether the present system effectively applies this principle.

Under the present Federal Rules of Civil Procedure, a judge has broad powers to control discovery. In complex cases, a pre-trial conference similar to the one established by Rule 16[67] is often used to establish a schedule and guidelines for discovery.[68] The Manual for Complex Litigation[69] suggests that, in complex cases, each party should

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62. *Id.*

63. *Id.*

64. GLASER, *supra* note 32, at 113 (Table 27).

65. *Id.* at 113-14 (Table 28).

66. Rosenberg, *supra* note 31, at 488-89. Professor Rosenberg directed Columbia's field survey. Advisory Committee Notes, *supra* note 1, at 489. The statistics here cited might not be the result of the use or non-use of discovery. It is reasonable to predict that cases involving discovery are those with factual disputes which are more complex or more hotly contested than those in which discovery is not used. Accordingly, it may be the nature of the case and not the use of discovery which accounts for these statistical results.

67. FED. R. CIV. P. 16. The Rule provides in relevant part: In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master . . .;

(6) Such other matters as may aid in the disposition of the action . . . .

68. *See* Jeffers, *Discovery, Including Priority of Discovery, Motions to Produce, Interrogatories, Depositions and Pretrial Hearings,* 38 A.B.A. ANTITRUST J. 16, 19 (1968-69).

submit a proposed plan of discovery. After hearing objections to the submitted plans, the court is to fashion a discovery schedule for the suit.[70] In multidistrict actions, the separate actions can be transferred to one court for the purpose of coordinating pretrial procedures, such as discovery. The transferee court is empowered to design a discovery schedule in order to avoid duplication of efforts in the individual actions.[71]

At least in principle, the courts have interpreted the federal discovery rules as investing them with broad powers in controlling the amount and scope of discovery in ordinary cases. In *Lewis v. Texaco, Inc.*[72] the Second Circuit Court of Appeals heard an appeal taken by thirty-two seamen who had brought an action against their employer for breach of shipping articles. The employer claimed that the release and mutual consent language contained in the shipping articles and signed by the plaintiffs barred the seamen's claim. Two years after the suit was filed, and immediately before trial, the employer sought to depose all thirty-two plaintiffs with respect to their mental state at the time of the alleged release and consent. Since the employer had waited more than two years before making the request, the trial court denied discovery. In affirming the trial court decision, the Second Circuit Court wrote, "[t]he management of discovery is within the discretion of the trial court. On this record of defendant's dilatoriness, we find no abuse of that discretion."[73] Thus, although the information sought was of some relevance, discovery was denied since it would result in delay.

In other cases, courts have limited discovery where the discovering party's interest in getting the information was outweighed by privilege. In *Richards of Rockford, Inc. v. Pacific Gas & Electric Company,*[74] the district court denied discovery in order to protect an academic researcher's sources. Although the interest in protecting sources was not held to rise to the level of a constitutional privilege, it did outweigh the discoverer's need for the information. In *Apicella v. McNeil Laboratories, Inc.,*[75] a patient, after suffering permanent disabilities caused by a drug, sued the manufacturer. Both the patient and the drug manufacturer sought an order to compel the publisher of a medical newsletter containing an article on deaths allegedly related to the use of the drug to

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69. [1978] TRADE REG. REP. (CCH) *Manual for Complex Litigation.*

70. Becker, *supra* note 42, at 271.

71. *See In re* Petroleum Products Antitrust Litigation, 419 F. Supp. 712, 718 (*Judicial Panel on Multidistrict Litigation* 1976).

72. 527 F.2d 921 (2d Cir. 1975).

73. *Id.* at 926.

74. 71 F.R.D. 388 (N.D. Cal. 1976).

75. 66 F.R.D. 78 (E.D.N.Y. 1975).

disclose its author. The Eastern District Court of New York denied discovery in order to protect the medical newsletter's sources and refused to allow either party to use the article at trial.

The courts in *Lewis, Richards,* and *Apicella* used a similar process of decision, although the cases were factually quite different. Each court made a broad statement of its power to control discovery,[76] yet each one felt obligated to find an identifiable opposing interest in order to justify the decision to deny discovery. In *Lewis,* the opposing interest was the avoidance of delay,[77] while in *Richards* and *Apicella* the opposing interest was some form of privilege.[78] None of these courts were comfortable with applying the principle that discovery of *relevant* information could be denied in the absence of an identifiable opposing policy.

Under the present rule, the protective order,[79] which is intended to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense,"[80] is the device which is available for use by courts to exercise broad discretion over discovery in cases where there is no identifiable opposing interest. When the protective order is used in this situation, the courts are applying the often enunciated principle of controlling discovery, while at the same time satisfying a tendency toward procedural conservatism by identifying the interest which conflicts with liberal discovery.

In fact, protective orders have proven to be an inadequate device for controlling discovery. Where the information sought has been relevant, courts have generally denied protective orders. For example, in *United States v. Nysco Laboratories,*[81] the United States sought to enjoin Nysco from introducing the drug phenylpropanolamine hydrochloride into interstate commerce. The United States served seventy-three interrogatories containing over 800 questions which prompted Nysco to seek a protective order. In holding that relevance is an absolute concept, the

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76. The statement quoted from *Lewis* is representative of other courts' statements. *See* note 73 and accompanying text *supra.* One court has said that *parties* and not the *court* should determine what discovery is allowed. *See* Identiseal Corporation of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977). However, that case should not be taken as authority for the proposition that courts do not have broad powers to control discovery. In *Identiseal,* the Seventh Circuit was reviewing a decision by the trial court to dismiss the plaintiff's action because it *refused* to take discovery. Whether a court can compel a party to take discovery is governed by very different considerations than the question of whether a court can limit discovery.

77. 527 F.2d 926 (1975).

78. 71 F.R.D. 388, 390 (N.D. Cal. 1976) (information pertaining to scholarly research held to be supplementary and therefore not warranting disclosure); 66 F.R.D. 78, 80-81 (E.D.N.Y. 1975) (name of author of article in question held to be relevant but not essential).

79. FED. R. CIV. P. 26(c).

80. *Id.*

81. 26 F.R.D. 159 (E.D.N.Y. 1960).

district court stated that relevance either does or does not exist. If it does exist, discovery is allowed[82] and a protective order is denied.

Protective orders have also been denied where the requests for discovery have been objected to on the ground that the discovery which was being sought would be duplicative of other sources of information. In *Blankenship v. Hearst Corporation,*[83] a newspaper distributor brought an action against a newspaper publisher. The distributor sought to depose the publisher in order to obtain information regarding the publisher's alleged price fixing policies. The publisher, Hearst Corporation, objected that the plaintiff already had other sources which provided him with the same information. The Ninth Circuit Court of Appeals allowed discovery since "a strong showing is required before a party will be denied entirely the right to take a deposition."[84] Even though the informational gains to be realized through the discovery were relatively minor, discovery was allowed.

On the basis of the foregoing discussions, it is clear that the current Federal Rules of Civil Procedure have been ineffective in inducing courts to exercise the broad powers over discovery which their opinions indicate they possess.[85] The Advisory Committee on Civil Rules has proposed a new pretrial discovery conference procedure[86] in order to

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82. *Id.* at 161-62.

83. 519 F.2d 418 (9th Cir. 1975).

84. *Id.* at 429.

85. The reluctance of courts to control discovery may be due, in part, to the operation of the final judgment rule, Rule 54(b). Federal Rule 54(b) provides:

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay* and upon an express direction for the entry of judgment. In the absence of such determination . . . the order or other form of decision is *subject to revision at any time before the entry of judgment* adjudicating all the claims and the rights and liabilities of all the parties (emphasis added).

Discovery orders are usually considered to be interlocutory and not immediately appealable. *See, e.g.,* International Union UAW v. National Caucus of Labor Committees, 525 F.2d 323 (2d Cir. 1975) (order denying premission to tape record depositions not immediately appealable); Securities and Exchange Commission v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975) (various pretrial discovery orders not immediately appealable); Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972) (order for production of documents not immediately appealable); Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969) (where opposition to order for discovery is based on relevance objections, order is not immediately appealable). *But see* Sheehan v. Doyle, 513 F.2d 895 (1st Cir. 1975) (order for production of documents is immediately appealable where nothing else was pending at the time in district court). Courts might therefore be reluctant to limit discovery since there would be a risk of reversal of the judgment following completion of the trial due to overly restricted discovery. There is less of a risk that a final judgment will be reversed on the ground that the allowed discovery was too broad. The explicit balancing test proposed in the text accompanying notes 99-104 *infra,* is an attempt to encourage judges to limit discovery despite the risk of reversal imposed by the final judgment rule.

86. *1979 Preliminary Draft, supra* note 8, at 3-4 (§ 26(f)).

This proposal differs in several respects from the 1978 Preliminary Draft amendment cir-

encourage courts to be more active in the management of discovery. The proposed amendment establishes the following procedure:

1) At any time after an action is commenced the court on its own motion *may* direct the holding of a pretrial discovery conference. Either party may call for a discovery conference at any time after the suit is commenced upon meeting several conditions. Before requesting a conference, the requesting party must attempt to reach agreement as to discovery with the opposing party. If a party makes a request for a conference and performs the necessary precedent acts, the court *must* convene a discovery conference;
2) Following the discovery conference, the court must enter an order identifying the issues for discovery purposes, setting out a plan and schedule for discovery, and setting limits on discovery;
3) In most instances, the discovery conference can be combined with the pretrial conference provided for by Rule 16;
4) If a party fails to make a good faith effort to agree on a discovery plan when such effort is required preceding a party-initiated conference, that party may be assessed the costs, including attorney's fees, which are a result of that failure.[87]

The Advisory Committee's proposed amendment would improve the courts' ability to manage pretrial discovery effectively. At present, there exists confusion as to a court's powers in controlling pretrial discovery through the use of a Rule 16 pretrial conference. Several federal district courts have adopted local rules of court which specifically provide that discovery planning and scheduling can be a subject of the pretrial conference.[88] The existence of such local rules demonstrates how cautiously courts interpret Rule 16. Adoption of an amendment which provides

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culated by the Advisory Committee. The 1978 proposed amendment did not allow a court to schedule a discovery conference on its own motion. Furthermore, the 1978 draft contained sanctions for not making a good faith effort to agree to a discovery plan in Rule 26(f) instead of in Rule 37(e). *See 1978 Preliminary Draft, supra* note 7, at 624-26 (Rule 26(f)).

The ABA Section of Litigation has proposed a pretrial discovery conference which is identical in all respects to the Advisory Committee's 1978 Preliminary Draft amendment except that the conference could not be held until the issue was joined, rather than at any time after the plaintiff's complaint is filed.

See ABA Section of Litigation Proposal, *supra* note 9, at 4.

87. The conditions alluded to in step (1) of the proposed procedure require a party to submit the following to the court:

a. A statement of the issues as they then appear;
b. A proposed plan and schedule of discovery;
c. Any proposed limitations on discovery;
d. Any other proposed orders with respect to discovery; and
e. A statement showing that the attorney making the request has made a reasonable effort to reach agreement with the opposing attorneys on the matters set forth in items a to d. Within ten days after this submission is made, the opposing party may object to any or all of it and may make additions to it.

1979 Preliminary Draft, *supra* note 8, at 3 (§ 26(f)).

88. *See, e.g.*, E.D. Ill. Local R. 9(b)(6); N.D. Ohio Local R. 17(b).

for a pretrial discovery conference will notify courts that not only is judicial management of discovery permissible, but also that it is anticipated.

Although the Advisory Committee proposal will serve to give courts more control over the management of discovery, its effectiveness can be increased if several changes are made in the proposed procedure. First, the conference should be made mandatory in all cases in which one or both parties seek discovery. As the proposed amendment is written, one would expect judges to call for a conference only in those cases which are large and unusual. These cases, however, constitute only a very small portion of the caseload.[89] Smaller and more routine cases, such as personal injury suits, make up the large majority of the courts' caseload and result in nearly as many discovery complaints as the larger, predominantly commercial cases.[90] Either party can request a discovery conference in any case; however, a party will probably request a conference only after it has a complaint about discovery. If the court has not scheduled a conference early in the case, it will be faced with the problem of fashioning a discovery schedule after partial discovery has been completed on each side. It would be easier for a court to plan discovery when faced with a clean slate rather than to fashion a schedule while faced with a snarled mass of partially completed and partially planned discovery.

One possible reason why the Advisory Committee did not decide to have the discovery conference mandatory in each case where there was discovery is that it would necessitate an increased time commitment by judges and pretrial examiners.[91] This objection can be answered in two ways. Although extra court time may be occupied by mandatory pretrial discovery conferences, an equivalent amount of time might be saved by averting a number of discovery motions that would otherwise reach the courts. Also, the resources needed to conduct these discovery conferences can be reduced by holding them formally, but in chambers. This procedure will avoid the problem of having to schedule court room time.

A second change which should be made in the Advisory Committee's proposed amendment is to hold the conference forty-five days after the issue is joined.[92] Additionally, during the first forty-five days after the issue is joined and before the conference is held, a limited amount of

89. *See* GLASER, *supra* note 32, at 192.

90. *Id.* at 129 (Table 30) and 138-39 (Table 32).

91. *See* Note, *Developments in the Law*, 74 HARV. L. REV. 939, 972 (1961).

92. This proposal contrasts with the scheduling of the conference provided for by the Advisory Committee proposal and the ABA Section of Litigation proposals which allow a conference after the commencement of the action (Advisory Committee amendment) or any time after the issue is joined (ABA Section of Litigation amendment).

discovery, specified by the amended Rule, should be permitted for the purpose of identifying the issues which are disputed in the case. This combination of procedures will retain the benefits of notice pleading[93] and result in the planning of a discovery schedule at the earliest possible time.

A similar two-tiered initial discovery-pretrial conference procedure has been proposed as a revision to the federal class action damage procedures.[94] In that proposal, a pretrial conference is scheduled within 120 days of the filing of the complaint. At the conference, the court enters an order which may include litigation timetables, including a timetable for discovery.[95] Each side is allowed to conduct discovery before the conference; however, it is limited to ten depositions, interrogatories solely for the purpose of identifying documents and the identity of persons to be deposed, and requests for document production.[96]

Any amendment to Federal Rule 26 which provides for a pre-trial discovery conference should specify the amount of discovery which may be conducted before the conference is held. This amendment should specify one amount of allowable pre-conference discovery for complex cases and another lesser amount for simple cases.[97] The amount of pre-conference discovery allowed for simple and complex cases should be based on an estimate of how much discovery is needed to enable the parties to identify the issues and frame a plan for the remaining discovery.

This two-tiered system of discovery will realize the advantages of the

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93. *See* notes 41 and 42 and accompanying text *supra.* Parties will not be compelled to define the issues at the time the issue is joined, as they would be if the ABA Section of Litigation's proposal to change "subject matter" to "issue" in Rule 26(b)(1) were adopted.

94. S. 3475, 95th Cong., 2d Sess. (1978).

95. *Id.* at § 3004(a).

96. *Id.* at § 3003(a).

97. In order to minimize the judicial and attorney time occupied in categorizing a case as "simple" or "complex" for this purpose, a determination should be made by the judge after examination of the pleadings. No argument should be heard on this issue. If, at the pretrial conference, it becomes apparent that additional discovery is needed before a discovery plan can be framed, the judge may, upon a showing of good cause, allow such discovery and recess the pretrial conference until it is completed.

Although it is beyond the scope of this paper to draft a definition of a complex case, a definition has been suggested by the *Second Circuit Proposal, supra* note 10, at 3 of the Report of Subcommittee No. 1. A complex case would be any of the following:

> (a) antitrust cases; (b) cases involving a large number of parties or an unincorporated association of large membership; (c) cases involving requests for injunctions affecting the operations of a large business entity; (d) patent, copyright, and trademark cases; (e) common disaster cases, such as those arising from aircraft crashes; (f) individual stockholder's, stockholders' derivative, and stockholders' representative actions; (g) products liability cases; (h) cases arising as a result of prior or pending Government litigation; (i) multiple or multidistrict litigation; (j) class actions or potential class actions; or (k) other civil cases involving unusual multiplicity or complexity of factual issues.

Id. To this list might be added cases with above a specified amount *(e.g.,* $1,000,000) in controversy.

ABA Section of Litigation's proposed change in the scope of discovery from "subject matter" to "issue" while avoiding possible disadvantages.[98] After preliminary discovery has been completed, judges, in fashioning a discovery plan, will naturally give the phrase "relevant to the subject matter" a more restrictive interpretation than they would if they had to decide what discovery should be allowed before any facts were known to the parties. At the same time, parties will not be made to commit themselves to a statement of desired discovery before they learn what is actually at issue.

A third change in the Advisory Committee proposal that should be made is to include an explicit provision similar to the following: "In determining what discovery will be allowed, the likelihood that the proposed discovery will produce information relevant to the subject matter will be balanced against the time, effort, and cost of the discovery to the answering party and the court." The balancing test embodied in this formulation is similar in form to the balance between relevance and prejudice in Federal Rule of Evidence 401.[99] Although the information sought to be discovered by a party might lead to relevant information, discovery can be denied if the likelihood of learning relevant information is outweighed by the burdens of producing it. As the likelihood decreases, the chances of denying discovery increase. This proposed addition to the pretrial conference provision will result in allowing discovery where the informational gains are expected to be the greatest and denying it where the gains are existent, but minimal.

Although a balancing test is not written into the Federal Rules of Civil Procedure, several courts have used it. In *Carlson Companies, Inc. v. Sperry and Hutchinson Company,*[100] the plaintiff sued the defendant for antitrust violations in the stamp market. The defendant sought to discover information about the plaintiff's stamp and non-stamp related business activities. Although information about the plaintiff's non-stamp activities was of marginal relevance, discovery was denied on that subject due to the ensuing delay and the extra burden placed upon the plaintiff. As the court noted:

> Clearly, those requests that relate to information unquestionably relevant to the legal issues raised in a case should be honored. However, when the requests approach the outer bounds of relevance and the information requested may only marginally enhance the objectives of providing information to the parties or narrowing the issues, the Court must then weigh that request with the hardship to the party from whom the discovery is sought.[101]

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98. *See* notes 12-48 and accompanying text *supra.*
99. FED. R. EVID. 401. *See also* FED. R. EVID. 403.
100. 374 F. Supp. 1080 (D.Minn. 1974).
101. *Id.* at 1088.

Other courts have occasionally resorted to a balancing test,[102] although not always explicitly.[103] A balancing test has already been proposed for complex cases.[104]

The incorporation of a balancing test into the Federal Rules of Civil Procedure will provide more certainty as to what is the applicable standard of review. Judges will be more inclined to apply a balancing test and less hesitant to deny discovery of marginally relevant information. The primary discovery goal of obtaining relevant information will continue to be served, while at the same time the burdens of discovery on the parties and the courts will be diminished.

Finally, the Advisory Committee's proposal should be amended to strengthen the incentive of parties to agree on a plan of discovery. Counsel should be required to meet in every case prior to the pretrial discovery conference in order to attempt to agree on a discovery plan. As currently written, the Advisory Committee proposal only requires an attempt to agree on a discovery plan in instances where one of the parties has requested the pretrial discovery conference.[105] To the extent that parties are able to agree on a discovery plan, the burden on the courts to devise such plans will be reduced. Recognizing the fact that agreements between the parties with respect to discovery disputes will reduce the burdens on courts, many federal district courts have adopted local rules which require parties to meet and attempt to reach agreement before bringing discovery-related motions to court.[106]

If agreement as to a discovery plan and schedule cannot be reached by the parties, the judge should decide upon a discovery plan using the final-offer-selection technique.[107] This technique requires each party to submit one proposed discovery plan to the judge. The judge must choose one plan or the other without compromise. Since a party submitting an unreasonable plan risks having the opposing party's plan accepted in full, each party has an incentive to submit the most reasonable

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102. *See, e.g.*, United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); Richards of Rockford, Inc., v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Cal. 1976); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975).

103. *See* K.S. Corp. v. Chemstrand Corp., 203 F. Supp. 230 (S.D.N.Y. 1962).

104. National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and the Attorney General* 45 (1979).

105. *1979 Preliminary Draft, supra* note 8, at 3-4.

106. *See, e.g.*, D. ARIZ. LOCAL R. 42A.2.(b); E.D. CAL. LOCAL R. 114(c); N.D. CAL. LOCAL R. 230-4; N.D. FLA. LOCAL R. 8(a); S.D. FLA. LOCAL R. 10(I)(2); M.D. FLA. LOCAL R. 3.04(a); S.D. ILL. LOCAL R. 11; E.D. LA. LOCAL R. 3.11 (as amended and effective Aug. 9, 1978); M.D. LA. LOCAL R. 5D; W.D. LA. LOCAL R. 10.1(c); E.D. MO. LOCAL R. 7(6); M.D. N.C. LOCAL R. 21(k); W.D. N.C. LOCAL R. 8A; S.D. OHIO LOCAL R. 3.7.2; W.D. OKLA. LOCAL R. 13(d); M.D. PA. LOCAL R. 301.02(e); W.D. TENN. LOCAL R. 9(d); E.D. & S.D. N.Y. LOCAL R. 9(f).

107. *See* Note, *Final Offer Arbitration: A Pre-trial Settlement Device*, 16 HARV. J. ON LEGIS. (1979) (unpublished as of this printing).

plan consistent with its discovery needs. If parties are compelled to develop reasonable plans of discovery,[108] the probability of the parties reaching agreement on discovery is greater than if the parties are led to believe that the court will issue a plan that is a compromise between the two parties' proposals.

II. Specific Discovery Devices and Sanctions

A. Interrogatories

1. Number of Interrogatories

Rule 33 allows a party to serve interrogatories upon any other party without obtaining leave of court.[109] Unless a protective order has been issued, the number of interrogatories which may be served is not limited.[110]

The ABA Section of Litigation has proposed that Rule 33 be amended so that each party is limited, as a matter of right, to serving thirty interrogatories to each of the other parties.[111] Each question is to be considered to be one interrogatory.[112] If a party wishes to serve more than thirty interrogatories, it must seek leave of court and must make a showing of necessity.[113]

In its 1979 Preliminary Draft, the Advisory Committee on Civil Rules has not proposed any change in the current rules which govern the number of interrogatories.[114] Thus, parties would retain their right to serve an unlimited number of interrogatories, subject to a protective order. In its 1978 Preliminary Draft, the Advisory Committee had proposed an addition to Rule 33 which would give authority to district courts to adopt local rules limiting the number of interrogatories.[115] The

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108. The aspect of the proposed Rule which requires parties to meet and agree on a plan of discovery, if possible, is a logical extension of the trend of the Rules to reduce the burden on the courts and place it on the parties. For example, prior to 1970, a party with objections to interrogatories served objections by scheduling a court hearing. Thus, nearly all objections to interrogatories resulted in court hearings. The 1970 amendments transferred the burden of scheduling a hearing to the party who served the interrogatories. Thus, hearings were avoided in situations where the discovering party did not wish to pursue a question. *See* Note, *Federal Discovery Rules: Effects of the 1970 Amendments,* 8 COLUM. J. OF L. AND SOC. PROB. 623, 638 (1972); Blair, *supra* note 2, at 69. This proposed Rule and final-offer procedure will make it even more likely that parties will agree and avoid a court hearing.

109. FED. R. CIV. P. 33. Prior to 1948, parties were required to obtain information in some instances from oral depositions instead of by interrogatories. *See, e.g.,* Wirtz v. Capitol Air Service, Inc., 42 F.R.D. 641, 643 (D. Kan. 1967).

110. FED. R. CIV. P. 26(a). Prior to 1948, parties were limited to serving one set of interrogatories on each adverse party. *Developments in the Law, supra* note 91, at 960.

111. ABA Section of Litigation Proposal, *supra* note 9, at 18.

112. *Id.*

113. *Id.*

114. *1979 Preliminary Draft, supra* note 8, at 13-14.

115. *1978 Preliminary Draft, supra* note 7, at 646.

committee believed that the local variations of practice made a nationwide limit on interrogatories unwise.[116] The 1978 Advisory Committee amendment would have given specific approval to the local rulemaking which several districts had already undertaken.[117] Prior to enactment of such an amendment, some courts might hesitate to make local rules because of the provision in Rule 26(a) which states that the frequency of discovery is to be unlimited.[118]

The ABA proposal was prompted by the results of a questionnaire administered by the ABA Section of Litigation's Special Committee for the Study of Discovery Abuse. That questionnaire revealed that members of the bar invariably believed that interrogatories are the discovery device which most often leads to discovery abuse.[119]

The perceived abuse of interrogatories is reflected in the reported cases. Abuse takes several forms: number of questions or subparts, requests for information which is either not relevant or already known, and requests which would require a large number of man-hours to answer. In *Frost v. Williams,*[120] the plaintiff brought a personal injury action against the defendant arising out of a rear-end automobile collision. The plaintiff served the defendant with over 200 interrogatories, asking such things as the defendant's hair and eye color; the names and addresses of the defendant's parents, spouse, former spouse, and children; and whether it was snowing on the date of the accident (July 27th). The court held that because of the broad range of questions asked the defendant was not required to answer any of the interrogatories. The plaintiff however, was allowed to file a reasonable set of questions.[121]

In *United States v. Diapulse Manufacturing Company of America,*[122] the government served approximately 10,000 interrogatories on the defendant. Diapulse objected to the interrogatories on the ground that answering them would require Diapulse to, in effect, write a medical treatise. The court concluded that "[i]t is abundantly clear that the in-

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116. *Id.* at 648-49 (Advisory Committee Note).

117. *See, e.g.,* M.D. Fla. Local R. 3.03(a) (limit of 50 interrogatories); S.D. Fla. Local R. 10(I)(1) (limit of 40 interrogatories).

118. *1978 Preliminary Draft, supra* note 7, at 649 (Advisory Committee Note).

119. ABA Section of Litigation Proposal, *supra* note 9, at 20 (Committee Comments).

Perhaps the reason why interrogatories are so prone to be abused is that they are the only discovery device which requires the responding party to spend more time than the initiating party. *See* GLASER, *supra* note 32, at 74 (Table 8).

In the sample of cases for which interviews were conducted as part of the Columbia Field Survey, thirty-eight percent of the time the answering party spent more time than the questioner on a set of interrogatories. The questioner used more time in thirty-two percent of the cases, and time commitment was equal in thirty percent of the cases. *Id.* at 151.

120. 46 F.R.D. 484 (D. Md. 1969).

121. *Id.* at 485.

122. 41 F.R.D. 46 (D. Conn. 1966).

terrogatories are entirely too voluminous . . . ."[123] The parties were ordered to confer in an attempt to agree as to what discovery would be conducted by each party.

In *Tivoli Realty v. Paramount Pictures,*[124] the plaintiff served interrogatories on the defendant. The defendant objected to several of the interrogatories on the grounds that getting the answers would involve 10,000 to 15,000 man-hours of work and conducting interviews and document searches throughout the country. The court stated that it could not judge at the time how great the burden of compiling the answers would be, but that if the burden was several thousand man-hours of work the defendant would not be ordered to answer the questions. The parties were given thirty days to settle the dispute on their own; if no settlement was reached, a master would be appointed to determine how great a burden the interrogatories would place on the defendant.[125]

The ABA Section of Litigation proposal would probably not have been thought necessary if protective orders could easily be obtained to curb interrogatory abuse. In practice, however, protective orders have been difficult to procure. If the questions bear some relevance to the case and are not overly repetitious, courts will allow an extreme number of interrogatories before they issue a protective order.[126]

Although interrogatories are especially susceptible to abuse, the ABA's proposal of imposing an across-the-board nationwide limit on interrogatories should not be adopted for several reasons. To begin with, a limit on the number of interrogatories would be detrimental to parties with the least income and wealth. Interrogatories are relatively inexpensive discovery device since no transcribing of questions and answers is needed and lawyers for each party need not be present during *both* the questioning and answering.[127] If the number of interrogatories is sharply limited, parties who are relatively poor will be left with the option of using more expensive discovery devices, such as oral depositions,[128] or foregoing discovery.

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123. *Id.* at 47.

124. 10 F.R.D. 201 (D. Del. 1950).

125. This case was decided before Rule 33(c) went into effect. Even under Rule 33(c), the result would likely be the same. The answering party, due to its familiarity with company structure, would be able to answer the questions with less burden than if all documents were turned over to the questioning party. Also, interviews, not covered by Rule 33(c), were necessary here to compile the answers to the interrogatories.

126. *See* Savell, *supra* note 42, at 200.

127. Figg, McCullough, & Underwood, *Uses and Limitations of Some Discovery Devices,* 20:4 THE PRACTICAL LAWYER 65-70 (1974). It is possible, however, for interrogatories to be more expensive than other discovery devices in those instances when the lawyer for the questioning party must spend an inordinate amount of time perfecting questions. Also, where several sets of interrogatories are needed to gain the information which could have been gained from a single deposition, cost savings of interrogatories may evaporate. *Id.* at 68-70.

128. Oral depositions are the most expensive discovery device. *See* Doskow, *Ninth Annual*

The characterization of interrogatories as a poor man's device[129] is supported by the data of the Columbia Survey.[130] Interrogatories are used in a constant degree, the number not varying with the monetary value of the expected recovery in the case. The use of depositions, on the other hand, increases as the amount of the expected recovery increases.[131] Therefore, interrogatories are a more significant discovery device in smaller cases where the parties can be expected to be less wealthy.

A second difficulty with the ABA proposal is that the courts will become involved in deciding the issue of what constitutes "a single question." Although the proposed amendment states that each question will constitute an interrogatory, compound questions and questions with multiple subparts will present potentially limitless disputes.[132] The courts might become arbiter of a morass of essentially mechanical disputes. Even under the current Rules, without a limit on the number of interrogatories, parties often serve a limited number of interrogatories containing many subparts in the hope that a lesser number of interrogatories will appear to the court to be less burdensome.[133] This practice would undoubtedly increase under the proposed rule.

A third problem with the ABA proposal is that it imposes the same limit of thirty interrogatories on all types of actions.[134] Thus, the same thirty interrogatories would be allowed, at least initially, in *United States v. I.B.M. Corp.*[135] as well as in a simple action for nonpayment of a promissory note. In any case with complex factual issues, this uniformly low limit on interrogatories will lead to court hearings in order to obtain leave of the court to serve additional interrogatories. The harm sought to be alleviated by the ABA proposal, *i.e.*, hearings to resolve objections by answering parties to interrogatories, will be replaced by hearings to request leave to serve additional interrogatories, a burden on the court time equally as undesirable.

In contrast to the ABA proposal, the following system of limiting in-

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Postgraduate Conference of the Colum. L. School Alumni Assoc., 45 F.R.D. 479, 500 (1968).

129. *Id.* at 499-500.

130. *See* note 58 and accompanying text *supra*.

131. *See* GLASER, *supra* note 32, at 81 (Table 11); 68 (Table 5).

132. For example, consider how many questions are contained in the following fairly standard interrogatory: "State the name, occupation, and address of each person making inspections of the defective structure, giving the date of each inspection, the procedures followed, and the results or findings of said inspections."

133. *See, e.g.*, Boyden v. Troken, 60 F.R.D. 625 (N.D.Ill. 1973) (209 interrogatories, 432 questions); Cummings v. Bell Telephone Company of Pennsylvania, 272 F.Supp. 9 (E.D.Pa. 1967)(198 interrogatories, 314 questions); United States v. Nysco Laboratories, Inc., 26 F.R.D. 159 (E.D.N.Y. 1960) (73 interrogatories, 800 questions).

134. ABA Section of Litigation Proposal, *supra* note 9, at 18.

135. 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969).

terrogatories would be a desirable improvement to the present system:

1) Before the pretrial discovery conference,[136] place a limit on the number of interrogatories, the subject matter of which should be limited to those topics on which information is needed in order to narrow the issues and agree to a discovery plan for the case, and
2) Once the issues are defined at the pretrial discovery conference, the judge should use a balancing test similar to the one proposed for other discovery devices[137] in order to determine how many interrogatories or sets of interrogatories may be served throughout the remainder of the case.

The limiting of the number and topics of interrogatories before the pretrial discovery conference will not place less wealthy parties at a disadvantage since enough information can still be gained to enable the parties to prepare for the conference. This proposal will permit the subject of the questions to be broad enough to elicit information with which the discovering party can identify and narrow the issues.[138]

The further problems of having one limit for all types of actions would also be alleviated by this proposal. At the pretrial discovery conference, after the issues are drawn, the judge may place an appropriate limit on the number of interrogatories to be allowed. Since the limit is set on a case by case basis, there are likely to be fewer motions to increase the allowable number of interrogatories after the pretrial discovery conference than would be made if a uniform limit of thirty was imposed. Also, this proposal should result in fewer disputes about what constitutes a single interrogatory. The number of interrogatories allowed under this proposal is less arbitrary than a flat limitation of thirty. Since a balancing test is used to determine the number of interrogatories that will be allowed, the limit set will be more adequate to elicit the needed information. Therefore, parties will find it less necessary to resort to the practice of asking compound questions containing subparts than they would under the ABA proposal.

2. Additions to Rule 33 to Conform to Existing Judicial Practice

It is proposed that three amendments be added to Rule 33 to conform the explicit language of the Rule to its current consistent application in

136. *See* notes 86-108 and accompanying text *supra*.

137. *See* notes 99-104 and accompanying text *supra*.

138. One lawyer has suggested that interrogatories be limited to seeking the addresses of persons having knowledge of the case and the location of documents. GLASER, *supra* note 32, at 149 n.29 (quoting a defense attorney). This suggestion is rejected since it would result in interrogatories which would not yield the type of information needed to narrow the issues. After the names of persons having knowledge of the case were received, a party would have to conduct depositions to obtain information from those persons, and this would place poorer parties at a disadvantage.

the courts. A fourth amendment will make explicit a duty which it is likely the courts would impose if they were faced with the question. These amendments will reduce the extent to which parties must turn to court decisions in order to know the rules governing interrogatories.[139]

The proposed additions to Rule 33 are as follows:

1. Change the phrase "as is available to the party"[140] in paragraph one of (a) to "as is available to the party, his agents, and his attorney.";
2. Add the following sentence after the first sentence of paragraph one of (a): "If the answering party does not have knowledge of the information sought by the interrogatories, it must conduct a reasonable investigation of sources under its control before responding to the interrogatories.";
3. Add the following sentence after the first sentence of paragraph two of (a): "If a question or questions cannot be answered fully, it (they) must be answered to the extent possible. Reasons for not answering the remainder must be given.";
4. Add the following sentence after the sentences added by proposed amendment three, above: "If part of a question is objectionable, the non-objectionable part must be answered, and objections to the remainder stated."

The first amendment proposed will codify the existing practice of requiring answering parties to divulge information in the possession of their attorneys or agents, as well as information known to the parties themselves. As far back as 1947, the United States Supreme Court, in *Hickman v. Taylor,*[141] indicated by way of dictum that an answering party must disclose information even if the information is in the sole possession of the party's attorney. "A party clearly cannot refuse to answer interrogatories on the ground that information sought is solely within the knowledge of his attorney."[142] The principle announced in *Hickman* has since been directly applied on numerous occasions.[143] Courts also currently require parties to answer interrogatories with information in possession of the party's agents. This requirement has

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139. These amendments should be accompanied by an advisory note which states that the amendments are not intended to change judicial interpretations of the rules, but are intended to codify the current judicial interpretations. A number of representative cases should be cited in the note. This advisory note should reduce the possibility that the amendments will lead to widespread litigation for the purpose of establishing the meaning of the amendments.

140. FED. R. CIV. P. 33(a).

141. 329 U.S. 495 (1947).

142. *Id.* at 504.

143. *See, e.g.,* Shires v. Magnavox Company, 74 F.R.D. 373 (E.D.Tenn., Northeastern Div. 1977); Pilling v. General Motors Corp., 45 F.R.D. 366 (D.Utah, Cen. Div. 1968); Gaynor v. Atlantic Greyhound Corporation, 8 F.R.D. 302 (E.D.Pa. 1948). *See also* Steelman v. United States Fidelity and Guaranty Company, 35 F.R.D. 120 (W.D.Mo. 1964).

been extended to information in the possession of the party's employees,[144] insurers,[145] and investigators.[146]

The second proposed amendment would apply to the situation in which the answering party does not have current knowledge of the information sought, but could obtain that knowledge through a non-burdensome investigation. An example of when this amendment would apply would be a personal injury case where the plaintiff has asked the defendant the amount of his insurance coverage. Although the defendant might not know precisely the amount of his insurance coverage, he could obtain the information by looking at the written insurance policy. Under the proposed amendment, it would be clear that this type of investigation is required on the part of the answering party. The amendment would make explicit a rule which the courts already apply.[147]

The third amendment remedies an ambiguity in the present Rule. The duties of an answering party in situations where that party can partially, but not wholly, answer an interrogatory are presently unclear under Rule 33. For example, if an interrogatory asked the plaintiff to list the name of each person who made an inspection of a defective structure and to give the address of each such person, an answering party might, after reading the current Rule, believe that a reply alleging insufficient information to answer the question would be appropriate if he knew the names but not the addresses. In practice, courts have not allowed the withholding of partial information. "[I]f he claims to have less than full information at the time his answers are due he should answer by giving the available information and by stating that the answer reflects the limited information that he then has."[148] The proposed amendment will make it clear that a party must provide the information that he possesses, even if it is less than complete.

The fourth proposed amendment is similar to the third except that it clarifies the procedure when part of a question is objectionable and part is not. Several districts have adopted local rules to this effect,[149] indicating that failure to answer non-objectionable portions of single interrogatories has been a problem in some areas of the country. Courts have not explicitly held that partially objected to interrogatories must

144. *See* Ballard v. Allegheny Airlines, Inc., 54 F.R.D. 67 (E.D.Pa. 1972).

145. Steelman v. United States Fidelity and Guaranty Company, 35 F.R.D. 120 (W.D.Mo. 1964).

146. *Id.*

147. *See, e.g.,* Flour Mills of America, Inc. v. D.F. Pace, 75 F.R.D. 676 (E.D.Okla. 1977); Thomason v. Leiter, 52 F.R.D. 290 (M.D.Ala. 1971); Jackson v. Kroblin Refrigerated Xpress, Inc., 49 F.R.D. 134 (N.D.W.Va. 1970).

148. Bar Harbour Theatre Corp. v. Paramount Film Distributing Corp., 5 F.R.Serv. 2d. 613, 613-14 (E.D.N.Y. 1961).

149. *See, e.g.,*S.D.CAL. LOCAL R. 6(d); W.D. LA. LOCAL R. 10.1(b)(3); E.D. MICH. LOCAL R. XIV. *See also* E.D. PA. LOCAL R. 25(b); W.D. PA. LOCAL R. 5(c).

be partially answered,[150] but the question so closely parallels the situation in which a party has only enough information to answer a question partially[151] that it is likely that a court would so hold when directly confronted with the question.[152] This amendment will clarify the procedure to be followed.

3. Form Interrogatories

The Federal Rules of Civil Procedure[153] neither expressly allow nor prohibit the use of form interrogatories.[154] Several districts have adopted local rules which either expressly prohibit form interrogatories[155] or allow them.[156] Some of the districts which allow form interrogatories have drawn up model interrogatories which are deemed to be proper as against any objection.[157] In at least one district with model interrogatories, there exists a presumption against the propriety of non-model interrogatories.[158]

The possible abuses of form interrogatories are fairly obvious. Form interrogatories are easy to print and require little effort on the part of the questioning party. Since interrogatories normally require more time to answer than to prepare,[159] and since form interrogatories exacerbate that difference, they have the potential of being used to harass other parties by imposing a large time commitment on them while requiring only a small effort by the preparer.[160] Form questions are sometimes used in cases regardless of their bearing on any possible relevance to the particular case.[161]

Despite the possibility of abuse, form interrogatories have substantial advantages. First, where the interrogatories are drafted by the district

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150. *See* Liquidometer Corporation v. Capital Airlines, Inc., 24 F.R.D. 319 (D.Del. 1959) (decision implies that partially objected to interrogatories must be partially answered).

151. *See* note 148 and accompanying text *supra*.

152. *Cf.*, Bar Harbour Theatre Corp. v. Paramount Film Distributing Corp., 5 F.R.Serv. 2d 613 (E.D.N.Y. 1961).

153. FED. R. CIV. P. 33.

154. Form interrogatories are those which are prepared as models without regard to the facts of any specific case.

155. *See, e.g.*, E.D. ILL. LOCAL R. 10(b); N.D. IND. LOCAL R. 8(b); S.D. IND. LOCAL R. 12(b).

156. *See, e.g.*, D. ARIZ. LOCAL R. 37(b)(1).

157. The District of Maryland and the Eastern District of Pennsylvania have drafted sets of model interrogatories. GLASER, *supra* note 32, at 157-58.

158. *See* Pankola v. Texaco, Inc., 25 F.R.D. 184 (E.D.Pa. 1960).

159. *See* note 119 and accompanying text *supra*.

160. Becker, *supra* note 42, at 277.

161. One author gives the example of a defendant taxicab company that was served with form interrogatories which asked whether it (the company) had a driver's license, where it learned to drive, whether it was married or divorced, and whether it had children, either legitimate or illegitimate. Savell, *supra* note 42, at 199-200.

court, disputes should be eliminated about whether the interrogatories were properly drafted.[162] Second, since model or form interrogatories are written by presumably skilled draftsmen, the number of questions needed to elicit a given body of information should be smaller; in addition, loaded questions will be less frequent.[163]

The empirical evidence provided by the Columbia Field Survey confirms the advantages of form interrogatories.[164] The most significant finding was that more new evidence was gained in those cases where some or most of the interrogatories were forms, as opposed to those cases where the interrogatories were all original or all forms.[165] The Survey also showed that the number of discovery motions prompted by interrogatories was smallest when all the interrogatories used in the case were forms.[166]

Given the distinct advantages of forms they should be allowed by Rule 33. Individual courts should follow the example of those districts which have already drafted model interrogatories. Model interrogatories will reduce the number of complaints about whether particular questions are properly drafted; however, since the major difficulty with forms is that they may be used even where the model questions do not apply to a case, parties should still be permitted to object to the questions on grounds of relevance or privilege.[167] Original interrogatories should be allowed in addition to forms since a combination of forms and orginal questions has been found to yield a greater amount of new information. Original questions can be used by parties to more closely tailor the set of interrogatories to the individual facts of the case.

B. Supplementation of Prior Responses

Rule 26(e) imposes a duty on a party who has responded to discovery to supplement his responses, even without a request by the questioning

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162. *See* GLASER, *supra* note 32, at 157; Note, *supra* note 91, at 961.

163. *See* GLASER, *supra* note 32, at 157.

164. *Id.*

165. *Id.* at 159 (Table 37). In cases in which all interrogatories were forms, the set of interrogatories resulted in new evidence sixty-three percent of the time. When most of the interrogatories were forms, new evidence was gained seventy-five percent of the time. When some of the interrogatories were forms, new evidence was gained seventy-nine percent of the time. In cases with none of the interrogatories being forms, the percentage was fifty-nine. *Id.*

166. *Id.*

167. A party should not be able to object to interrogatories merely on the grounds that the questions come from forms or model sets. As a practical matter, it would be impossible to identify interrogatories as forms unless a party was so careless as to serve them on mimeographed sheets or the equivalent.

If the questions asked are irrelevant or called for privileged information, they should be objectionable, whether they are originals or forms. A party who has been served with objectionable interrogatories may seek a protective order. This article proposes that courts also be empowered,

party, in two specified situations.[168] The first is when the original discovery question was addressed to either "the identity and location of persons having knowledge of discoverable matters" or "the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony."[169] The second provision states that:

> A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.[170]

Rule 26(e)(2) clearly applies when new information indicates to the answering party that a previous response was *incorrect* when made or is now *incorrect* in the light of the new information. It is unclear, however, whether the provision requires supplementation when new information indicates that the prior answer was *incomplete* when made or is now *incomplete.* The distinction between the two possible interpretations is illustrated by *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A. e. M. Usellini.*[171] In *P.A.B.,* Satinine brought an action to cancel P.A.B.'s trademark alleging disuse. In 1975, Satinine served P.A.B. with interrogatories asking, among other things, the dates on which P.A.B. had used the trademark. P.A.B. answered on June 23, 1975, listing dates up to June 23rd when it used the trademark. P.A.B. made no supplementation of its response between June 23rd and trial. Satinine sought to infer from the failure to supplement that there was no use of the trademark after June 23rd. The court held that no such inference would be allowed since P.A.B. did not have a duty to supplement in this situation.[172]

P.A.B. is an example of a case where new information rendered prior answers incomplete, but not incorrect. All of the dates initially supplied by P.A.B. in its response were still correct. If there were dates of trademark use after June 23rd, however, the initial response to the interrogatory was incomplete at the time of trial. The court in *P.A.B.* did not rest its decision explicitly on the distinction between incomplete and incorrect prior responses.[173]

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by an amendment to Rule 37, to sanction a party who has served such interrogatories. *See* note 245 and accompanying text *infra.*

168. FED. R. CIV. P. 26(e).

169. FED. R. CIV. P. 26(e)(1).

170. FED. R. CIV. P. 26(e)(2).

171. 570 F.2d 328 (U.S. Ct. of Customs and Patent Appeals 1978).

172. *Id.* at 334.

173. The failure to supplement was held not to be a knowing concealment. *Id.*

The Advisory Notes to Rule 26(e) support the interpretation that the rule does not impose a continuing duty to supplement incomplete answers.[174] The Committee apparently recognized the distinction between incomplete and incorrect prior responses when they noted that "the issue (of whether to require supplementation) is acute when new information renders substantially *incomplete* or *inaccurate* an answer which was *complete* and *accurate* when made."[175] Later in the note, the Committee states that the Rule imposes a duty to supplement *incorrect* responses.[176] The exclusion of the term "incomplete" from the Rule and from the latter portion of the Advisory Note, coupled with the Committee's recognition of the distinction between the two terms, indicates that Rule 26(e) was not intended to require supplementation of incomplete responses.

The language of Rule 26(e)(2) has caused confusion in courts which have sometimes not perceived the difference in treatment between incomplete and incorrect prior responses. In referring to Rule 26(e)(2), the Eighth Circuit has stated that "[t]he duty imposed by this rule requires a party to disclose newly discovered facts which render a prior answer either incorrect or incomplete."[177] The language of the Rule itself fails to give courts a clear directive.

It should be noted that Rule 26(e)(2) imposes a duty of supplementation only when the answering party possesses certain levels of knowledge. A duty to supplement exists only when the answering party has *actual* knowledge of the new fact and *actual* knowledge that the new information renders a prior response incorrect.[178] Thus, in establishing a duty to supplement, Rule 26(e)(2) uses a subjective measure of knowledge both as to existence of the new information and as to conflict with prior discovery.

Two district courts in Pennsylvania have adopted identical local rules of supplementation[179] which differ from the Federal Rule in their treatment of the two issues discussed above. Those rules require that:

> Upon discovery by any party of information which renders that party's prior answers to interrogatories substantially inaccurate, incomplete or untrue, such party shall file appropriate supplemental answers with reasonable promptness.[180]

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174. Advisory Notes to FED. R. CIV. P. 26(e) provide: "The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a 'continuing burden' on the responding party to supplement his answers if he obtains new information . . . ."

175. Advisory Committee Notes, *supra* note 1, at 507 [emphasis added].

176. *Id.* at 508.

177. Havenfield Corporation v. H & R Block, Inc., 509 F.2d 1263, 1272 (8th Cir. 1975).

178. *See* Advisory Committee Notes, *supra* note 1, at 508; 8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE. § 2049 (1st ed. 1970).

179. *See* E.D. PA. LOCAL R. 25(e); M.D. PA. LOCAL R. 301.02(d).

180. *Id.*

Unlike the Federal Rule, the Pennsylvania rule clearly requires supplementation when new information renders a prior answer incomplete (i.e.,. either inaccurate, incomplete or untrue). Additionally the knowledge requirements of the Pennsylvania rule differ from those required by the Federal Rule. Under the Pennsylvania rule, as under the Federal Rule, supplementation is required when the answering party has *actual* knowledge of new information. The Pennsylvania rule, unlike the Federal Rule, imposes an *absolute* duty to supplement if new information renders the prior response inaccurate, incomplete, or untrue.[181] This duty is not qualified by limiting its application to situations where the answering party knows (measured either subjectively or objectively) that the new information has made the prior response currently inadequate. Thus, the Pennsylvania rule requires an answering party to continually review his prior responses to ascertain whether supplementation is required due to new information. The Federal Rule contains no such requirement.

Should the Federal Rule be amended to place an absolute continuing duty on an answering party to supplement prior responses when new information is found? Such a duty would, of course, result in the discovering party having more information at trial.[182] It would also reduce the number of interrogatories served immediately before trial for the purpose of updating prior discovery[183] and would reduce the number of court orders sought requiring supplementation.[184]

A rule imposing an absolute duty to supplement is, however, both unnecessary and undesirable. The disadvantages outweigh the benefits to be gained. First, supplementation is unnecessary in many instances since the discovering party will not need updated answers to all the questions he has asked previously. As issues change and are reformed, questions that are asked at an early stage of discovery may become irrelevant.[185] Updated answers to these questions will be of no use to the discovering party. Second, an absolute duty of supplementation would impose an extreme time commitment on answering parties, often without corresponding informational gains to the discovering party. Since parties are, in many cases, unaware of the importance of new

181. No courts have interpreted the knowledge requirement of the Pennsylvania rule. However, the interpretation offered here is supported by a comparison of the language in the rule and the language in FED. R. CIV. P. 26(e). The requirement of subjective knowledge of conflict with prior discovery is explicit in the Federal Rule. FED. R. CIV. P. 26(e)(2). The two district courts in Pennsylvania had the Federal Rule before them when they drafted their local rule. The absence of an explicit knowledge requirement in the local rule therefore evidences a rejection of a knowledge requirement and the imposition of an absolute duty.

182. *See* C. Wright & A. Miller, *supra* note 178, at § 2048.

183. *See* Advisory Committee Notes, *supra* note 1, at 507; Blair, *supra* note 2, at 60 n.13.

184. *See* Blair, *supra* note 2, at 60 n.13.

185. *See* Advisory Committee Notes, *supra* note 1, at 507.

information they receive, their counsel would often be required to obtain additional information from the client and compare it on a periodic basis with all discovery questions which have been updated.[186] After this time commitment, there still would be no guarantee that the new information would be of significant benefit to the discovering party.[187]

This time-benefit analysis also applies to the complex case.[188] In such a case, a party may have several attorneys conducting discovery and gathering information. An absolute duty to supplement answers would mean that one lawyer for each party would be required to know at all times all the information in the case and all the discovery which had been conducted. In a large antitrust case with thousands of documents and hundreds of depositions and interrogatories, this knowledge would be practically impossible to maintain.

There exists a middle position between the minimal duty of supplementation imposed by the Federal Rule, and the absolute duty imposed by the Pennsylvania rule. It is submitted that the following duty of supplementation should be incorporated into an amendment of Rule 26(e)(2):

1. Prior responses to discovery should be updated when new information reveals that the prior answers were untrue when made, or, if true when made, are currently incorrect or incomplete;
2. Prior responses should be supplemented when the answering party has *actual* knowledge of the new information *and* where he *should know* that the new information has rendered a prior response incorrect or incomplete.

This proposal will maximize the informational gains which supplementation is intended to achieve, while minimizing the disadvantages of an absolute duty.

The provision which would require supplementation of incomplete responses will increase the information which is received by the discovering party. The information yielded by supplementing incomplete responses is equally as important to the preparation of the discoverer's case as is the information learned from the supplementations of incorrect responses. For example, in *P.A.B. v. Satinine,*[189] it would be equally important for Satinine to be informed that there existed additional dates of trademark use not disclosed in the original answer to the interrogatory, as it would be to know that some of the

186. *Id.*

187. C. Wright & A. Miller, *supra* note 178, at § 2048.

188. *Id.*

189. 570 F.2d 328 (U.S. Ct. of Customs and Patent Appeals 1978). *See* text accompanying notes 171-73 *supra.*

dates listed in the original answer were incorrect. Satinine had the burden of proving non-use for a two year period; accurate and complete information about the dates of use was essential to that proof.

If the goal of discovery is to provide parties with the maximum amount of information prior to trial, consistent with the efficient administration of the legal system, this provision will help achieve discovery's purpose. The above proposal utilizes a standard of actual knowledge of the new information combined with the knowledge, objectively measured, that the new information has rendered the prior answer incorrect or incomplete.[190] Any other standard would place the answering party in the position of conducting a continuing investigation for the discovering party.

The answering party should be required to supplement only in situations when he *should* know that the new information makes a prior response incorrect or incomplete. This objective standard is midway between the Federal Rule, which requires actual knowledge (measured subjectively), and the Pennsylvania rule, which requires no knowledge before imposing the duty to supplement. Factors to be considered in determining whether a party should have known that new information renders a prior response incorrect or incomplete include, but are not limited to, the amount of discovery that the party has responded to, the complexity of the case, the division of labor between a group of attorneys representing a single client,[191] and most importantly, the importance of the new information to the case.

This objective knowledge standard is preferable to both the absolute

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190. Although permitted by the current Rule, it is submitted that a party should not have a duty to supplement unless he has actual knowledge of new information. This provision does not affect the duty of a party to conduct a reasonable investigation upon being served with new interrogatories. *See* FED. R. CIV. P. 33 and note 147 and accompanying text *supra*.

191. The issue of knowledge requirements raises the question: Who is the knowledge required of? As with answering interrogatories, the knowledge of a party's attorneys is imputed to the party. *See* notes 141-46 and accompanying text *supra*. Thus, if a party's attorney possessed a level of knowledge which would require supplementation if possessed by the party, the party would have a duty to supplement.

If a party is a corporation, the persons whose knowledge is required would be the top corporate officers and any other personnel who are participating in the handling of the suit.

Although the attorneys' knowledge is imputed to the party(s), the attorneys and all persons who are considered to be the party should not be considered as a group when determining whether "the party" had knowledge of the new information *and* knowledge of the conflict with prior discovery. It would not be fair to impose a duty of supplementation where, for example, one corporate officer knew of the new information and one of the attorneys would have known of the conflict with prior discovery if he had known the information which the corporate officer possessed. The test which is proposed would establish a two part inquiry. First, does any of the persons who is either the party or an attorney possess new information? If so, is there any reason why *this* person should know of the conflict with prior discovery?

Of course, if a court finds that responsibility for preparing a party's case has been divided for the purpose of avoiding being held responsible for supplementation, the court should consider the group of attorneys to be a single person when applying this provision.

standard and the subjective standard. Unlike the absolute standard, this proposal would not require a party to make continual review of all prior discovery. Since a party would be more likely to know the effect of new information when that information is important to the case, the proposal will result in supplementation on only the more important matters in the case.[192] It is on these matters that supplementation provides the greatest informational benefit. Also, if issues in the case change, supplementation would not be required on the deleted issues. When an issue is eliminated, it is reasonable for an attorney to put it from his mind. Therefore, if new information would change a response to discovery on one of these issues, there is no reason an attorney "should know" that prior discovery is affected, and supplementation is not required. Supplementation as to eliminated issues, which is required by the absolute standard, produces no useful informational gain to the discovering party. In complex cases, the proposal would reduce the problem which occurs when a single lawyer does not possess all the new information and knowledge of all prior discovery. Unless there is some reason why a party's lawyers should have knowledge of the new information and its relationship to prior discovery, supplementation would not be required under the objective standard. The absolute standard imposes a duty to supplement in this situation and in effect penalizes a party for not possessing knowledge which few could have.

Unlike the subjective standard imposed by the Federal Rule, this proposal will require a party's attorney to give some thought to the relationship between new information and prior discovery. If it would be reasonable for an attorney to realize the connection between new information and prior discovery responses, then supplementation would be required. The Federal Rule presently rewards those attorneys who intentionally avoid realizing that new information is relevant to prior discovery; supplementation is not required in the absence of actual knowledge. The proposed objective standard will be easier for the courts to apply than the Federal Rule because an individual determination of what the party actually knows will not be required.

The proposal for an objective standard for supplementation has one additional advantage. There may be occasions when the court, as part of its pretrial discovery conference[193] order, directs that discovery is to be completed within a certain time period prior to trial. The supplementation rule here survives such an order. Without a supplementation rule, should one party acquire important new information after discovery has been cut off, that party will again have an unfair advantage over the

192. *See* Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 296-97 (1968).

193. *See* notes 86-108 and accompanying text *supra*.

opposing party, who cannot submit new interrogatories to elicit that information. The objective supplementation rule, will detenuate the potential unfairness.[194]

C. *Production of Documents*

Rule 34 establishes a procedure by which a party may discover documents without obtaining leave of court.[195] The discovering party must specify the items to be inspected "either by individual item or by category [and must] describe each item and category with reasonable particularity."[196] The discoverer's request must specify the time, place, and manner in which the inspection is sought to be conducted.[197] The responding party may either agree or reject the request within thirty days.[198]

Practice has revealed that the current procedure presents opportunities for abuse by the responding party. In responding to requests for documents, "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring [the] significance [of important documents]."[199] In complex cases involving extensive discovery, the "dumping" of documents in response to Rule 34 requests has been identified as one of the most burdensome forms of discovery abuse.[200]

The number of motions brought by discovering parties to compel discovery could be reduced if a rule change had the effect of diminishing the frequency of document dumping. In the Columbia Field Survey,[201] conducted before the 1970 amendments, it was found that eight percent of the parties who requested document production believed that the opposing counsel created obstacles to inspecting documents.[202] Although this percentage is rather low, a high proportion

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194. As the Eighth Circuit Court of Appeals has noted: "Any difficulty, misconception or prejudice in limiting the time for discovery would be eliminated by placing a continuing duty of disclosure of subsequent material facts on answers to interrogatories that were correct when made but have become incomplete or incorrect because of subsequent developments." Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 145 (8th Cir. 1968).

195. FED. R. CIV. P. 34.

196. FED. R. CIV. P. 34(b).

197. *Id.*

198. *Id.*

199. ABA Section of Litigation Proposal, *supra* note 9, at 22 (Committee Comments).

200. *See* GLASER, *supra* note 32, at 190 *citing Handbook of Recommended Procedures for the Trial of Protracted Cases,* 25 F.R.D. 351, 359-60 (1960) (preface).

201. *See* note 58 and accompanying text *supra.*

202. *See* GLASER, *supra* note 32, at 135 (Table 31). A survey taken today might reveal a higher

of those who held this belief sought judicial relief. Thirty-one percent of all plaintiffs and fifty-four percent of all defendants who believed their opponents were putting obstacles in the way of document production went to court seeking sanctions for noncompliance with the court order for production.[203]

The current rule does not supply standards which can reliably mitigate the dumping problem. Courts have, on an ad hoc basis, used different rationales to insure that documents are produced in usable form; however, these approaches invariably lack consistency. In *Stapleton v. Kawasaki Heavy Industries,*[204] Stapleton brought an action for property damage caused by the defective design of a motorcycle. Stapleton requested that Kawasaki produce documents containing the manufacturer's specifications for the motorcycle. Kawasaki produced the requested documents, but they were in Japanese. Stapleton paid $420 to have the documents translated and sought to have the court order Kawasaki to reimburse her for the expense. The district court held that Kawasaki had an obligation to provide the documents in English, since they must be in usable form. It relied on the clause in Rule 34(a) which requires translations to be made of requested data.[205]

In *Kozlowski v. Sears, Roebuck, & Co.,*[206] Sears, a manufacturer and marketer of pajamas, was sued by Kozlowski when a pair of pajamas purchased by Kozlowski caught on fire. Kozlowski requested documents, including "a record of all complaints and communications concerning personal injuries or death allegedly caused by the burning of children's nightwear"[207] manufactured by Sears. Sears failed to produce the documents and, upon Kozlowski's motion, the district court

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degree of dissatisfaction with document production. Prior to 1970, a party wishing to get document production first had to obtain an order from the court. Orders were issued upon a showing of good cause. *See* Advisory Committee Notes, *supra* note 1, at 526. As part of this court hearing, a party would have to specify, with greater particularity than is now required, the documents which he sought. Thus, there would be less potential for either document dumping or failing to turn over any documents following a court order and a specification of documents than there is today.

203. *Id.* at 144-45 (Table 34). It is unclear whether these percentages would be as high today. Before 1970, a court order was needed to get document production. If a party went to court initially to get documents, then, in the face of resistance from the producing party, it would be more likely that the party would return to court than if the party had initially served merely a request on the producing party.

204. 69 F.R.D. 489 (N.D. Ga. 1975).

205. *Id.* at 490. It is quite clear that the court was straining to find a duty to present the documents in usuable form. The provision relied on by the court was clearly intended to provide for translation of electronic data compilations, such as computer-stored information. *See* Advisory Committee Notes, *supra* note 1, at 527.

206. 73 F.R.D. 73 (D.Mass. 1976).

207. *Id.* at 74.

ordered their production. When Sears again failed to produce, a default judgment was entered. Sears, in an attempt to have the default judgment removed, informed the court that its files were massive and that it had offered to allow Kozlowski to search them for the requested documents. The court held that Sears' offer did not fulfill the court's order to produce. "The defendant has in essence told the plaintiff that, if he wishes, he may hunt through all its documents and find the information for himself. This amounts to nothing more than a gigantic 'do it yourself' kit."[208] Although it might be thought that the court's opinion should be taken as a broad proscription against dumping documents, it can also be read as a narrow application of one court's order to produce. The absence of many other similar reported cases may indicate that courts do not read the rule as prohibiting this manner of document production.

The Advisory Committee on Civil Rules and the Second Circuit Commission on the Reduction in Costs of Civil Litigation have each proposed amendments to Rule 34 which are designed to alleviate the dumping of documents problem.[209] The Advisory Committee's proposal would require a producing party to produce the documents "as they are kept in the usual course of business" or to "organize and label them to correspond with the categories in the request."[210] The Second Circuit amendment is a proposal for a local rule.[211] This amendment would give a party seeking production two options, the second of which is simply to proceed under the present rule.[212] Under the first option, the following procedure would be followed:

1. The party seeking production would give to the responding party a list of the subject matters on which he would like production;
2. The responding party may then object to any of the subject matters on the grounds of relevance;
3. After the court rules on the objections, the responding party must (a) list the location of all files relating to the subject matters, (b) identify the people with knowledge about the organization and maintenance of the files, and (c) describe the categories of documents at each location or supply a list of the file folder legends from each file referring or relating to the subject matter;
4. The court may allow the party seeking production to interview or depose the file personnel;

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208. *Id.* at 76-77.

209. The amendment proposed by the Advisory Committee on Civil Rules is based upon and is substantially the same as an amendment proposed by the ABA Section of Litigation. *See* ABA Section of Litigation Proposal, *supra* note 9, at 22.

210. *1979 Preliminary Draft, supra* note 8, at 16.

211. *See Second Circuit Proposal, supra* note 10, at 1.

212. *Id.* at 3.

5. The party seeking production must notify the responding party of the order in which he wishes to inspect the files. The party making production can then review the files in that order for privileged material;
6. The court will review all claims of privilege.[213]

The party seeking production under the Second Circuit Proposal must make the election at the time it requests document production.[214]

It is submitted that the Second Circuit proposal should be adopted as an amendment to Rule 34, rather than merely as a local rule. It is better suited to reduce document dumping than is the Advisory Committee proposal. Under the Advisory Committee proposal, a producing party could produce the documents as they were kept in the usual course of business. This would allow the producing party to simply turn over its files to the party seeking discovery. The rationale behind this proposal is that documents as they are kept in the usual course of business have some internal organization. The discovering party obtains the benefit of this system of organization by receiving the documents in the same form as they are kept. However, there is no guarantee that a discovering party, without the benefit of explanation, will understand the producing party's system of organization. If he does not understand the system, the document dumping problem has not been solved.

The Second Circuit proposal would give the discovering party a meaningful way to discriminate between documents, thus reducing the problem of being faced with a huge, undifferentiated mass of documents. The party seeking discovery would be aided in locating the most important documents by having a list of file legends and the right to ask file maintenance personnel questions about the filing system.[215] These two features of the Second Circuit proposal hold obvious advantage over the Advisory Committee proposal.

The Second Circuit proposal has the corollary advantage of reducing the burden to the producing party, at least where the first option is chosen. Under both the current rule and the Advisory Committee proposal, the producing party would have to review, at the outset, all the documents which it would be turning over to determine if they contained privileged material. By contrast, the producing party under the Second Circuit proposed rule would have to review the files only as the opposing party indicated that he wished to look at them. If the discovering party realized, as it became familiar with the files and the filing system, that it did not need to look at some files it originally had re-

213. *Id.* at 1-3.
214. *Id.* at 1.
215. *Id.* at 7 (Commentary).

quested, the producing party would be saved the burden of reviewing them.[216]

The cost of copying documents also may be reduced by the Second Circuit proposal.[217] The party seeking discovery, in searching the raw files, will copy only those documents which will be helpful in the preparation of his case. Under the Advisory Committee rule, the producing party would, in many cases, supply copies of all the documents which the discovering party requested. Some of those copies would ultimately not be useful to the discovering party and the money spent on copying the documents, as well as the copies themselves, would be wasted.

D. Sanctions

Rules of discovery, no matter how clearly drafted, will not produce the desired informational exchange unless there exists a comprehensive system of sanctions for violations. The current federal rules provide sanctions for discovery violations in Rule 37.[218] These rules are not comprehensive in their coverage and should be amended.

Two common discovery situations, discussed earlier in this article — supplementation[219] and the dumping of documents[220] — do not have explicit corresponding sanctions. Although Rule 26(e) establishes a duty to supplement in certain situations, Rule 37 provides no sanctions when the failure to supplement is brought to the attention of the discovering party at trial.[221] If a failure to supplement is established in advance of trial, the party using discovery can obtain an order compelling discovery,[222] together with corresponding sanctions should the responding party fail to comply with the order.[223] Such an order to compel discovery will be ineffective if the failure to supplement is established only at trial; the responding party will supplement immediately, retain the element of suprise, and will not be penalized for its delay.[224]

Courts have resolved the problems caused by the lack of comprehensive sanctions in Rule 37 by finding authority to sanction discovery

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216. *Id.* at 8 (Commentary).
217. *Id.* at 10 (Commentary).
218. FED. R. CIV. P. 37.
219. *See* notes 168-94 and accompanying text *supra*.
220. *See* notes 195-217 and accompanying text *supra*.
221. *See* Note, *supra* note 192, at 296.
222. FED. R. CIV. P. 37(a).
223. FED. R. CIV. P. 37(b).
224. In the situation where a party responding to a document request dumps documents on the requesting party, it is not clear that the present sanctions of Rule 37(b) apply. *See* notes 204-08 and accompanying text *supra*. As the text indicates, it is possible that the court in Kozlowski v. Sears, Roebuck, & Co., 73 F.R.D. 73 (D.Mass. 1976), was interpreting its own court order and was not applying Rule 37 sanctions to the dumping of documents in general.

violations from sources other than Rule 37. The formless concept of "inherent authority" has been one device used by courts to impose sanctions on parties who do not abide by the discovery rules.[225] In *First Iowa Hydro Electric Coop v. Iowa-Illinois Gas & Electric Company,*[226] the Eighth Circuit Court of Appeals cited inherent authority as one basis for upholding the trial court's dismissal of the plaintiff's complaint due to the refusal of its officers to be deposed.[227]

At least one court has held that federal contempt statutes can be used to provide sanctions for discovery violations. The Southern District of Iowa, in *Crosley Radio Corporation v. Heib,*[228] held that the federal contempt statute[229] could be applied to a failure to give true answers to interrogatories, even though giving false answers to interrogatories is not a violation to which Rule 37 sanctions apply.[230]

Rule 41(b)[231] has been used as an alternative ground for sanctioning discovery violations.[232] This rule allows dismissal of a complaint for failure "to prosecute or to comply with these rules or any order of court."[233] Since the sanction provided by the Rule is dismissal of the action, its deterrent effect acts only against the plaintiffs.

In the 1958 United States Supreme Court decision of *Societe Internationale v. Rogers,*[234] the Court considered the relationship between Rule 37 and other bases for sanctioning discovery violations. In that case, the district court had dismissed a plaintiff's complaint because he failed to comply with an order to produce documents. The authority to sanction was found not in the provisions of Rule 37, but in the authority to sanction in Rule 41(b) and in the inherent authority of the court. The Supreme Court reversed, holding that the sole authority for sanctioning failure to produce is contained in Rule 37:

> In our opinion, whether a court has power to dismiss a complaint

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225. *See* Note, *supra* note 91, at 988; GLASER, *supra* note 32, at 154.

226. 245 F.2d 613 (8th Cir. 1951).

227. The court stated:

> Under Rule 37(d) and Rule 41(b) of the Federal Rules of Civil Procedure as well as in the exercise of its inherent power the District Court is authorized to dismiss the action of any individual plaintiff who wilfully disobeys a proper order of the court to compel the giving of security or the giving of testimony on deposition to dismiss the action of a corporate plaintiff whose managing agent so offends.

Id. at 628.

228. 40 F. Supp. 261 (S.D. Iowa 1941).

229. 28 U.S.C.A. § 385 (1940) (current version at 18 U.S.C.A. § 401 (1948)).

230. The court in Crosley Radio Corporation v. Heib, 40 F. Supp. 261 (S.D. Iowa 1941), referred to the predecessor provisions of Rule 37. Contempt was not found upon examination of answers to the interrogatories in question.

231. FED. R. CIV. P. 41(b).

232. *See* GLASER, *supra* note 32, at 154; Rosenberg, *supra* note 45, at 484.

233. FED. R. CIV. P. 41(b).

234. 357 U.S. 197 (1958).

> because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is "just." There is no need to resort to Rule 41(b) . . . .[235]

Despite its holding that inherent power and Rule 41(b) cannot be utilized to sanction failure to comply with an order to produce, *Societe* should not be read to hold that Rule 37 is the sole source of discovery sanctions; rather, the case should be read as stating that where Rule 37 *covers* a particular type of discovery violation, it is the sole source of sanction.[236] Thus, in *Societe*, Rule 41(b) was not applicable because "[t]here is no need to resort to Rule 41(b) . . . ."[237]

This analysis of *Societe* is supported by an interpretation of the Advisory Notes to the 1970 amendments and by current case law. The Advisory Notes to Rule 26(e) demonstrate that the Committee envisioned that failure to supplement would be subject to sanctions: "The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate."[238] However, Rule 37 provides no sanctions for the situation when the failure to supplement is detected only at trial.[239] Thus, if the planned for sanctions are to be available, they must be authorized under a provision other than Rule 37. Since Rule 37 does not cover this situation, *Societe* would allow a court to find the authority to sanction from other sources. Such was the result in *Dudley v. South Jersey Metal, Inc.*,[240] where the Third Circuit held that declaring a mistrial would be an appropriate sanction when the discovering party found out at trial about the opposing party's failure to supplement.[241]

Even if, as this analysis suggests, a court can use inherent power, Rule 41(b) or federal contempt statutes to sanction discovery violations not covered by Rule 37, the Federal Rules should be amended so that Rule 37 contains all the sanctions for violation of discovery rules.[242] When all sanctions are contained in one rule, parties will not have to guess whether the court will choose to look for a different source for a sanction. There can be no predictability of results when a court may sanction an act under a sourceless inherent power.

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235. *Id.* at 207.
236. *See* Note, *supra* note 192, at 293-94.
237. 357 U.S. 197, 207 (1958).
238. Advisory Committee Notes, *supra* note 1, at 508.
239. *See* notes 221-23 and accompanying text *supra.*
240. 555 F.2d 96 (3rd Cir. 1977).
241. *Id.* at 102-03.
242. *See* Rosenberg, *supra* note 45, at 483, 486.

Based on an ABA Section of Litigation Proposal,[243] in its 1978 Preliminary Draft, the Advisory Committee on Civil Rules recommended an amendment to Rule 37 which would bring all sanctions for discovery violations under one rule.[244] This proposed amendment provides that a "court may impose upon any party or counsel sanctions as may be just, . . . if any part or counsel . . . (2) otherwise abuses the discovery process in seeking, making or resisting discovery."[245] This provision, however, was omitted from the 1979 Preliminary Draft.[246]

It is submitted that this amendment should be adopted. In addition to codifying all sanctions for violation of discovery rules in one section, the proposed amendment will be an improvement over the present rule in several respects. First, the language is broad enough to insure that there will be an available sanction for every form of discovery abuse. Every violation of a duty created by any of the discovery rules will have a means of enforcement. Abuses in *seeking* discovery not presently covered by Rule 37 can be addressed by sanctions under this amendment. Second, the amendment recognizes the distinction between resisting discovery (*e.g.*, not producing documents) and abuses in the making of discovery (*e.g.*, dumping documents), and provides sanctions for both.

CONCLUSION

The Federal Rules of Civil Procedure established a system of liberal discovery devices designed to reduce suprise at trial. However, the pendulum has swung so far in favor of liberal discovery that the scope and amount of discovery is almost unchecked. Since the Rules have been abused by parties who have sought or produced masses of material for the purpose of delaying proceedings and harassing opposing parties, amendments to the present system of control are necessary to both increase the efficency and productivity of particular discovery devices and to give judges the guidelines and authority needed to effectively manage the discovery process.

Nine years have passed since the last amendment of the federal discovery rules. It is time to reassess the rules in light of recent experience and to alter them, where necessary, so that they fulfill the purposes for which they were designed. The proposals set forth in this

243. ABA Section of Litigation Proposal, *supra* note 9, at 23-24.
244. *See 1978 Preliminary Draft, supra* note 7, at 652-53.
245. *1978 Preliminary Draft, supra* note 7, at 652.
246. *1979 Preliminary Draft, supra* note 8, at 19-21.

article are aimed at maximizing the informational gains which may be reaped from discovery while minimizing the potential for discovery abuse. If the mechanics of the discovery process are refined as herein proposed, the resulting system set forth by the Rules will provide a smooth and efficient framework for judges and attorneys alike.

NOTES

Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?

With more than seventy billion dollars being spent on public education each year, one would expect the U.S. to have a fully literate society by now.[1] Yet, a recent congressional survey reveals that thirteen percent of this nation's seventeen year olds, referred to as functional illiterates, are barely able to read or write.[2] A similar survey, conducted in 1970 and repeated in 1974, exhibited "that . . . students aged 13 and 17 used a simpler vocabulary, wrote in short, 'primer-like' style and had more incoherent paragraphs than their counterparts in school four years earlier."[3] In addition, the U.S. Navy, due to its advanced technology, now requires many of its new recruits to engage in a six week program designed to raise their reading ability to a sixth grade level.[4] Even colleges and universities are beginning to set requirements for their entering freshmen to pass tests in reading, writing, and math skills.[5] With public confidence in public education declining,[6] legislators,[7] school ad-

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1. *See* Hentoff, *The Great Consumer Fraud,* CURRENT, March, 1978, at 3, 4.

2. *Hearings on H.R. 6088 Before the Subcomm. on Elementary, Secondary, and Vocational Education,* 95th Cong., 1st Sess. 7 (1977) [hereinafter cited as *House Hearings*].

3. *Examination into the Quality of Education of our Nation's Students and Means of Improving Competency in Basic Skills at Various Grade Levels Before the Subcomm. on Education, Arts, and Humanities,* 95th Cong., 1st Sess. 66 (1977) (statement of Dr. Roy Forbes, Director of National Assessment of Educational Progress) [hereinafter cited as *Senate Hearings*].

4. *See House Hearings, supra* note 2, at 9 (statement of Hyman G. Rickover).

5. *The New York Times,* Dec. 26, 1978, at C1, col 1.

6. *Quality of Education Seen as Continuing to Decline,* GALLOP OPINION INDEX, Feb. 1978, at 13. The Gallop survey used a five-point scale, similar to that used by the schools themselves, which measures the public's perceptions of the quality of public school education in their own communities. The survey reveals the following:

	National Totals			
Ratings Given the Public Schools	1977 %	1976 %	1975 %	1974 %
A rating	11	13	13	18
B rating	26	29	30	30
C rating	28	28	28	21
D rating	11	10	9	6
FAIL	5	6	7	5
Don't know/no answer	19	14	13	20

7. *House Hearings, supra* note 2.

ministrators,[8] and parents have become concerned about finding a way of eliminating functional illiteracy. One of the products of their efforts has been the development and implementation of minimal competency tests for both teachers and students.[9] The courts, however, have thus far played a limited role in this area by failing to recognize that teachers and school administrators, like other professionals are legally responsible for providing students with an adequate education.[10]

This note will discuss the failure of the courts to recognize a cause of action for educational malpractice, the effects of their non-recognition, and whether court intervention in this area is likely to occur in the future. Since nearly all the states have taken steps to institute minimal competency tests,[11] the present effects of these tests and their implications for future litigation will be fully explored. Parts I and II of the note will analyze the courts' policy of non-intervention, the ineffectiveness of a common law action in negligence, and the effectiveness of state legislation to eliminate educational malpractice and functional illiteracy. The note will conclude with an explanation in Part III of alternative ways for students to prove educational malpractice in the courts.

I. THE RELUCTANCE OF COURTS TO INTERVENE

Although learning has always been highly regarded,[12] gains in technology have created a demand for an increase in the quality of public education.[13] This need was recognized by the Supreme Court in *Brown v. Board of Education:*[14]

> [T]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values,

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8. *Senate Hearings, supra* note 3, at 16.

9. *See* notes 107-11 and accompanying text *infra.*

10. *See Suing the Schools for Fraud: Issues and Legal Strategies, Transcript of a Conference,* March, 1973, at 69 [hereinafter cited as *Fraud Conference*].

11. *See* notes 107-11 and accompanying text *infra.*

12. *See House Hearings, supra* note 2, at 16, where Hyman G. Rickover, Deputy Commander for Nuclear Power, Naval Sea Systems Command, quotes Plato: "I maintain that everyone of us should seek out the best teacher he can find, first for ourselves, and then for the youths, regardless of expense or anything."

13. *See* T. GOODE, B. BIDDLE & J. BROPHY, TEACHERS MAKE A DIFFERENCE 87 (1975), where the author asserts, "Today the problem is no longer simple. For one thing, success in the modern world requires more than simple literacy. . . . Today, we demand that the schools accomplish a broader range of more difficult tasks."

14. 347 U.S. 483 (1954).

> in preparing him . . . to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education . . . [it] is a right which must be made available to all on equal terms.[15]

Despite this recognition of the importance of education,[16] both state and federal courts have been unwilling to protect students from incompetent teachers. Instead, the courts have directed their attention at protecting students who are physically harmed due to a teacher's negligence,[17] and to assuring equal educational opportunities for minorities,[18] ethnic groups,[19] and the handicapped.[20] Several reasons have been advanced for the reluctance of our courts to litigate teacher malpractice. First, many courts adhere to the doctrine of academic freedom, a philosophy which stresses that teaching and learning must be free of outside interference.[21] However, the Supreme Court has long recognized that this freedom is not absolute,[22] and that a state may limit this right in the proper exercise of its police power.[23] Nevertheless, courts stubbornly cling to their belief in academic freedom, and in so doing disregard their obligation to see that public education in the various states is responsive to its students.

Second, public school systems, like administrative agencies, have full-time administrators and elected school board officials to manage their affairs.[24] Many judges feel that school personnel possess expertise

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15. *Id.* at 493.

16. *See, e.g.*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 30 (1973), where several Supreme Court decisions which demonstrate respect for education before and after *Brown* are cited.

17. *See generally* Ripps, *The Tort Liability of the Classroom Teacher*, 9 AKRON L. REV. 19 (1975); Vacca, *Teacher Malpractice*, 8 RICHMOND L. REV. 447 (1974).

18. *See* Milliken v. Bradley (II), 433 U.S. 267 (1977) (a federal court in the furtherance of desegregation may order a school district to test and offer guidance). *See also* Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971).

19. *See* Lau v. Nichols, 414 U.S. 563 (1973) (a State has a duty to provide bilingual education).

20. *See* Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) (fiscal resources must not bear more heavily on handicapped than normal children).

21. *See generally* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PENN. L. REV. 1293 (1976). Professor Goldstein asserts, "[T]he modern development of the doctrine of academic freedom is derived largely from the 19th century German concepts of lehrfreiheit and lernfreiheit — freedom of teaching and learning." *Id.* at 1299.

22. *See* Myer v. Nebraska, 262 U.S. 390 (1923), where the Supreme Court held, "[t]he power of the State to compel attendance at some schools and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum. . . ." *Id.* at 402.

23. *See* Board of Education v. Allen, 392 U.S. 236, 245 (1968); Levitt v. Committee for Public Education, 413 U.S. 472, 479-80 (1973); Wolman v. Walter, 433 U.S. 229, 237-41 (1977).

24. *See* Alson, *A Common Law Remedy for the Educational Harms Caused by Incompetent*

in their field and are therefore better able to take the proper steps to remedy teacher incompetence.[25] However, dismissal, the primary mechanism used by administrators, has not been effective.[26] To begin with, many incompetent teachers are protected by tenure, and although tenured teachers can be removed, the process is slow, and often their years of experience outweigh the particular claim against the instructor.[27] Furthermore, dismissal provides no compensation to the injured student who is unable to afford remedial aid and must continue his or her education deficient of those skills which should have been acquired. Moreover, dismissal proceedings are customarily instituted by the school administrator, which either permits a large number of complaints to accumulate before taking any action,[28] or as is often the case, shields the teacher behind the walls of solidarity that surround the profession.[29] Educators, who like police officers feel that they are subject to much unwarranted criticism,[30] tend to join together and protect themselves from further mockery. Finally, students who are victims of teacher malpractice often get as far as high school before the injury is realized. After such a lapse of time it becomes difficult, if not impossible, to isolate which teacher or teachers should be dismissed for causing the injury. Consequently, school agencies have demonstrated that they

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or Careless Teaching, 73 N.W. L. REV. 641 (1973). Elson believes that judges need assurance that they would not be overstepping their bounds by safeguarding students against the abuse of school officials. *Id.* at 646. *See also* Flast v. Cohen, 392 U.S. 83, 111 (1968), where Justice Douglas, in a concurring opinion warns, "The constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches." *See generally* Simon v. Eastern-Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681, 1717-22 (1975).

25. *See, e.g.*, Donahue v. Copiague Union Free School District, 64 App. Div. 29, 407 N.Y.S. 2d 874 (1978), where the court stated, "[T]he recognition of a cause of action sounding in negligence to recover for 'educational malpractice' would impermissibly require the courts to oversee the administration of the State's public school system." *Id.* at 879.

26. *See* Applebaum v. Wulff, 95 N.E.2d 19 (1950); Hapner v. Carlisle County Board of Education, 205 S.W.2d 325 (Ky. Ct. App., 1947).

27. *See House Hearings, supra* note 2, at 14, where Hyman G. Rickover points out that in twenty-three years only one teacher with tenure in Cleveland, Ohio was dismissed due to incompetence.

28. *See* Applebaum v. Wulff, 42 Ohio Op. 434, 95 N.E.2d 19, 22 (1950), where it took twenty years to dismiss a teacher whose competence was questioned twice without resulting improvement and who was considered the least effective math teacher in the entire school system.

29. *See Senate Hearings, supra* note 3. Senator Hayakawa of California asserts, "When are we going to, as a teaching profession, say . . . 'Look, you are not good enough so go find a job somewhere else.' We don't. We just take them in and protect them for the rest of their lives." *Id.* at 27.

30. *See* J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968). Wilson has found that police officers develop a "defensiveness, a sense of not being supported by the community, and a distrust of outsiders." *Id.* at 48-49. *See also* J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 52 (2d ed. 1975).

are unable to remedy teacher incompetence, thereby making it necessary to find some agency outside the system which can.

A third reason why courts are hesitant to become involved in educational malpractice litigation is an underlying fear that a flood of litigation will occur.[31] This fear was expressed in *Peter W. v. San Francisco Unified School District,*[32] where a student who graduated from a California high school barely able to read or write alleged that the school district was negligent for failing to inform him of his deficiencies in order that he and his parents could take remedial action. In dismissing the suit, the court held that with the number of potential lawsuits, society would be burdened "beyond calculation."[33] This fear, however, is exaggerated, for malpractice suits are too timely and expensive to be brought without good cause.[34] Furthermore, tests are presently being implemented by state legislatures that are designed to inform both parents and teachers whether the students are having difficulty learning the basic skills (math, reading, and writing).[35] Provisions for testing students at an early age with remedial instruction when necessary should substantially reduce the need for litigation, except for extreme cases of educational malpractice.[36]

II. A Common Law Remedy Besieged with Problems

In *Peter W. v. San Francisco Unified School District*[37] and *Donohue v. Copiague Union Free School District,*[38] where the plaintiff high school graduates charged their school districts with failing to provide them with an adequate education, the respective courts held that a teacher or school district has no legal obligation to educate their students and therefore is not liable in tort when a student fails to learn

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31. *See, e.g., Fraud Conference, supra* note 10. Freedman, J., a Massachusetts Probate Court judge, expressed the fear that "if there are about 40 million students that attend the public schools of America and if we conservatively estimate that probably 5 percent are having an unsatisfactory . . . experience, then one might anticipate 2 million parents bringing suit claiming damages." *Id.* at 82.

32. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

33. *Id.* at 825, 131 Cal. Rptr. at 861.

34. *See, e.g.,* E. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974) (plaintiff ordered to pay attorney fees and litigation costs).

35. *See* notes 107-11 and accompanying text *infra.*

36. Functional literacy tests are being designed to identify those students deficient in the basic skills and to provide them with remedial aid. If this purpose is realized, functional literacy should greatly decline. *See, e.g.,* notes 114-15 and accompanying text *infra* where the purposes of the minimal competency test are set out.

37. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

38. 407 N.Y.S.2d 874 (1978).

due to inadequate teaching.[39] The courts came to this conclusion after discovering that proving the traditional elements required in a negligence action would be an impossible task. The *Peter W.* and *Donohue* courts isolated three major difficulties in bringing an action in negligence, which must be overcome before the victim of educational malpractice can receive relief. An analysis of these difficulties with possible solutions will be undertaken.

A. Identifying the Responsible Teacher

When students such as Peter W. and Donohue fail to realize that they have been denied an adequate education until they graduate high school and try to seek employment, a fundamental problem arises in that it is clearly impossible or at best difficult for the student to pinpoint which teacher or teachers are responsible for his or her failure to learn.[40] Perhaps, if the suit is not barred by sovereign immunity[41] the school district itself could be held accountable.[42] However, proving a school district liable would be a difficult task.[43] Factors, such as a student's

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39. *Id.* at 878.

40. Generally, a public school student being a minor, cannot bring a lawsuit in his or her own behalf. The rational is that a minor is considered weak, immature, and often irrational. Consequently, a general guardian, next friend, or guardian ad litum must bring the suit in the minor's behalf by alleging in the complaint that the student has a present substantial interest or otherwise the action will be dismissed. This requirement is met by showing that the student has sustained or is in immediate danger of sustaining a direct injury. *See Ex parte* Levitt, 302 U.S. 633, 634 (1937). *See generally* 42 AM. JUR. *Parties* § 159 (1969).

There is also the possibility of two or more students joining as parties in an action for negligence against a school district. Under the Federal Rules of Civil Procedure joinder of parties sharing the same interest is desirable providing there is no problem of subject matter jurisdiction or service of process. The maintenance of a class action, however, will rarely occur since the requirement by the Federal Rules that the class be large enough to make joinder impossible will rarely be met. *See* FED. R. CIV. P. 19(a)(1) & (2); FED. R. CIV. P. 23(a) & (b). *See generally* 59 AM. JUR. 2d *Parties* § 103 (1971).

41. Traditionally, two reasons have been suggested or extending sovereign immunty to public schools. First, it has been asserted that money appropriated to public schools is distributed solely for school purposes and therefore authorities have no means of paying damages. *See generally* Annot., 33 A.L.R.3d 703, 727 (1970). Second, it is argued that since public schools are operated for the general welfare of all, the welfare of a few must be sacrificed in the interest of all. *Id.* at 728.

However, many states have abrogated sovereign immunity judicially or through legislation. Two types of statutes have emerged. One excludes sovereign immunity from all or certain government entities that are specifically involved with public schools. The other excludes sovereign immunity from government entities that are only incidentally involved with the public schools. *See generally* Annot., 33 A.L.R.3d 703, 768 (1970).

42. Since teachers are employees of the municipality or state, the school district could be held liable under the doctrine of respondeat superior. *See generally* W. PROSSER, THE LAW OF TORTS 458-59 (4th ed. 1971).

43. *See* T. GOODE, B. BIDDLE, & J. BROPHY, *supra* note 13, at 102, 222 (1975), where the

self-motivation,[44] socio-economic factors,[45] psychological problems, the influence of television,[46] grade inflation,[47] and any innovative programs that may have been instituted by the school or teacher may have caused the student to have difficulty in learning academic skills.[48] Isolating which of these factors is the major cause would be exceedingly difficult for any judge or jury. Nevertheless, a situation could arise where the negligence of a particular teacher becomes apparent. For example, suppose a class of grammar school students is having difficulty with fifth grade skills due to the incompetence of a teacher they had the previous year. Although it appears that the causal connection between the teacher and the injury could be shown, it is very unlikely that the injury would be quickly identified; as time passes, it becomes increasingly difficult to find the responsible teacher. Moreover, since students generally vary in their capacity to learn, the chances that a class of students will be equally affected by an incompetent teacher is remote.

B. The Difficulty of Awarding Damages

When an individual graduates from high school with a fourth grade reading ability and is unable to complete a simple job application, an injury certainly has occurred. Although this is quite obvious, the courts have had great difficulty in awarding damages for educational malpractice. In *Peter W. v. San Francisco Unified School District,*[50] and *Donohue v. Copiage Union Free School District,*[51] two public policy reasons were advanced for not awarding damages: (1) fear that a flood

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authors point out, "Clearly some schools and teachers do make a measurable difference . . . . Unfortunately, however, there is no simple way to identify good and bad schools or teachers."

44. Note that the teacher may play an important role in a student's motivation. As one commentator points out, "The teacher is essential in stimulating . . . [the desire to learn], and if he is effective in his role, the student's desire to learn will carry over from the classroom to the rest of the world. Bruner [a psychologist] feels that a teacher can best stimulate learning by creating interest in the material itself so that the student can realize it's worth learning." J. GIBSON, PSYCHOLOGY FOR THE CLASSROOM 163-64 (1976). *See generally* H. LINDGREN, EDUCATIONAL PSYCHOLOGY IN THE CLASSROOM 19-42 (1976); H. KLAUSMEIER, LEARNING AND HUMAN ABILITIES: EDUCATIONAL PSYCHOLOGY 217-44 (4th ed. 1975), where various theories on motivation are discussed.

45. *See* J. GIBSON, PSYCHOLOGY FOR THE CLASSROOM 35 (1976), where a 1957 survey by Maccoby and Levin points out that the socio-economic status of a student's mother has a significant effect on the student. *See generally* F. ARMBRUSTER, OUR CHILDREN'S CRIPPLED FUTURE: HOW AMERICAN EDUCATION HAS FAILED 128-63 (1977).

46. *See House Hearings, supra* note 2, at 11.

47. *Id.* at 10-11.

48. For a general discussion of grade inflation *see* note 153 and accompanying text *infra.*

49. *See House Hearings, supra* note 2, at 11, where Admiral Rickover discusses how innovations have permeated the schools, thereby allowing students to avoid the basics.

50. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

51. 407 N.Y.S.2d 874 (1978).

of litigation would occur[52] and (2) the difficulty of accurately assessing damages.[53]

For several reasons it is unlikely that a flood of litigation will occur: (1) the time and expense of litigation, (2) the fact that students as minors, are unable to file suit in their own behalf, and (3) the institution of minimal competency tests. Moreover, even if there is a high potential for litigation, an administrative court system could be developed to handle all disputes with the civil courts available if an appeal is taken. This type of procedure has been working successfully in the income tax area, where a large number of cases are filtered through special tax courts.[54] Consequently, the argument of the courts that a flood of litigation would occur is not viable. Rather, it seems a convenient way for the courts to avoid becoming involved in educational matters.

A major difficulty which the courts have encountered in educational malpractice litigation is how to assess damages.[55] Traditionally, courts would only award damages if they could be measured with absolute certainty.[56] In the few jurisdictions that still adhere to this view, damages could not be recovered for educational malpractice since assessing the loss of an adequate education cannot be accomplished with such certainty. However, most courts apply a less rigid standard, requiring that damages be assessed with reasonable certainty.[57] Otherwise, injuries suffered from violations of anti-trust laws, wrongful deaths, and injuries caused by nuisance could never be compensated. To meet the requirements of the "reasonable certainty" test, damages cannot be assessed by mere speculation; but, as held by the Supreme Court, "it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approx-

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52. 60 Cal. App.3d at 825, 131 Cal. Rptr. at 861; 64 App. Div. at 131-33, 407 N.Y.S.2d at 878 (1978).

53. *Id.* at 824-25, 131 Cal. Rptr. at 860-61; 64 App. Div. at 31-33, 407 N.Y.S.2d at 878 (1978).

54. Note that a taxpayer having an income tax dispute may file suit in either a specially created Tax Court or the Federal District Court. *See generally* W. PEDRICK & V. KIRBY, THE STUDY OF FEDERAL TAX LAW 20-21 (1978).

55. *See* note 53 and accompanying text *supra*. *But see* Selders v. Armatrout, 190 Neb. 275, 207 N.W.2d 686 (1973), where damages were awarded although impossible to assess for loss of society and companionship in the wrongful death of three minors.

56. *See* Moran Towing Corp. V.M.A. Gammino Construction, Co., 244 F. Supp. 729 (D.R.I. 1965), where the court concluded that damages cannot be based on speculation or conjecture. *See also* Swartz v. Steele, 42 Ohio App.2d, 325 N.E.2d 910 (1974). *See generally* 22 AM. JUR. 2d *Damages* § 22 (1965).

57. *See* Daniels Towing Service, Inc. v. Nat Harrison Associates, Inc., 432 F.2d 103 (5th Cir. 1970), where the court held, "in those situations where the evidence establishes a negligent wrong has occurred but its exact monetary extent is merged in other losses, the victim should not be precluded from all recovery of damages simply because explicit apportionment is impossible." *Id.* at 106.

imate. The wrongdoer is not entitled to complain that they cannot be measured with . . . exactness and precision. . . ."[58]

A reasonable manner of assessing damages for teacher malpractice would be to determine the cost of remedial instruction. For example, tutors could be brought into court as expert witnesses and questioned concerning the reasonable cost of raising the student's ability to the minimal competency level. This would serve the dual purpose of compensating the student for his injury, while punishing the school district or teacher for negligent conduct. It would also diminish future misconduct, for as one commentator points out, "the theory that the imposition of damages is a socially effective way to accomplish change is based upon what in criminal law is called 'deterrent efficiency.' That is, if the defendant has to suffer through the payment of a damage penalty for failure to teach this plaintiff to read, other prospective defendants will be deterred so they will exert themselves to teach all students to read."[59]

In addition to the fact that a reasonable method of assessing damages exists which would force school districts incurring liability under the doctrine of respondeat superior to take measures to eliminate educational malpractice, an added pressure in the form of social disgrace and the increased price of insurance which follows liability, will discourage teacher malpractice. Moreover, those opposed to awarding damages assert that if victims are compensated, an increasing number of students will feign injury to bring an action for educational malpractice.[60] This argument is not persuasive, since a student seeking damages must prove the alleged negligence by either a "preponderance of the evidence"[61] or "clear and convincing evidence,"[62] depending upon the jurisdiction. Furthermore, the defense of contributory negligence is usually available for a teacher or school district to demonstrate that the student has feigned the injury. Finally, the cost and time factors involved in instituting a lawsuit reduce any incentive a student may have to fraudently induce litigation.

In conclusion, when a student is injured due to the negligence of a teacher or school district, there are no justifiable reasons for not awarding damages. Yet, the courts' primary concerns, namely, that a flood of litigation will occur and that damages are too difficult to assess, are not plausible when one considers the damages awarded in other areas of the law.

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58. Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563 (1931).

59. *Fraud Conference, supra* note 10 at 120 (statement of Harry Hogan, Director of Government Relations at Catholic University).

60. *See* Peter W. v. San Francisco United School District, 60 Cal. App.3d 184, 825, 131 Cal. Rptr. 854, 861 (1976); Donohue v. Copiague Union Free School District, 64 App. Div. 29, 31-33, 407 N.Y.S.2d 874, 878 (1978).

61. *See generally* C. MCCORMICK, THE LAW OF EVIDENCE 793 (2d ed. 1972).

62. *Id.* at 796.

C. Teachers Have No Duty to Educate

A further problem arises from the fact that there is nothing explicit in the United States Constitution establishing a duty on the states, municipalities, or school districts to educate their students.[63] Therefore, teachers cannot be held liable for malpractice unless the courts hold that they have a legal duty to provide students with an adequate education. However, in *Peter W. v. San Francisco Unified School District,*[64] the California court found that educators, unlike their counterparts in the other professions, do not have a duty to conform to a standard of care.[65] The court distinguished "duty," a word of common parlance, with the legal definition of duty.[66] It defined the latter as "the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."[67] The court then listed the various considerations of public policy which must be accounted for.[68] Certainly, if one analyzes each of the considerations, it is difficult to understand how the court could conclude that there was no legal duty.

Another argument which has been advanced opposing the establishment of such a duty is that the laws which establish public schools, like those which establish police and fire departments, require the schools merely to provide educational services without setting up any standards to be met. For example, in *Riss v. City of New York,*[69] a woman brought an action against the city for failing to provide her with police protection after she received numerous threats from a former suitor. The court held that the city had no duty to provide her with the requested protection.[70]

Finally, the major reason why the courts have been reluctant to

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63. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973), where the court held that "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."

64. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

65. *Id.* at 824-25, 131 Cal. Rptr. at 860-61.

66. *Id.* at 821, 131 Cal. Rptr. at 858.

67. *Id.* at 824, 131 Cal. Rptr. at 860.

68. The court balanced the following factors:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the unavailability, cost, and prevalence of insurance for the risks involved.

Id. at 823, 131 Cal. Rptr. at 859-60.

69. 22 N.Y.2d 579, 240 N.E.2d 860 (1968).

70. The court in *Riss* concluded that before liability can be extended to police departments which negligently fail to provide sevices, the state legislature must establish a duty of care. *Id.* at 583, 240 N.E.2d at 861.

establish a legal duty is the lack of an acceptable standard of care.[71] Several possibilities, including the community standard applied in medical malpractice litigation[72] and the "reasonable man" standard applied to other professions[73] are available for the courts to apply. However, the teaching profession does not easily lend itself to such standards. As the court held in *Peter W.*,[74] "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standard of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of what a child should be taught. . . ."[75] Doctors, lawyers, accountants and other professionals, in contrast to educators, have customary practices. In addition, students are often affected by forces completely unrelated to the classroom such as their family background, personality changes which occur throughout their childhood, motivation, and psychological factors.[76]

1. The Search for an Appropriate Standard

Soon after the court in *Peter W.*[77] held that there was no acceptable standard to evaluate a teacher's performance, Congress,[78] educational agencies,[79] states[80] and municipalities,[81] were actively searching for a remedy to the high rate of functional illiteracy and the corresponding public outrage over the decline in the quality of education.[82] Their efforts resulted in a shift in focus from the teacher to the student, with the major emphasis centered on whether the student was indeed learning.[83]

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71. *See* Peter W. v. San Francisco Unified School District, 60 Cal. App.3d 814, 824, 131 Cal. Rptr. 854, 860 (1976); Donohue v. Copiague Union Free School District, 407 N.Y.S.2d 874, 878 (1978).

72. *See generally* W. PROSSER, THE LAW OF TORTS 164 (2d ed. 1971).

73. *Id.* at 149-66.

74. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

75. *Id.* at 824, 131 Cal. Rptr. at 860-61.

76. *See House Hearings, supra* note 2, at 11.

77. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

78. *See generally House Hearings, supra* note 2; *Senate Hearings, supra* note 3.

79. *See House Hearings, supra* note 2, at 9; *Senate Hearings, supra* note 3, at 18.

80. *See House Hearings, supra* note 2, at 113; *Senate Hearings, supra* note 3, at 78.

81. *See House Hearings, supra* note 2, at 119, where Barry B. Beal from the Department of Development and Evaluation of Denver Public Schools describes what initiatives Denver has taken to combat functional illiteracy.

82. R. CAMPBELL, L. CUNNINGHAM, R. MCPHEE & R. NYSTRAND, THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS 557 (2d ed. 1970).

83. The following results will occur from accountability:

a. [S]uccessful implementation of accountability will shift the principal focus in the school system from input to output; from teaching to learning.

b. When a child has failed to learn, the school personnel have assigned him a label — "slow," "unmotivated," or "retarded." Accountability triggers a reversed commitment that every child shall learn.

A. ORNSTEIN, ACCOUNTABILITY FOR TEACHERS AND SCHOOL ADMINISTRATORS 5 (1973).

This change in emphasis stems from the 1960's, when surveys exposed the fact that teachers were unqualified to hold their positions.[84] Teaching quality was especially low in poor urban communities where as many as forty percent of high school graduates were functionally illiterate.[85] It was discovered that teachers in these urban areas, by taking into consideration the socio-economic background of these students tended to lower their expectations to the detriment of students of higher ability. For example, when an urban ghetto student had difficulty understanding a mathematical concept, many teachers would attribute the failure to the student's social status and therefore curb their efforts to teach the concept. This phenonomenon is referred to as the "Pygmalion Effect."[86]

Due to the high rate of functional illiteracy, the ineffectiveness of dismissal, and the reluctance of the courts to intervene, the possibility of a legislative remedy was soon explored. One suggestion called for the payment of public funds on the basis of performance contracting, which consists of paying teachers only on the condition that their students learn.[87] Another proposal, referred to as "The-Most-Wanted-Teacher-Plan," would allow parents to select their child's teacher, who would then be paid in proportion to their popularity.[88] Although these plans are quite extreme and exceedingly difficult to implement, they illustrate the drastic degrees to which proposed legislative action has gone in an effort to hold the schools accountable.

However, two practical solutions are currently being put into operation. One is the implementation of student minimal competency tests which place the burden of learning on the *students* by requiring them to attain a minimum level of proficiency in basic skills.[89] In most states successful completion of the tests is or will be necessary to receive a high school diploma. The other solution, teacher competency exams, places the burden on *teachers* who are required to attain a certain score to receive or maintain their certification. Both tests are being administered

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84. A survey by the National Education Association conducted in the 1960's revealed: Nearly 150,000 teachers believe they are unqualified for their jobs. 4,000,000 children are taught by these teachers. The tenure laws affecting 70 percent of the nation's 1,700,000 teachers makes it almost impossible in most states to dismiss incompetent, bigoted, cruel, or often even mentally unbalanced teachers. Conservative estimates by school personnel experts and administrators suggest that between 5 and 10 percent of those now teaching in the U.S. are in that category.

B. FINE, UNDERACHIEVERS: HOW THEY CAN BE HELPED 101 (1967).

85. As a result, a great deal of money was spent on education projects specifically to help the disadvantaged. *See* T. GOODE, B. BIDDLE & J. BROPHY, *supra* note 13, at 102 (1975).

86. H. MILLER, STUDENT ACHIEVEMENT, TEACHER BEHAVIOR, AND ACCOUNTABILITY 75 (1976).

87. *See* H. SCRIBNER & L. STEVENS, MAKE YOUR SCHOOLS WORK 14 (1975).

88. *Id.* at 39.

89. The terms "minimal competency tests" and "functional literacy tests" are often used interchangeably.

concurrently in many states[90] and are expected to have a major impact on public education.

a. Teacher competency exams

A need for raising teacher competency standards has been recognized for many years and has recently been demonstrated by several developments.[91] For example, one-third of the 1976 applicants for a teaching position in a Florida county failed an eighth grade general knowledge exam.[92] In addition, a New Jersey newspaper recently reported that, "Visitors to classrooms often report seeing misspelled words on notices and other materials posted on the walls by teachers. A mother on the upper East Side of Manhattan told of receiving a note from her child's teacher that began, "Walter's homework is progressively becoming worst. [Signed] "Sincerly."[93]

As a result of widespread recognition that teacher education must be improved, many states are instituting competency-based teacher exams.[94] For example, in Tennessee such tests were administered in November, 1978,[95] requiring candidates for teaching positions to meet a particular cut-off score established by the State, but allowing educational institutions to set a higher cut-off if they desire. In Louisiana, where the National Teachers Exam is administered,[96] a controversy has developed over the appropriate cut-off score to be required. As with student minimal competency tests, implementation of these tests, before adequate standards are developed, could easily lead to future court battles charging lack of due process or discrimination if a substantial number of candidates fail the exam.[97]

On the other hand, several competency-based teacher education programs offer encouragement. Florida's program, for example, has

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90. *See* notes 107-11 and accompanying text *infra*.

91. *See, e.g.*, J. KOERNER, THE MISEDUCATION OF AMERICAN TEACHERS 34 (1963).

92. *See House Hearings, supra* note 2, at 14.

93. The Morning Union, Nov. 24, 1978, at 60, Col. 1.

94. Competency-based programs to improve the quality of teachers entering the profession are also being developed. *See, e.g.*, J. MERROW II, THE POLITICS OF COMPETENCE: A REVIEW OF COMPETENCY-BASED TEACHER EDUCATION (1975). Dr. Merrow asserts, "A student's progress through a CBTE program will depend on competence, and not on accumulated semester hours. The would-be teacher will be told in advance just what skills he or she is expected to demonstrate, and graduation/certification will follow skill demonstration, just as the aspiring driver knows what he or she must do to earn a driver's license." *Id.* at 10.

95. Education Commission of the States, *AACTE's Legislative Briefs*, November, 1978.

96. *Id.* at 2.

97. *See, e.g.*, Robinson v. School Board of Palm Beach County, Florida, No. 78-2137 (Cir. Ct. filed June 8, 1978), where a court battle has arisen due to a large number of failing scores on the minimal competency test recently implemented there.

several interesting features[98] including the categorization of twenty-three generic competencies,[99] the requirement of a five year internship, maximum certification for five years, and the training for extension of certification through college courses or inservice training. This new legislation is due to take effect by 1980.[100] The development of these tests, accompanied by the tight market in the teaching profession should result in a significantly more competent group of teachers. Nevertheless, teachers have failed to take on professional responsibilities.[101] A task force comprised of teachers, administrators, school board members, parents and others involved in teacher education appointed by the State of New York recognized this need, and after exhaustive study and numerous hearings concluded that the best way to improve the quality of teaching is to define teachers legally as professionals.[102] Once legally regarded as professionals, teachers would have to assume the responsibilities of professionals, including the defense of a malpractice suit if one should arise.

b. Student minimal competency tests

The feasibility of a national minimal competency test for students was the topic of a House subcommittee meeting on September 23, 1977.[103] The proposed bill would have required a national proficiency exam to be administered during eleventh grade, which, if failed, could be re-taken the following year before denying a student a high school diploma.[104] Much controversy arose over the proposed exam due to widespread belief that legislative activity in education has traditionally

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98. Florida's CS/SB 549 requires any competency test to include:

(a) [T]he ability to write in a logical and understandable style with appropriate grammar and sentence structure;
(b) [T]he ability to comprehend and interpret a message after listening;
(c) [T]he ability to read, comprehend, and interpret orally and in writing, professional and other written material;
(d) [T]he ability to comprehend and work with fundamental mathematical concepts; and
(e) [T]he ability to comprehend patterns of physical, social, and academic development in students, and to counsel students concerning their needs in these areas.

Education Commission of the States, *AACTE's Legislative Briefs,* June, 1978.

99. The term *generic* refers to a group or class. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 549 (5th ed. 1975).

100. *See* Education Commission of the States, *AACTE's Legislative Briefs,* June, 1978.

101. *See* R. CAMPBELL, L. CUNNINGHAM, R. MCPHEE & R. NYSTRAND, *supra* note 82, at 578, where a comparison is made between schools where administrators make use of teachers as professionals and those where no professionalism exists.

102. Education Commission of the States, *AACTE's Legislative Briefs,* April, 1978.

103. H.R. 6088, 95th Cong, 1st Sess. (1977).

104. The proposed legislation provides:

(2) Such examination shall be administered to a student during the academic year during which such student completes the requirements necessary for graduation from secondary school. If such student fails to achieve a passing grade in such examination, such student shall be given an opportunity to take such examination during the following academic year.

Id.

been and should remain a local function.[105] Indeed, there may be little need for Congress to become involved since several states through recent legislation have demonstrated that they are fully capable of composing as well as administering the tests themselves.[106]

Currently, student minimal competency tests are either being considered,[107] planned,[108] or implemented[109] in nearly every state. Twenty-one states require a passing score in order for a student to receive a high school diploma.[110] In Florida, where the test has recently been given for the first time, a large number of failing scores led to several class action suits charging the school districts with either lack of notice[111] or racial discrimination.[112] Such controversy is being avoided in states like Massachusetts where, at least in the initial stages, failure to pass the tests will not deprive students of their high school diplomas.[113]

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105. *See House Hearings, supra* note 2. For example, Mrs. Carolyn Warner, Superintendent of Public Instruction in Arizona, testified, "In Arizona we believe strongly in the concept of local autonomy." *Id.* at 113.

106. *See, e.g., Senate Hearings, supra* note 3, at 18 (statement by Dr. Mary Berry).

107. Minimal competency tests have been proposed in the following states: Alabama, Connecticut, Georgia, Illinois, Indiana, Kansas, and Rhode Island. Educational Commission of the States, *State Activity: Minimal Competency Testing,* Jan., 1979.

108. Minimal competency tests will soon be implemented in the following states: Delaware and Oklahoma (base-line testing); Colorado, Idaho, and Oregon (local district option); California, Illinois, Kentucky, Maine, Massachusetts, Missouri, New Jersey, New Mexico, New York, Tennessee, Utah, Vermont, Virginia, and Wyoming (will be put into effect soon). *Id.*

109. The following states presently administer minimal competency tests: Arizona, Florida, Louisiana, Maryland, North Carolina, Michigan, Nebraska, New Hampshire, and Washington. *Id.*

110. A passing score is required in the following states: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Kentucky, North Carolina, Oregon, Tennessee, Virginia, Utah, Vermont, and Wyoming. *Id.*

111. *See, e.g.,* Robinson v. School Board of Palm Beach County, Fla., No. 78-2137 (Cir. Ct., filed June 8, 1978).

112. *See, e.g.,* Debra P. v. Turlington, 474 F. Supp. 244 (D. Fla. 1979), where the court held that the Florida Functional Literacy Test may not be used to deprive a student of a high school diploma until 1983. The following are sample questions from the Florida tests:

a. Brad is in charge of buying the chicken for the class picnic. He buys 3 buckets, 5 barrels and 1 tub. How many pieces of chicken did he get? See menu.

A. 84
B. 111
C. 186
D. 198

MENU

SIZE	NO. PIECES
Box	5
Bucket	15
Barrel	21
Tub	48

b. If you want to find out what the word *television* means, you should look:
A. in the yellow pages.
B. in the newspaper.
C. in the dictionary.
D. in the TV Guide.

See also Borger, *Is Your Child Learning Anything In School?* PARENTS' MAGAZINE, September, 1978, at 59.

113. For a list of those states which do not require passing grades for graduation *see* Education Commission of the States, *State Activity: Minimal Competency Testing,* Jan., 1979.

Generally, the test should serve two purposes: (1) early identification of students with learning difficulties, and (2) indicating the need for remedial aid to assure that the students possess adequate proficiency in the basic skills at graduation.[114] In regard to early identification, almost all the states plan to begin assessment during a student's elementary years and continue at regular intervals.[115] But early identification of learning difficulties will become meaningless unless sufficient remedial instruction is provided. This will require more teachers with special skills as well as an increased school budget in many areas.

The composition of the test has been left to the local school boards in several states.[116] This is to assure that the test is representative of the various socio-economic and ethnic groups within each community.[117] In Massachusetts, all interested parties have been given an opportunity to help prepare the test.[118] It is hoped that by getting a large segment of the public involved, class action suits like those which have occurred in Florida will be avoided.[119] Nevertheless, implementation of student minimal competency tests has created a new area of regulation for both administrative and civil courts.[120]

One of the chief criticisms of the miminal competency tests is that they place the burden of failure on the students. For example, in *Robinson v. School Board of Palm Beach County,*[121] a class action was filed in behalf of 558 high school students who took and failed the Florida functional literacy test. Although these students fulfilled all other requirements for their graduation in 1978,[122] they will receive a certificate of attendance rather than the usual high school diploma.[123] In asking the court to bar the effects of the test, the plaintiff students claimed that by not being provided with a high school diploma, their prospects for

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114. The University of the State of New York, The State Education Department, *The Regents Competency Testing Program Information Brochure,* September, 1978, at 1.

115. For example, the Massachusetts Department of Education proposes the "[e]stablishment of an early elementary level (grades K-3), a late elementary level (grades 4-6), and a secondary level (grades 7-12) basic skills improvement program." Bureau of Research and Assessment, Mass. Dept. of Education, *Questions and Answers on the Basic Skills Improvement Policy and Proposed Regulations,* 1978 at I [hereinafter cited as *Questions and Answers*].

116. *Id.* at II.

117. *See, e.g.,* The Boston Globe, Jan. 28, 1979, at 17, col. 2, where the Massachusetts test is referred to as "unique" due to the fact that various groups in each community have been involved in its composition.

118. The Massachusetts regulations require parent, employers, teachers, administrators, students, and the general public to formulate the tests at the local level. *See Questions and Answers, supra* note 109, at III. *See also* The Boston Globe, Jan. 28, 1979, at 17, col. 2.

119. *See* notes 121-42 and accompanying text *infra.*

120. *Id.*

121. No. 78-2137 (Cir. Ct., filed June 8, 1978).

122. *Id.* Motion for Temporary Injunction at 1.

123. *See* Education Commission of the States, *State Activity: Minimal Competency Testing,* January, 1979, at 3.

future employment will be diminished and they will be caused much embarrassment within their community.[124]

In *Robinson*,[125] the students demonstrated the need for a phase-in-period before the full implementation of the test. The complaint alleged that these students were not given sufficient notice.[126] It may be argued that since education is a property right,[127] students must be afforded due process of law. The failure of the school district to provide adequate notice before instituting an exam which, if failed, would leave a social stigma is just as much a deprivation as the dismissal of a student without sufficient notice and an opportunity to be heard. Furthermore, the *Robinson* controversy is a prime example of placing too much of the burden of achieving functional literacy on the student.[128] Accountability is aimed at making teachers, administrators, and school boards more responsive to student learning.[129] In *Robinson*,[130] over five hundred students were identified as functionally illiterate due to years of inadequate teaching. If these students were to now sue the school district for educational malpractice, the court might hold that the competency testing program had not been in effect long enough to guide teachers in the teaching of basic skills. As a result, innocent students must bear the burden of either passing these tests or not receiving a diploma. Therefore, an adequate phase-in-period is crucial so that teachers and students can mutually adjust to the test and ultimately share the burden of poor results.[131]

In addition, more research is necessary before the burden of failing these tests can equitably fall on the students. This becomes apparent when Florida's results[132] are contrasted with Denver's,[133] where seventy-five percent of students pass the test in ninth grade, and almost

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124. Motion for Temporary Injunction at 1; Robinson v. School Board of Palm Beach County, Florida, No. 79-2137 (Cir. Ct., filed June, 8, 1978).

125. Robinson v. School Board of Palm Beach County, Florida, No. 78-2137 (Cir. Ct., filed June 8, 1978).

126. *Id.*, complaint at 2.

127. Goss v. Lopez, 419 U.S. 565, 574 (1974). For further discussion of this case, *see* notes 189-91 and accompanying text *infra*.

128. *See, e.g.*, McClung, *Are Competency Testing Programs Fair? Legal?*, PHI DELTA KAPPAN, February, 1978, at 397. The author emphasizes that learning involves both teachers and students and therefore each should share the responsibility. So, if students are evaluated, teachers must be tested also. Furthermore, the administrators must perform their role of making necessary changes in the school structure while the public provides the necessary finances.

129. *See* note 83 and accompanying text *supra*.

130. Robinson v. School Board of Palm Beach County, Florida, No. 78-2137 (Cir. Ct., filed June 8, 1978).

131. *See* McClung, *supra* note 128, at 397.

132. Borger, *supra* note 112, at 58. Note that Denver has been requiring the passing of tests in arithmetic, spelling, grammar, and reading comprehension for the past 17 years.

133. *Id.*

everyone passes by the end of high school. This raises several possible implications: (a) Florida's test is more difficult; (b) Florida's students are not as knowledgeable in the basic skills; (c) Florida's teachers are not teaching basic skills as effectively; or (d) Florida's test is not geared towards what the teachers are teaching and the socio-economic make-up of the students. On the other hand, the Denver test may be too simple. Whatever accounts for the difference, the above comparison reveals that until there is a better understanding of what functional literacy is, the test should not be used to detriment of the students.[134]

Another problem which arises in regard to minimal competency tests is their possible discriminatory impact. In *Debra P. v. Turlington,*[135] a class action was filed in behalf of 1,180 black twelfth grade students who failed the Florida functional literacy test. The students charged in their complaint that the test was discriminatory because it "unfairly penalizes, stigmatizes, and resegregates black students who have suffered the effects of prior and continuing racial discrimination in the public schools."[136] The validity of a similar constitutional attack was recently addressed by the Supreme Court. In *Washington v. Davis,*[137] two black candidates for positions in the District of Columbia Metropolitan Police Department alleged that the recruitment exam was discriminatory. The candidates argued that the test had a discriminatory impact. The Supreme Court concluded that discriminatory impact is not irrelevant, but unless the exam could be traced to a racially discriminatory purpose, it could not come under the protection of the fourteenth amendment.[138] The Court found no discriminatory purpose in the construction of the exam and therefore concluded that it was valid.[139] Applying this analysis to *Debra P.,*[140] no discriminatory purpose should be found in the construction and implementation of the minimal competency exam.[141] On the contrary, the purpose of the test is to identify those who are deficient in the basic

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134. *See Senate Hearings, supra* note 3. Dr. Mary Berry, Assistant Secretary of Education, believes that we are not ready for a national competency test because there is no national consensus on what every child should learn. Therefore, we should wait for further research to be done. *Id.* at 18. *See also* T. GOODE, B. BIDDLE, & J. BROPHY, *supra* note 13, at 101 (1975). The authors assert that "until more research is available, many of our most important decisions must be made in the dark." *See generally* Bureau of Research and Assessment, Mass. Dept. of Education, *Questions and Answers on the Basic Skills Improvement Policy and Improved Regulations,* 1978, at IV, pointing out how Massachusetts has recognized the need to wait before applying any pass/fail standard to its test.

135. 474 F. Supp. 244 (D. Fla. 1979).

136. *Id.*

137. 426 U.S. 229 (1976).

138. *Id.* at 242.

139. *Id.* at 246.

140. Debra P. v. Turlington, 474 F. Supp. 244 (D. Fla. 1979).

141. Yet, the court has recently held that the Florida minimal competency exam cannot be used to deprive students of a high school diploma until 1983. *Id.*

skills in order that remedial aid may be provided. Consequently, the long-term implications for minorities and others of low socio-economic status should be favorable.[142] Additionally, most states plan to administer the tests in elementary schools so that students might benefit from remedial aid at an early age, thereby permitting disadvantaged students to "catch up" and perhaps surpass the others.

Now that nearly all the states or their local school districts are actively involved in establishing minimal competency standards, the question arises whether these tests provide a standard by which a civil or administrative judge can properly assess whether a teacher or school district is negligent. First of all, it must be noted that the tests are limited to evaluating one's knowledge of the basic skills. Since most of these skills are easily learned and reinforced in the home, such a standard offers little protection to most victims of educational malpractice. Secondly, by implementing such a low standard, concern has arisen whether teachers, especially in the middle to upper income areas, will structure their teaching to the minimal competency exam instead of to their students' abilities.[143] As a result, minimal competency testing could have the detrimental effect of lowering the overall quality of public education. On the other hand, the staggering rates of functional illiteracy, especially in the poor urban communities, must be eliminated. Student minimal competency tests, given at an early period of a child's education followed by remedial aid where necessary appears to be an effective way of doing so. Therefore, although "minimal competency" is not a standard that will entirely remedy teacher incompetence, it may be utilized by the courts to award relief to the students who continue to graduate functionally illiterate.

In conclusion, teacher and student competency tests represent an important step towards the elimination of functional illiteracy. Nevertheless, the tests may have a negative effect on educational malpractice. Although teacher competency exams should foster a better skilled teaching body, they offer little hope to the victims of "lazy" teachers, who are fully competent, but fail to exercise their skills to benefit their students. Similiarly, student minimal competency tests will help motivate students who want to avoid the social embarrassment of failing and will help those who clearly have learning difficulties by applying pressure on the students to pass. However, the tests fail to ensure that the teachers are in fact teaching. Consequently, competency tests leave

142. *See House Hearings, supra* note 2. Admiral Rickover believes that a minority student is just as capable of learning as any other student. He asserts, "I came to America from a foreign country when I was 6 years old. I could not read or write. . . . There is nothing hard about learning; it is only being made to seem hard by people who want to find excuses. Any ordinary child can learn to read or write." *Id.* at 19.

143. *See* Borger, *supra* note 112, at 59.

public school teachers free to inadequately perform their roles without incurring liability. As a result, more than competency tests is needed. The difficulties facing a tort remedy in negligence must be overcome. In addition, alternative remedies must be explored.

IV. ALTERNATIVE WAYS TO ATTACK TEACHER MALPRACTICE IN THE COURTS

A. Deceit and Negligent Misrepresentation

An action for educational malpractice may also be brought on the basis of misrepresentation, which in itself is not a tort, but may be divided into two torts, deceit and negligence.[144] The courts have encountered much difficulty in distinguishing between the two.[145] Leading authorities, including Professor Prosser, have attributed the confusion in distinguishing negligence and deceit to a failure by the courts to carefully separate the elements necessary to maintain an action in either tort.[146]

There are five elements necessary to prove an action in deceit: (1) a false representation, (2) actual knowledge or belief of the defendant that the representation is false (scienter), (3) an intent to induce or restrain the plaintiff from acting, (4) justifiable reliance, and (5) damage.[147] In *Peter W.*,[148] and *Donohue,*[149] there was clearly a false representation. Although the standards for high school graduation differ throughout the United States, it is reasonable to assume that graduation from high school is a representation that the student is, at least, proficient in the basic skills. When a student receives passing grades throughout high school, it certainly would be reasonable for his or her parents to feel confident that their child is progressing sufficiently. Yet,

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144. W. PROSSER, THE LAW OF TORTS 684 (4th ed. 1971).

145. *Id.;* Note, *Negligent Misrepresentation: Fraud or Negligence,* 13 CLEV.-MAR. L. REV. 250, 253 (1964).

146. W. PROSSER, THE LAW OF TORTS (4th ed. 1971). Professor Prosser concludes, "Any attempt to bring order out of the resulting chaos must be at best a tentative one, with the qualification that many courts do not agree." *Id.* at 685. *See also* Note, *supra* note 145, at 250, 253, where the author points out that the failure to separate misrepresentation into negligence and deceit has resulted in "inconsistencies, illogical fictions, and unresolvable conflicts of decisions."

147. W. PROSSER, THE LAW OF TORTS 685-86 (4th ed. 1971). *See* RESTATEMENT (SECOND) OF TORTS § 525. Liabililty for Fraudulent Misrepresentation:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

148. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

149. 407 N.Y.S.2d 874 (1976).

upon his completion of high school, Edward Donohue could not even complete a simple job application. Moreover, his grade report[150] revealed that he had received passing grades in high school English despite the fact that he could only read at a fourth grade level.[151] Clearly, both the grade report and high school diploma furnish ample evidence of a false representation of Donohue's level of proficiency.[152]

Proving the second element, that the defendant knew or believed that the representation was false could be quite simple when the perpetrator is a teacher, since most teachers do, or at least should, get well enough acquainted with their students to determine whether they are experiencing learning difficulties. If not, certainly objective testing could aid teachers in appraising their students' abilities. Despite this knowledge, however, teachers award functional illiterates better grades than they deserve due to public education's adherence to the doctrine of "social promotion," a philosophy which maintains that the psychological consequences of leaving a student behind outweigh the benefits of learning.[153] What is ironic about this belief is that in an effort to avoid an immediate psychological impact on the students, the schools foster a much greater trauma, as demonstrated in *Peter W.*,[154] and *Donohue*.[155] Several school districts are beginning to realize this and abandonment of the doctrine will likely occur in the future.[156]

When a school district is sued directly, it may argue that its administrators did not have personal knowledge or belief that the grade reports or diploma issued by its teachers was false. However, such actual knowledge is not necessary if the representation was made with reckless disregard of whether it was true or false.[157] Certainly, a school administration should have the means of ascertaining whether its students possess the minimal skills assumed to be acquired during grammar school. Otherwise, the diploma may no longer serve as a sign of achievement. Furthermore, when a school district issues a student a report card that indicates that the student is barely passing, only

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150. Record on appeal at 48, Donohue v. Copiague Union Free School District, 407 N.Y.S.2d 874 (1978).

151. *Id.* at 34.

152. *See* Gibbons v. Brandt, 170 F.2d 385, 391 (7th Cir. 1948) (a written, oral, or printed statement is the most obvious example of a misrepresentation).

153. The New York Times, Nov. 28, 1978, at C1, col. 6. Some teachers and principals are now arguing that social promotion has had the negative impact of causing affected students to either sink to the bottom of the class or drop out.

154. 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

155. 407 N.Y.S.2d 874 (1978).

156. Social promotion has already been barred in Hempstead, New York, Chicago, Illinois, and Greensville County, Virginia. The New York Times, Nov. 28, 1978, at C1, col. 6.

157. *See* RESTATEMENT (SECOND) OF TORTS § 526. Conditions Under Which Misrepresentation Is Fraudulent (Scienter):

reckless disregard would prevent it from probing into the student's difficulties.[158]

The third element, "intent to induce the plaintiff to refrain from acting"[159] as a result of the misrepresentation will often be difficult to prove in an educational malpractice action since a school district or teacher rarely gives a student passing grades so he or she will refrain from seeking remedial aid. Rather, such action on the part of the teacher or school district is largely due to the school's policy of social promotion.[160] However, where there is reason to anticipate that others will rely on the representation, as with a deed to a parcel of land, the recent trend is for courts to extend liability.[161] Since teachers should anticipate that students and their parents will refrain from taking remedial action when they continually receive passing grades, the requirements of deceit should easily be satisfied.

Once intent is proven, in order for an action in deceit to be successful, the student must have justifiably relied on the representation.[162] This does not mean that the representation must be the sole cause of the damage.[163] Therefore, it is not critical that a "host of factors" were involved[164] as long as the false representation had a material influence on the student.[165] Materiality is satisfied if the student was justified in taking or refraining from taking action upon the representation.[166] Although it appears impossible for a student to reach the high school level unaware of his or her deficiencies in the basic skills, according to Dr. Benjamin Fine, "underachievers [such as Donohue and Peter W.,] may want a diploma, or may want to go to college, but they expect such attainments to materialize mysteriously without effect on their part. . . . Faced with reality, they act the way ostriches were once

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A misrepresentation is fraudulent if the maker
(a) knows or believes that the matter is not as he represents it to be,
(b) does not have the confidence in the accuracy of his representation that he states or implies, or
(c) knows that he does not have the basis for his representation that he states or implies.

See also W. PROSSER, THE LAW OF TORTS 701 (4th ed. 1971).

158. *See Fraud Conference, supra* note 10, at 13, where Suzanne Martinez, Peter W.'s attorney, tells of an incident where, when Peter's mother requested that her son be tested in 10th grade, the guidance counselor reported that Peter was able to read at the ninth grade level, which was quite average. This demonstrates that Peter's parents had a legitimate reason for relying on his grade report and diploma as a true representation of his ability.

159. W. PROSSER, THE LAW OF TORTS 686 (4th ed. 1971).

160. *See* note 156 and accompanying text *supra.*

161. W. PROSSER, THE LAW OF TORTS 717-18 (4th ed. 1971).

162. *Id.* at 686.

163. *Id.* at 715.

164. *See* Peter W. v. San Francisco Unified School District, 60 Cal. App.3d 814, 824, 131 Cal. Rptr. 854, 861 (1976).

165. W. PROSSER, THE LAW OF TORTS 715 (4th ed. 1971).

166. *Id.* at 719.

thought to act — they refuse to see reality."[167] Consequently, many students with learning difficulties blindly believe that they are obtaining an adequate education when it is obvious they are not. The grade reports and diploma reinforce their false beliefs. As a result, students like Donohue and Peter W., who do not realize what has occurred until after graduation face a major trauma.

A final requirement is proving that the student suffered substantial damage,[168] which may be satisfied by showing that the student has been put in a worse position than he or she would have otherwise.[169] When a school falsely represents that a child is learning, it deprives the child of remedial aid since the parents of the student do not have the opportunity to inquire into special programs.[170] In regard to assessing damages, the majority rule, which is referred to as the "loss-of-bargain" rule gives the plaintiff the benefit of what he was promised and allows recovery of the difference between the actual value of what he has received and the value that it would have had if it had been as represented.[171] Although it is difficult to place a monetary value on an adequate education, it would be reasonable to award damages based on what it would cost the injured student to obtain remedial aid.

A minority of jurisdictions have adopted the "out-of-pocket" rule, which only compensates for the difference between what was parted with and what was received.[172] This would be difficult to apply since it would be impractical to calculate how many tax dollars each family spends on a child's education. Furthermore, several courts hold that there should be flexibility in deciding which rule to evoke so that a plaintiff who has been injured will not be deprived compensation due to mere technicalities.[173] Consequently, a student who is deprived of an adequate education due to the fraudulent representations of his or her teachers and administrators has been substantially injured and therefore should be amply compensated.

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167. B. FINE, UNDERACHIEVERS: HOW CAN THEY BE HELPED 17 (1967).

168. W. PROSSER, THE LAW OF TORTS 686, 731 (4th ed. 1971).

169. *Id.* at 731.

170. *See* note 114 and accompanying text *supra.*

171. W. PROSSER, THE LAW OF TORTS 734 (4th ed. 1971) (also referred to as the "benefit of the bargain" rule).

172. *Id.*

173. Professor Prosser sets out the following four rules adopted by several jurisdictions to aid in determining whether to apply the "loss-of-bargain" rule or "out-of-pocket" rule:

1. If the defrauded party is content with the recovery of only the amount he has actually lost, his damages will always be measured under that rule.
2. If the fraudulent transaction also amounted to a warranty, he may recover for loss of the bargain, because a fraud accompanied by a broken promise should cost the wrongdoer as much as the breach of promise alone.
3. When the circumstances disclosed by the proof are so vague as to cast virtually no

A typical example of negligent misrepresentation is where a young child's I.Q. test indicated a learning disability. On the basis of the test results, the school administration placed the child in a class of children with similiarly diagnosed learning difficulties, where the child remained throughout public school. Then, either during high school or shortly thereafter it was discovered through additional testing that the original test results were inaccurate and that the child had always possessed a normal learning ability. Due to the negligent failure of the school personnel to re-test, however, the student was deprived of a normal education.[174] Since at the time of the original testing the representations made were accurate, an action for deceit would not lie. Rather, an action could be maintained in negligence. However, a few problems arise with regard to proving negligent misrepresentation. First, there must be a duty of care.[175] As previously noted, the courts have refused to establish such a duty.[176] Secondly, it is usually held that a gratuitous statement, if negligently made, will not impose liability on the maker.[177] Since public education may be considered a gratuitous service, like police and fire protection, recovery may be precluded.[178]

In summary, an action for misrepresentation, whether in deceit or negligence, is feasible where a school district awards grades, diplomas, and positive test results which falsely reflect a student's ability. Teachers and other school personnel must be held accountable not only for exercising their duties with care and skill, but also for properly informing students and parents of any problems or deficiencies. Indeed, if parents are informed of their child's difficulties at an early stage of their education, appropriate action can be taken before significant damage occurs.

B. A Constitutional Remedy to Teacher Malpractice

Much of the foundation for a constitutional attack on teacher malpractice already exists and has been evidenced by several developments. First, there has recently been a movement towards ex-

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light upon the value of the property had it conformed to the representations, damages will be awarded equal to the loss sustained.

4. Where the damages under the benefit-of-bargain rule are proved with reasonable certainty, that rule will be employed. *Id.* at 735.

174. *See* Hoffman v. City of New York, 410 N.Y.S.2d 99 (1979), where the court awarded a student $500,000 for diminished intellectual development and psychological injury.

175. *See* notes 63-71 and accompanying text *supra.*

176. *See, e.g.,* Jaillet v. Cashman, 235 N.Y. 511, 139 N.E. 714 (1923); Peter W. v. San Francisco Unified School Dist., 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976); Donohue v. Copiague Union Free School Dist., 407 N.Y.S.2d 874 (1978). *See generally* Note, *supra* note 145, at 250 (1964).

177. W. PROSSER, THE LAW OF TORTS 706 (4th ed. 1971).

178. *See, e.g.,* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860 (1968); Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).

panding the rights of the young.[179] Traditionally, the young have been characterized as "the weak, the uninformed, the unsuspecting, and the gullible . . ." who require protection from their own volition.[180] Several U.S. Supreme Court decisions indicate that minors may have certain rights independent of their parents or any other adult.[181] In *Planned Parenthood v. Danforth*,[182] the Court held that "minors as well as adults are protected by the Constitution and possess Constitutional rights," and therefore may obtain abortions without parental consent.[183]

A second development is the recognition by the Court that education serves a vital function.[184] Consequently, the lack of an adequate education may have a great effect on other constitutional rights such as free speech and voting.[185] Although the Court concluded in *San Antonio Independent School District v. Rodriguez*[186] "that the causal dependence of the intelligent exercise of free speech and voting rights on education does not imply a constitutional guarantee of education,"[187] the Court hinted that a minimal proficiency in the basic skills may be constitutionally protected. This is evidenced in Justice Powell's holding in *Rodriguez* that no constitutional showing was made that the students were deprived of "the basic minimum skills necessary for the enjoyment of rights or speech and of full participation in the political process."[188] A reasonable interpretatation of this statement indicates that the Court recognizes the constitutional right to acquire basic educational skills,

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179. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (a minor is not required to have parental consent to obtain an abortion). *See generally* Note, *Schools and School Districts — Doe v. San Francisco Unified School District, Tort Liability for Failure to Educate,* 6 LOYOLA U. L. J. 462, 481 (1975); Letwin, *After Goss v. Lopez; Student Status as Suspect Classification?,* 29 STAN. L. REV. 627, 652-53 (1977).

180. Paris Adult Theater I v. Slaton, 431 U.S. 49, 64 (1973). *See* Prince v. Mass., 321 U.S. 158, 168 (1954).

181. *See In re* Gault, 387 U.S. 1 (1967) (rejected paternalism under which the young were denied criminal procedural rights); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (students have first amendment right to wear armbands in opposition to Veitnam War); Goss v. Lopez, 419 U.S. 565 (1975) (students have a property right to receive an education).

182. 428 U.S. 52 (1976).

183. *Id.* at 75.

184. *See* note 14 and accompanying text *supra*; Wolman v. Walter, 433 U.S. 229, 240 (1977).

185. D. KIRP, THE POOR, THE SCHOOLS AND EQUAL PROTECTION (1974). The effect of education on voting is as follows:

> It is presumed that education can provide the skills that enables citizens to make intelligent political choices and thus participate effectively in a government which exercises coercive powers. As Alexis de Tocqueville once stated, "It cannot be doubted that in the U.S. the instruction of the people powerfully contributes to the support of the democratic republic . . . politics [is] the end and aim of education."

Id. at 8.

186. 411 U.S. 1 (1973).

187. Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication,* 41 UNIV. CHI. L. REV. 32, 39 (1973).

188. 411 U.S. 1, 37 (1973). *See generally* Richards, *supra* note 187, at 32 (1973).

thereby opening the way to educational malpractice litigation if deprivation of these skills can be demonstrated to have resulted from educational incompetence.

A third and more recent development resulted from the Supreme Court's holding in *Goss v. Lopez*[189] that education is a property right protected by the Due Process Clause of the fourteenth amendment.[190] However, the property right involved was not the right to be assured a certain level of education, such as functional literacy. Rather, it was the right to attend school and not be deprived of that right without adequate notice.[191] Although this distinction may be critical, the fact remains that a property right exists and could be extended to compensate the victim of educational malpractice.

In summary, the expansion of the constitutional rights of the young, the recognition that the acquisition of basic skills may be necessary for the exercise of fundamental constitutional rights, and the acknowledgement that education is a property right implies that a student has a constitutional right to at least some minimum level of education. Just what that level should be is currently being considered in nearly every state.[192] Initial attempts to develop an appropriate standard have produced different results. For example, in Denver, almost everyone passes the minimal competency test,[193] while in Florida, a high percentage have failed.[194] As a result, it has been questioned whether the Supreme Court should set the standard.[195] Critics maintain that such a standard would be too inflexible,[196] for it could not possibly take into consideration the various socio-economic factors and regional variations. Since the Supreme Court does not have the expertise to properly set the standard, state legislatures along with local school boards have assumed the task.[197] However, once standards are set, if they violate the Constitution in any manner, it is the duty of the Court to declare them unconstitutional.

CONCLUSION

The teacher has always been recognized as one of the most respected members of the American community.[198] Yet, with studies and statistics indicating that an enormous number of students are leaving the schools

189. 419 U.S. 565 (1975).
190. *Id.* at 574.
191. *Id.* at 579.
192. *See* notes 107-11 and accompanying text *supra.*
193. *See* note 132 and accompanying text *supra.*
194. *See* note 133 and accompanying text *supra.*
195. *See Fraud Conference, supra* note 10, at 115-24.
196. *Id.* at 123.
197. *See* notes 107-11 and accompanying text *supra.*

functionally illiterate,[199] the public is re-evaluating its faith in public education. Legislative and educational agencies among the various states have responded to the public outcry by implementing student minimal competency tests and competency-based teacher examinations. In their initial stages, the student tests have encountered serious difficulties. Minorities and the disadvantaged have charged that the tests have a discriminatory impact upon them. Others feel that the burden of passing the tests has been unduly placed on students who may be deprived of a graduation certificate due to years of inadequate teaching. Proponents of the tests believe that if they are properly administered, with a sufficient phase-in period, they will drastically reduce functional illiteracy. Similarly, the teacher exams, which are just beginning to face opposition, should, by making it more difficult for teachers to achieve and retain certification, foster a more competent teaching body.

Nevertheless, the problem remains in how to compensate those who meet the minimal competency standard, but are still victims of educational malpractice. The recognition by the courts that they must open their doors to litigation appears to be the only viable solution. With recent advances in technology, public expectations for our educational system are higher than ever.[200] Indeed, as one commentary maintains, "if man can reach the moon, if he can 'walk' in outer space, if he can harness the power of the cosmos, people begin to ask, and their leaders to suggest, why could we not also abolish poverty and injustice, eradicate slums, eliminate crime, cure cancer, educate everyone and so on."[201] Educators are the last of the professional groups to face malpractice suits.[202] The time has come for teachers, administrators, and other school personnel to be held accountable when they fail to provide an adequate education.

JAY M. PABIAN

198. *See* R. CAMPBELL, L. CUNNINGHAM, R. MCPHEE, & R. NYSTRAND, *supra* note 82, at 557, 578, where the authors characterize the teacher as the spirit of America.

199. *See* notes 1-5 and accompanying text *supra*.

200. C. SILBERMAN, CRISIS IN THE CLASSROOM 20 (1970).

201. *Id.; see* note 13, *supra*.

202. STRICKLAND, PHILLIPS, & PHILLIPS, AVOIDING TEACHER MALPRACTICE: A PRACTICAL LEGAL HANDBOOK FOR THE TEACHING PROFESSIONAL 64 (1963).

High-Demand Sects: Disclosure Legislation and the Free Exercise Clause

High-demand religious sects[1] have rapidly proliferated across the United States in the past decade.[2] Public concern has focused on alleged fraudulent recruitment practices and "thought control" indoctrination

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1. Jean Merrit, an authority engaged in therapy with ex-members of high-demand sects, uses the term "destructive cults" in characterizing sects which exert adverse effects on the member. The major components of cult indoctrination include isolation from society, physiological exhaustion, a total, unquestioning obedience to a higher authority, a turning against society, and destruction of ego functions (*i.e.*, lowering of IQ and vocabulary use, inability to negotiate reality external to the cult). Interview with Jean Merrit, Associate Professor of Social Work at Boston University, in Boston (Feb. 14, 1979). Dean Kelly, Executive for Religious and Civil Liberty, National Council of Churches, defines high-demand religious cults as organizations which require a total commitment of time and energy in contrast to weekly attendance. D. KELLY, WHY CONSERVATIVE CHURCHES ARE GROWING 47-49 (1977).

Dr. John Clarke, a psychiatrist and authority on such sects, characterizes high-demand sects in the following passage:

> [O]nes such as Hare Krishna, the Unification Church, the Scientologists, and the Divine Light Mission, all of whom are utilizing the same basic techniques. . . . The beliefs of all these cults are absolutist and nontolerant of other systems of beliefs. Their systems of governance are totalitarian. A requirement of membership is to obey absolutely without questioning. . . . It is clear that almost all of them emphasize money making in one form or another, although a few seem to be very much involved in demeaning or self-denigrating activities and rituals. . . . One of the most important of the common properties of such cults is the presence of a leader who, in one way or another, claims special powers or may even allow himself to be thought of as the messiah. . . . It appears that the techniques utilized by these cults are very similar overall although each one uses its own peculiar style.

Hearings, Vermont Senate Committee for the Investigation of Alleged Deceptive, Fraudulent and Criminal Practices of Various Organizations in the State 18, 19 (1976) (testimony of Dr. John Clarke) [hereinafter cited as *Vermont Hearings*].

Dr. Swope, a clergyman and psychologist, describes high-demand sects in the following manner:

> It is a group which vests in its religious or political leader divine powers and while the members undergo behavior modification resulting in self-abnegation . . . the leader obtains power and wealth out of all proportion to his followers. All of this occurs in communes or centers where contact with the real world is minimized and cult reinforcement is maximized. They have little opportunity to compare what they are undergoing with the real world. And they have this constant reinforcement of the cult which has separated them from reality.

Id. at 55-56.

The author uses the term "high-demand sect" in referring to those religious organizations which require communal living, a highly restricted daily schedule, and employ specific techniques designed to deceive the newcomer and destroy individual autonomy. *See* notes 95-107 and 132-47 and accompanying text *infra*. This article focuses on two major high-demand sects, the Unification Church, commonly referred to as the "moonies," and the Children of God (COG), as being representative of such sects in general.

2. It is estimated that between 300,000 and 750,000 youths are members of high-demand

techniques[3] aimed at subverting the autonomy of incoming members. The urgency of the problem is underscored by federal[4] and state[5] action in response to the pleas of concerned citizens. Moreover, parental consternation has resulted in the employment of both illegal[6] and judicially sanctioned methods[7] to remove offspring from communal confines.

Systematic application of patterned indoctrination techniques[8] within an isolated setting, and a rapid repudiation of former values and identity by the newcomer, have raised allegations of "brainwashing."[9] Nevertheless, there have been no criminal convictions. One court opined that techniques of "mindcontrol" or "brainwashing," even if employed in religious indoctrination to subvert rational thought, are not criminal *per se*.[10] The novelty presented by such charges is demonstrated by California Judge S. Lee Vauris' statement in granting the

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cults. *See* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment,* 51 S. CAL. L. REV. 1, 6 (1977). Since 1969, the Children of God expanded into a world-wide network of about 120 communes. New York Attorney General Reports, *Final Report on the Activities of the Children of God* 3 (1974). The Unification Church controls 37,000 U.S. followers with an average age of 24. NEWSWEEK, Dec. 4, 1978, at 81.

3. *See* notes 132-45 and accompanying text *infra.* Dr. Hans Lacquer, a Vermont psychiatrist, after questioning a former Unification Church member stated his opinion of "thought-control": "I think she impressed me as being very much under the influence of something I would call a thought controlling system that made it impossible for her to offend the people that had put her in that state." Deposition of Dr. Hans P. Lacquer, Weiss v. Patrick, 453 F. Supp. 717 (D.R.I. 1978). The First Circuit Court of Appeals affirmed the lower court's decision in dismissing charges of kidnapping, false imprisonment, and violation of civil rights of a Unification Church member against professional deprogrammer Ted Patrick. Weiss v. Patrick, 588 F.2d 818 (1978).

4. In January, 1979, Senator Robert Dole held informal open hearings concerning high-demand sects. Such action was prompted by the "Guyana Incident" where 900 followers of the Temple of God, a San Francisco based sect, committed suicide in the communal confines of the organization in Guyana, South America. *See* The Boston Globe, Feb. 5, 1979, at 6, col. 4. *See also* The Hartford Courant, Nov. 25, 1978, at 16, col 1.

5. A resolution was introduced into the Pennsylvania General Assembly to establish a committee to investigate high-demand sects and their effect on the Commonwealth's citizens. Pa.H.R. 37, 2d Sess. (1977). The preamble to the resolution stated that the cults "allegedly lure young people into their movements by using mind control or mental manipulation and coercion." *Id.* at 1. *See also Vermont Hearings, supra* note 1. Several bills were introduced in the California Senate to provide the use of emergency temporary guardianship statutes without notice to remove cult members from the sects' confines. *California Senate Select Committee on Children and Youth: Hearings on the Impact of Cults on Today's Youth,* 49th Sess. (1974).

6. *See* notes 175-86 and accompanying text *infra.*

7. *Id.*

8. *See* notes 132-45 and accompanying text *infra.*

9. *See, e.g.,* People v. Murphy, No. 2012-76 (N.Y. Sup. Ct., Queens Cty., Mar. 16, 1976), (indictment of "brainwashing" tantamount to false imprisonment dismissed); Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (allegation charged the following: "It is our position that the proof will demonstrate that these people are victims of artful and designing persons due to coercive conversion which is oftentimes referred to as thought control, thought reform, or 'brainwashing'.") *Id.* at 972, 141 Cal. Rptr. at 246; Helander v. Salonen, No. H.C. 7-75, slip op. at 15 (D.D.C. Sept. 23, 1975) (court found insufficient evidence of mind control to warrant issuance of writ of habeas corpus). For a discussion of "brainwashing" *see* notes 132-47 and accompanying text *infra.*

10. People v. Murphy, No. 2012-76 (N.Y. Sup. Ct., Queens Cty., Mar. 16, 1976).

parents' request for conservatorship over five Unification Church followers: "I have researched the law and with the exception of a very few instances there's nothing to give me a guiding light."[11]

The "free exercise clause"[12] of the first amendment represents the primary legal bar to judicial or legislative intervention into the practices of high-demand sects. This note focuses on the free exercise clause and its relationship to the deceptive and injurious indoctrination techniques employed by high-demand sects.[13] Specifically, an historical analysis of the free exercise clause will provide a backdrop for constitutional evaluation of disclosure legislation designed to prevent fraud, and a series of holdings in which the free exercise clause clashed with the state's police power will give form to the interface between government and religion. Judicial attempts to reconcile the mutually incompatible concepts of fraud and religion will also be presented.

This note also proposes disclosure legislation and evaluates its validity in light of a series of well-established constitutional doctrines. First, disclosure legislation requiring specified information from both religious and secular organizations which publicly recruit members is analyzed as a nondiscriminatory regulation of manner of recruitment under the "time, place and manner doctrine."[14] Second, such legislation, when applied to high-demand fraudulent destruction of autonomy via "thought-control," is viewed as a valid means to cope with a "substantial threat"[15] to the public health, safety and welfare. Third, a constitutionally established balancing test is applied to disclosure statutes where the state's interests are weighed against free exercise challenges. The religious sect's right to unfettered recruitment practices is balanced against the state's interest in protecting the psychological integrity and

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11. Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).

12. *See* notes 16-45 and accompanying text *infra.*

13. Had the majority of newcomers known the schedule of a day in the life of a cultist they more than likely would not have entered. The target population, college-age persons, are looking for freedom in the sect but are instead presented with an extremely restrictive lifestyle. *See* Interview with Jean Merrit, *supra* note 1. Ms. Merrit believes that public education is an effective means of dealing with the problem, and to that end lectures frequently on the subject. Richard Delgado, Visiting Professor of Law at the University of California, Los Angeles, stated in an interview that potential converts should be told of the sect's requirements before entering:

> But just as we require informed consent in obtaining medical treatment, the legislatures and courts ought to consider a requirement that cults disclose what life is like within them' — including some bizarre and onerous conditions of membership . . . I have no doubt that the large majority of cult recruits, on hearing what was offered, would respond by leaving or, at a minimum be on their guard.

U.S. NEWS & WORLD REPORT, Dec. 11, 1978, at 30-31.

14. *See* notes 53, 58, 113 and accompanying text *infra.* In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court stated that "[i]t is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon." *Id.* at 304.

15. *See* notes 114-51 and accompanying text *infra.*

independence of the incoming member through disclosure legislation. Finally, when compared to the constitutionally unacceptable method of deprogramming, the proposed legislation is viewed as being the least restrictive alternative in dealing with a most serious and sensitive issue.

I. THE FREE EXERCISE CLAUSE

A. Historical Perspective

Fear of heresy trials[16] and colonial religious intolerance[17] were the major reasons for the adoption of the "free exercise clause." An historical analysis incorporating Supreme Court decisions interpreting the free exercise clause demonstrates that the clause was primarily intended to eliminate religious persecution,[18] forced adherence to particular doctrines,[19] and civil disabilities attached to theological non-

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16. *See, e.g.,* Watson v. Jones, 80 U.S. 679 (13 Wall.) (1871) (the Court held that the independence of churches would be in grave danger if the civil government undertook to define religious heresy or decide which of two factions was the true faith); United States v. Ballard, 322 U.S. 78 (1944) (conviction of defendants for using the mails to defraud by means of a religious movement). Justice Douglas, in *Ballard,* upheld the lower court's decision to withdraw the issue of the truth of religious doctrine and stated: "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution." *Id.* at 86.

17. *See generally* W. TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA (1948). Torpey states that toleration of dissenters in Puritan Massachusetts in the seventeenth century was seditious. *Id.* at 9. He further states that by 1700 the voting privilege in most colonies was a function of conformity to a state approved sect. *Id.* at 12. Furthermore, until the early 1800's Connecticut and Massachusetts taxed citizens for support of the Congregational Church.

Justice Field, in Davis v. Beason, 133 U.S. 333 (1890), states the rationale for constitutional religious protection:

> The oppressive measures adopted . . . and the cruelties . . . for many ages . . . to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, . . . led to the adoption of the amendment in question.

Id. at 342.

18. Douglas City v. Jeannette, 319 U.S. 157, *rehearing denied,* 319 U.S. 782 (1943). The Court found an ordinance prohibiting public evangelism on Sunday invalid and stated:

> It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was a heretic and guilty of blasphemy because he failed to conform in mere belief of in support of prevailing institutions and theology.

Id. at 179.

19. In West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the Court struck down a compulsory flag salute bylaw and overruled Minersville School District v. Gobitis, 310 U.S. 586 (1940). The Court stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their belief therein." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

conformity.[20] Thomas Jefferson, an adamant proponent of religious freedom, demarcated the contours of constitutional protection in an address to the Danbury Baptist Association:

> No man shall be compelled to frequent or support any religious worship or ministry or shall otherwise suffer on account of his religious opinions or belief, but all men shall be free to profess and by argument to maintain, their opinions in matters of religion.[21]

Jefferson's dual perspective of religious freedom was thereafter embodied in the first amendment:[22] the establishment clause prohibited governmental advancement of a particular religious doctrine while the free exercise clause secured freedom from prejudice and eschewed discrimination by placing all religions on equal footing.[23]

The confusion surrounding attempts to clarify the boundary between religious protection and legitimate state interference in religiously-motivated action stems from the absence of explanation of what is meant by the "free exercise of religion."[24] Religious freedom under the free exercise clause requires that government provide absolute protection to belief in specific doctrines so that certain religions will not be disadvantaged by discriminatory taxes or ordinances designed to burden the believer. To effectuate the freedom from oppression which free exercise demands, government must also be prevented from burdening the translation of belief into forms of worship.[25] However, the drafters of the Constitution were not unmindful of the potentially destructive effect on all freedoms that would result by affording greater protection to religiously-impelled action.[26] Providing greater protection

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20. That the members of the Federal Convention of 1787 adopted the Pickney proposal providing that "no religious test shall ever be required as a qualification to any office or public trust under the United States" as U.S. Const. art. § 6, cl. 3 reflects their determination to guard against religious oppression. *See also* Torcaso v. Watkins, 367 U.S. 488 (1961) (test oath held as fatal invasion of freedom of religious belief).

21. *See* Torpey, *supra* note 17, at 3.

22. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Freedom of religion was first applied to the states in Meyer v. Nebraska, 262 U.S. 390 (1923), whereas the first amendment as a whole was applied to the states via the fourteenth amendment's due process clause in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The establishment clause prohibits governmental promotion of a particular religion whereas the free exercise clause affords freedom from governmental discrimination or prejudice and creates a protective sphere around the exercise of one's religious beliefs.

23. *See* P. KURLAND, RELIGION AND THE LAW (1961). Kurland states that first amendment freedom of religion should be read as conferring theological equal protection. *Id.* at 17-18. *See also* Fernandez, *The Free Exercise of Religion,* 36 S. CAL. L. REV. 546 (1963). The author concludes, "[E]quality of treatment is granted by the 'free exercise clause.' If one can show that a statute or other governmental act discriminates against him, either expressly or in its unstated purpose, because of his religious beliefs, he can seek protection by appeal to the clause." *Id.* at 565.

24. *See* W. TORPEY, *supra* note 17. ("Constitutional explanation of the meaning of 'free exercise of religion' is noticeably absent from the documents themselves.") *Id.* at 35.

25. *See* notes 32-45 and accompanying text *infra.*

26. The Court in Reynolds v. United States, 98 U.S. 145 (1878) cited Jefferson's works:

to religious actions would be tantamount to "arming every fanatic against all government."[27]

In an early free exercise case,[28] the Supreme Court cited Jefferson's works in an effort to interpret the drafters' intentions regarding religious freedom. The Court, quoting Jefferson, stated that while the propagation of belief must be afforded absolute protection, "it is time enough for the rightful purposes . . . to interfere when principles break out into overt acts against peace and good order."[29] As a result of Jefferson's thoughts, the Court held that polygamy was inimical to Western Civilization and destructive to the family, a social institution of paramount importance.[30] However, in stating that government could interfere with religious actions, the Court explicitly limited government intrusion to those "actions which were in violation of social duties and subversive of good order."[31]

Thus, Jefferson's views laid the foundation for a sliding constitutional scale for religiously-motivated action eventually resulted in a belief/harmful act dichotomy.[32] On the one hand, the practice of religious beliefs may neither be prohibited nor burdened, but when such beliefs are translated into acts in violation of "social duties or subversive of good order"[33] they may legitimately be restricted. Although the free exercise clause may be viewed as providing theological equal protection, it was never intended to extend greater license to religiously-motivated action. Jefferson succinctly stated his position in the following manner:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions . . . I shall see with sincere satisfaction that progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[34]

> [T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.

Id. at 163.

27. J. BENTHAM, THEORY OF LEGISLATION 86 (1887).

28. Reynolds v. United States, 98 U.S. 145 (1878).

29. *Id.* at 163.

30. *Id.* at 165-66.

31. *Id.* at 163.

32. The belief/harmful act dichotomy is a doctrine first enunciated by the Supreme Court in Reynolds v. United States, 98 U.S. 145 (1878). It provides absolute protection to religious belief and prevents discrimination on account of the profession of specific tenets, but it does not protect activities which threaten important social institutions or infringe upon the rights of others.

33. *Id.* at 163.

34. T. Jefferson in reply to a committee of the Danbury Baptist Association, *quoted in* Reynolds v. United States, 98 U.S. 145, 163 (1878).

B. Implementation

In forwarding the egalitarian purposes of the free exercise guarantee, the Supreme Court has held that government is powerless to: (1) coerce the unwilling expression of any belief;[35] (2) impose a direct prohibition on door-to-door religious solicitation;[36] or (3) censor religion by conditioning religious solicitation on local permits which empower administrative officials to determine what a religious cause is.[37] The Court has also held that government may not employ the taxing power to inhibit the propagation of religious views,[38] despite the solicitation of money during the distribution of religious tracts.[39]

The validity of license permit ordinances for the public dissemination of religious doctrines has consistently been brought to the Court's attention in their application to the Jehovah's Witnesses.[40] The opinions,

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35. In West Virginia State Board of Education v. Barnette, 319 U.S. 623 (1943), the Court struck down a compulsory flag salute bylaw and overruled Minersville v. Gobitis, 310 U.S. 586 (1940). The Court stated:

> It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to punish.

Id. at 633. In Sheldon v. Fannin, 221 F. Supp. 766 (D.C. Ariz. 1963), a District Court found that suspension of students for insubordination by reason of their refusal to stand during the National Anthem violated the first amendment on the basis of the *Barnette* decision. In Torcaso v. Watkins, 367 U.S. 488 (1961), the Court struck down a statute which required oath of belief in the existence of God as a prerequisite to holding public office. *Id.* at 496.

36. *See* Martin v. Struthers, 319 U.S. 141 (1943) (ordinance which prohibited knocking or ringing doorbells to deliver handbills was held an unconstitutional violation of free speech as applied to Jehovah's Witnesses); Marsh v. Alabama, 326 U.S. 501 (1946) (distribution of religious literature by Jehovah's Witnesses cannot be banned even on privately owned streets of company town); Douglas v. City of Jeannette, 319 U.S. 157 (1943) (ordinance prohibiting proselytization on Sundays held invalid).

37. In Cantwell v. Connecticut, 310 U.S. 296, 306 (1940), the Court held that potential discrimination and censorship could be imposed by permitting a local official to determine what was a religious cause. In two earlier cases, Lovell v. City of Griffin, 303 U.S. 444 (1938), and Schneider v. State, 308 U.S. 147 (1939), the invalidation of solicitation application permits which did not involve religious cause determination tests, rested on free press grounds. However, in Jaimison v. Texas, 318 U.S. 413 (1943), the Court failed to distinguish the cases and rested the decision on religious exercise although the religious test clause was absent.

38. Follet v. Town of McCormick, 321 U.S. 573 (1944). Justice Douglas, speaking for the majority, stated, "But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." *Id.* at 578.

39. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

40. *See* cases found in notes 32-36, 41, 42 *supra*. The difficulty in analyzing these cases as they relate to the free exercise clause stems from the fact that the holdings were either based wholly on freedom of speech or press, the first amendment as a whole, or a combination of the freedoms contained therein. Professor Kurland states the problem in the following manner:

> A large part of constitutional law relating to freedom of religion has been developed because of the readiness of the Jehovah's Witnesses to resort to the courts. . . . Particularly in that area where freedom of religion blends into freedom of speech have the Witnesses been active with resulting confusion of doctrine. . . . .

Kurland, *supra* note 23, at 50.

which contain an inextricable mixture of free speech and religious freedom, have caused confusion as to whether the Constitution affords greater protection to religious speech and action. The Court has held ordinances which lack appropriate standards unconstitutional, either on their face, because they establish "a previous restraint on the right of free speech,"[41] or as applied, due to their discriminatory effect.[42] Thus, when local ordinances are not specifically designed to either attain police power objectives or to regulate the "time, place or manner of the activity"[43] their application will be considered a violation of first amendment freedoms.

Notwithstanding cases involving the Jehovah's Witnesses, the Supreme Court has held that license requirements for the dissemination of views are not unconstitutional *per se*,[44] and "it has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquillity (sic) without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion."[45] Secular regulations containing appropriate standards may constitutionally restrict both speech and religious exercise in implementing the state's police power. With this in mind, it is now necessary to define the boundaries of legitimate state interference in religious matters.

C. Limitations on Free Exercise: The Belief/Harmful Act Dichotomy

The Supreme Court has never suggested that the free exercise clause affords complete immunity from legislative restriction to all religiously-based activity.[46] However, definitional problems arise in demarcating

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41. *See, e.g.*, Saia v. New York, 334 U.S. 588 (1948) (ordinance requiring a license permit to utilize a soundtrack for the dissemination of views held invalid when applied to a Jehovah's Witness as violative of free speech); Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance similar to that in *Saia* held valid as applied to nonreligious defendants because it contained appropriate standards, to wit, forbidding emissions which are "loud and raucous"); Kunz v. New York, 340 U.S. 290 (1951) (ordinance which prohibited holding of public worship meeting without a permit held invalid as a prior restraint on free exercise because it gave officials the power in advance to decide who could speak on religious matters).

42. *See, e.g.*, Neimotko v. Maryland, 340 U.S. 268, 272 (1951) (refusal by officials to issue a permit held invalid as violating the equal protection clause because of an obvious discriminatory application); Fowler v. Rhode Island, 345 U.S. 67 (1953) (conviction of Jehovah's Witness for violation of an ordinance which forbade speeches in public parks but not church services for other religious groups reversed and held unconstitutional as applied).

43. *See* notes 44, 45, 53, 57-59 and 113 and accompanying text *infra*.

44. Poulos v. New Hampshire, 345 U.S. 395 (1953).

45. *Id.* at 405-07.

46. In *Poulos* the Supreme Court stated: "It is a *non sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incident of freedom. This Court has never so held and indeed has definitely indicated to the contrary." *Id.* at 405.

the boundaries of legitimate state interference in religious action. Although no hard and fast test can readily be formulated, religious freedom guarantees virtual absolute liberty to action, provided that such activity does not infringe upon the rights of others.[47] The interface of religious freedom and legitimate state interference was succinctly stated by Justice Jackson, concurring in *Prince v. Massachusetts*:[48] "My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public."[49] In an early polygamy case,[50] the Supreme Court characterized free exercise as affording protection to actions "not injurious to the equal rights of others."[51]

In *Cantwell v. Connecticut*,[52] the Court recognized a belief/act dichotomy, and made religious protection contingent on the purpose of the challenged statute. While the Court believed that general nondiscriminatory ordinances regulating the "time, place or manner" of action and those grounded in the state's police power do not violate free exercise,[53] it stated that "in every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[54] However, the ordinance in *Cantwell* did just that

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47. *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In balancing the interests, the Court noted the absence of such a conflict.

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. . . . Nor is there any question in this case that their behavior is peaceable and orderly.

Id. at 630. In Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1944), the Court stated, "We are concerned, however, in these cases merely with one narrow issue. There is presented for decision no question whatsoever concerning punishment for any alleged unlawful acts during the solicitation." *Id.* at 110.

48. 321 U.S. 158 (1944).

49. *Id.* at 177.

50. In Davis v. Beason, 133 U.S. 333 (1890), the Court delimited free exercise protection when it stated that, "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subject of punitive legislation." *Id.* at 342-43.

51. *Id.* at 342.

52. 310 U.S. 296 (1940).

53. The *Cantwell* Court declared:

> It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Id. at 304.

54. In *Cantwell* the Court supplied the standard for legislation which could possibly affect religion in the following manner:

> The Constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such

by imposing a previous restraint on first amendment freedoms in permitting a local official to determine what was a religious cause.

Although the *Cantwell* holding has been read by some to have destroyed the belief/act dichotomy, it actually reaffirmed the notion.[55] This misconception stems from two sources: (1) there never existed a *simple* belief/act dichotomy; Jefferson's views and polygamy cases from which the doctrine spawned explicitly qualified legitimate state interference only when the activity posed a threat to society;[56] (2) the *Cantwell* Court, in affirming that position, held that the state has the right to safeguard its citizens and exercise local control of time, place and manner.[57] One year after *Cantwell,* the Court summarily dismissed a claim that a local license ordinance for parades, as applied to a religious cause, violated free speech and religious exercise.[58] In distinguishing *Cantwell*, the Court found no evidence of discriminatory standards and ruled that the statute was a mere exercise of local control over "time, place and manner."[59]

It is apparent that religious protection under the fourteenth amendment does not permit individuals to unlawfully infringe upon the rights of others and will "not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute."[60] Thus, the courts have consistently found that the free exercise clause does not protect activities in violation of statutes which pro-

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religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Id. at 303-04.

55. Galanter, *Religious Freedoms in the United States: A Turning Point?,* 1966 WIS. L. REV. 217, 236 (1966).

56. *See* notes 28-34 *supra.* In Reynolds v. United States, 98 U.S. 145 (1878), the Court went beyond legal principles and into the social sciences to determine the adverse effect of polygamy on American society. In finding such a practice to be a threat to the family, Justice Waite declared, "In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." *Id.* at 165.

57. *See* note 53 *supra.*

58. In Cox v. New Hampshire, 312 U.S. 569 (1941), the Court stated:

There is no evidence that the statute has been administered otherwise than in the fair and non-discriminatory manner which the state court has construed it to require. . . . No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.

Id. at 577-78.

59. *Id.* at 576.

60. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

hibit polygamy,[61] the unlicensed practice of medicine,[62] snakehandling,[63] obscenity,[64] fraud,[65] drug use,[66] and child labor.[67] However, one factor differentiating the above statutory violations from those regulations requiring permits,[68] license fees[69] and direct prohibitions

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61. *See, e.g.,* Reynolds v. United States, 98 U.S. 145 (1878). In Davis v. Beason, 133 U.S. 333 (1890), the Court stated, "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subject of punitive legislation." *Id.* at 342-43. In Cleveland v. United States, 329 U.S. 14 (1946), the Court upheld a conviction of a Mormon under a federal statute and held that whether the act was immoral is not to be determined by the accused's concept of morality. In Chatwin v. United States, 346 U.S. 455 (1946), the Supreme Court affirmed earlier decisions which held religiously motivated polygamous acts to violate criminal laws.

62. *See, e.g.,* People v. Handzik, 410 Ill. 295, 102 N.E. 2d 340, *cert. denied,* 343 U.S. 927 (1951). In State v. Verbon, 167 Wash. 140, 8 P.2d 1083 (1932), the court upheld a conviction against a preacher for practicing medicine without a license under the general state police power to preserve public health and general welfare. Likewise, the courts have found the religious defense invalid when the individual uses the instrumentalities of medicine. People v. Vogelgesang, 221 N.Y. 290, 116 N.E. 977, 158 N.Y.S. 1126 (1917); People v. Cole, 219 N.Y. 98, 113 N.E. 790, 148 N.Y.S. 708 (1916).

63. *See, e.g.,* Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); Hill v. State, 38 Ala. App. 404, 88 So.2d 880 (1956); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949). *See also* Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947) (religious motivation will not negate intent to murder); Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied,* 424 U.S. 954 (1976).

64. *See, e.g.,* Knowles v. United States, 170 F. 409 (8th Cir. 1909); Delk v. Commonwealth,166 Ky. 39, 178 S.W. 1129 (1915) (vulgarity in the pulpit found to be a breach of the peace).

65. *See, e.g.,* Ballard v. United States, 322 U.S. 78 (1944). In *Ballard,* the Supreme Court held that the trial court properly withdrew from the jury the issue of truth of the defendant's doctrine and left the jury to determine whether the representations were made in good faith. In United States v. An Article or Device . . . "Hubbard Electrometer, or Hubbard E-Meter," etc., 333 F. Supp. 357 (D.D.C. 1971), the court stated that E-Meter auditing, via a primitive electrical apparatus, was permitted only in a religious setting subject to placing explicit disclaimers on the meter itself and all labeling. *See also* Crane v. United States, 259 F. 480 (9th Cir. 1919); New v. United States, 245 F. 710 (9th Cir. 1917).

66. Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds,* 395 U.S. 6 (1969), (the court found a paramount interest in the enforcement of marijuana laws in protection of society and Leary's private, occasional and personal use, not religious); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (conviction for possession of marijuana and LSD use as member of Neo-American Church in which court found a lack of sincerity and a public interest in prohibiting a substantial threat); People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (Dist. Ct. App. 1966) (conviction for possession of marijuana did not violate free exercise where defendant considered marijuana use to be a religion); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied,* 386 U.S. 917 (1967).

Only the California Supreme Court has substituted judicial for legislative determination of activities which constitute a substantial threat. In People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), the court was faced with unique defendants of a peyote cult which had been practicing the rite in a purely religious manner for several hundred centuries with no adverse effect. In *In re* Grady, 61 Cal.2d 887, 394 P.2d 728, 139 Cal. Rptr. 912 (1964), the court granted writ of habeus corpus to determine the factual issue of defendant's good faith practice of religion.

67. Prince v. Massachusetts, 321 U.S. 158, *rehearing denied,* 321 U.S. 804 (1944). In *Prince,* the defendant was convicted for violating a Massachusetts child labor law by permitting his nine year old niece to sell religious magazines on a street corner at night. The Court found that the state as *parens patriae* had a strong interest in securing the healthy development of all its citizens.

68. *See* notes 37, 41, 42 and accompanying text *supra.*

69. *See* notes 37, 38 and accompanying text *supra.*

on solicitation,[70] is that the above conduct poses "some substantial threat to public safety, peace or order."[71] In determining the validity of legislation which incidentally restricts religious activity, the Supreme Court has based its decisions on whether the freedom asserted brings the activity into conflict with important social institutions or adversely affects the rights of others.[72] Since fraud is an activity which threatens the rights of others, it is submitted that narrowly drawn disclosure legislation would pass constitutional muster.

II. Deceptive Recruitment: An Argument For Legislation

A. Fraud and Free Exercise

Cases concerning religious fraud and the free exercise clause convincingly demonstrate that the first amendment does not immunize persons from criminal convictions under fraud statutes even when the conduct is exercised within a religious context.[73] The major difficulty presented by religious fraud is the absolute protection of religious beliefs and the inability of governmental and judicial authorities to determine the truth or falsity of religious representations.[74]

In *Ballard v. United States,*[75] a case concerning mail fraud, the

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70. *See* note 36 and accompanying text *supra.*

71. In citing Braunfeld v. Brown, 366 U.S. 599 (1961), the Court defined the absolute limits of religious protection in the following manner: "On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restriction'." Sherbert v. Verner, 374 U.S. 398 (1963). The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. *Id.* at 403. The Court cited polygamy cases and a vaccination case as examples of potential threats posed by religiously-based actions.

72. *See* notes 46-51 and 119-27 *supra.*

73. New v. United States, 245 F. 710 (9th Cir. 1918), *cert. denied,* 246 U.S. 665 (1919); Crane v. United States, 259 F. 480 (9th Cir. 1919). In the aforementioned cases religious leaders professing mental healing were convicted for using the mails to defraud. The cardinal issue presented to the jury was not the beliefs, but whether they were held and professed with sincerity and in "good faith." *See, e.g.,* Post v. United States, 135 F.1 (5th Cir. 1905) (if defendant practiced in good faith without the intention to defraud she is not guilty although in fact the theory and practice is worthless); Ballard v. United States, 322 U.S. 78 (1944) (in prosecution for mail fraud the trial court properly withdrew from the jury the truth of defendant's doctrine but left for its determination the issue of "good faith"). *See also* United States v. An Article or Device . . . "Hubbard Electrometer," or "Hubbard E-Meter," etc., 333 F. Supp. 357 (D.D.C. 1971).

74. In Ballard v. United States, 322 U.S. 78 (1944), the trial court addressed the jury as follows:

> The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that. If these defendants did not believe those things, they did not believe that Jesus came down and dictated . . ., did not believe the things they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty. Therefore, gentlemen, religion cannot come into this case.

Id. at 81-82.

75. 322 U.S. 78 (1944).

Supreme Court held that the truth of the defendants' religious allegations could not be submitted to the trier of fact.

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[76]

The Court affirmed the trial court's decision which withdrew the issue of truth and submitted only the question of whether the representations were made in good faith.[77] Thus, in religious fraud cases, the Court has been willing to radically alter the elements of fraud by eliminating proof of falsity and inferring intent from a lack of "good faith."

The issue of religious fraud has also been presented in free exercise challenges to convictions under statutes which prohibit the unlicensed practice of medicine.[78] Although several states have carved out exceptions for the practice of medicine in a religious context, the courts have upheld convictions of religious practitioners when instrumentalities of medicine were employed.[79] One case[80] involved the sale by a church organization of a simple, worthless electrical apparatus allegedly designed to cure both physical and mental infirmities. The federal district court held that literature accompanying the device would not be considered labeling under the FDA Act and not subject to charges of false labeling provided, however, that the seller market the device in a religious setting and deny medical or scientific claims by explicit disclaimer clauses.[81] Since the court found the device to be harmless, it appears that the interest sought to be protected by requiring such conditions was public protection from fraud.

The courts have consistently inquired into sincerity in determining

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76. *Id.* at 87.

77. It is unclear what the true holding of the case was. The convictions were reversed and the case remanded to the appellate court for consideration of the other grounds asserted by the defendants as bases for reversal. Pfeffer feels that Justice Douglas, speaking for the majority, took a compromise position between that of Chief Justice Stone, who felt that falsity could be decided, and Justice Jackson who would have dismissed the case altogether. *See* L. PFEFFER, RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA (I. Zaretsky & M. Leone ed. 1974).

78. *See* note 62 *supra.*

79. *See* People v. Vogelgesang, 221 N.Y. 290, 116 N.E. 977 (1917), where the court stated: "The statute prohibits the practice of medicine without a license, but excepts from its prohibition 'the practice of the religious tenets of any church'." *Id.* at 978. *See also* State v. Verbon, 8 P.2d 1083 (1932); People v. Cole, 219 N.Y. 98, 113 N.E. 790, 148 N.Y.S. 708 (1932).

80. United States v. An Article or Device . . . "Hubbard Electrometer," or "Hubbard E-Meter," etc., 333 F. Supp. 357 (D.D.C. 1971). *See* note 68 *supra.*

81. *Id.* at 364, 365.

religious exemptions from jury duty,[82] unemployment compensation provisions,[83] and the draft.[84] In other cases,[85] the courts regularly determined "good faith" or note that it is not at issue. Since "good faith" is diametrically opposed to fraud the courts have denied religious exemptions to persons whose beliefs are less than sincere. Accordingly, deception in religious recruitment would not be given constitutional protection, and legislation narrowly drawn to prevent such activities should not be found violative of the free exercise clause.

B. Fraud: A Constitutional Pariah

Although administrative officials may not decide what is a religious cause,[86] and the courts are prohibited from inquiring into the validity of religious belief,[87] the Supreme Court has held that in certain situations it is permissible to decide what is *not* religious practice.[88] Thus, the Court has stated with regard to polygamy that "[t]o call their advocacy a tenet of religion is to offend the common sense of mankind."[89] In another case,[90] the Court opined that cursing a public official cannot possibly be conceived as an exercise of religious belief.[91] By analogy, it

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82. In *In re* Jenison, 265 Minn. 96, 120 N.W.2d 515 (1963), the Supreme Court of Minnesota upheld a thirty-day sentence for contempt for a Jehovah's Witness who refused to serve on a civil jury on religious grounds. In a brief memorandum, the United States Supreme Court vacated the judgment and remanded for further consideration in light of Sherbert v. Verner, 375 U.S. 14 (1963). The Minnesota Supreme Court held that until further experience indicates that an exemption poses "a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall . . . be exempt." *In re* Jenison, 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963). It should be noted that the defendant's religious dictates in *Jenison* did not threaten the rights of others.

83. *See* Sherbert v. Verner, 374 U.S. 398 (1963). The Court footnoted that, "No question has been raised concerning the sincerity of appellant's religious beliefs." *Id.* at 399.

84. *See* United States v. Seeger, 380 U.S. 163 (1965). The Supreme Court allowed conscientious objector status to those who hold a "sincere and meaningful belief" paralleling that which is filled in the orthodox belief of a Supreme Being. *Id.* at 166.

85. *See, e.g.*, West Virginia Board of Education v. Barnette, 391 U.S. 624, 634 (1943), where the Court held, "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held."; Dobkin v. District of Columbia, 194 A.2d 657 (D.C. App. 163) (Sabbatarian who customarily worked on the sabbath cannot complain of Saturday trial as violating the free exercise clause); Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) ("The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be.").

86. *See* note 37 and accompanying text *supra.*

87. *See* notes 74-77 and accompanying text *supra.*

88. Fowler v. Rhode Island, 345 U.S. 67, 69 (1953), where the Court stated that there were narrow exceptions to the general prohibition that government cannot decide what is a religious cause and cited polygamy as an example.

89. Davis v. Beason, 133 U.S. 333, 341-42 (1890).

90. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

91. *Id.* at 571.

shocks one's sensibilities to consider religiously-advocated deception as a bona fide religious practice.

Religiously-advocated fraud may be practiced with sincerity; however, the Supreme Court has held that sincerity alone will not *a fortiori* provide constitutional protection[92] and that "good faith" will not free individuals from obedience to the law.[93] Even assuming that deception is being practiced with religious zeal, fraud will not be considered a religious tenet. Moreover, since laws punishing fraud are not subject to free exercise challenges,[94] it follows that bona fide statutes will not violate religious freedom when applied to high-demand recruiters.

C. High-Demand Fraudulent Recruitment

According to former high-demand sect members, significant parts of a sect's activities involve deception in recruitment.[95] For example, in a recent congressional sub-committee report on United States-Korean relations,[96] it was found that the Unification Church has ties to many subordinated organizations. One group of differently named organizations functions to attract new members while their relationship to the Church is hidden. Interestingly, this high-demand sect possesses a religious tenet termed "heavenly deception"[97] employed to rationalize concealment of identity and objectives to newcomers.[98]

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92. *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 643 (1943).

93. *See* Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 109 (1943).

94. *See* notes 73-81 and accompanying text *supra.*

95. *See* Singer, *Coming Out of the Cults,* PSYCHOLOGY TODAY, Jan., 1969, at 80. According to Merrit, deception in recruitment is twofold and involves both lack of information (concealment) and downright deceit in giving certain facts (fraud). Interview with Jean Merrit, *supra* note 1. A recent book on high-demand sects explains deceptive recruitment:

> When describing the new way of life, the cult recruiters may carefully avoid or even deny the group is a religion. Visitors at the Creative Community Project in California (a Unification Church front group) are told specifically that the group is not a religion. Recruiters avoid speaking of a lifetime commitment or describing the concession that may have to be made in order to belong.

C. STONER & J. PARKE, ALL GOD'S CHILDREN 61 (1977).

96. *House Sub-Committee on International Organizations, Investigation of Korean-American Relations,* 95th Cong., 2d Sess. (1978).

97. *See* Gillis, *Rev. Sun Myung Moon: "Heavenly Deception,"* TRIAL PRAC. 22 (Aug., 1976).

98. In a recent issue of the Congressional Record, more than 60 organizations were listed as having affiliations with the Unification Church. Gillis, *supra* note 97, at 23. The Children of God has adopted other entities to broaden its base which have no legal basis, *e.g.,* "Contact Jesus," "Cincy Christian Faith Association," "The Toronto Christian Truth Ministry." Lefkowitz Report, *supra* note 2, at 5, 9.

Advertisements in newspapers soliciting followers manifest that the religious aspect of the organization is initially concealed. At Queens College in New York, members of the Collegiate Association for Research of Principle (CARP), one of the names used by the Unification Church at some colleges, handed out flyers which asked, "Are you ready to accept the challenge of a new age? If so we are really anxious to meet you . . . ." The following ad was placed in the campus newspaper at Southern Methodist University in Dallas, Texas:

Deception and fraudulent high-demand practices can be separated into those which initially induce the individual to enter the cult and those employed during indoctrination. Deception in the joining process involves the use of "front" names and intentional false representations that the group is involved in social work.[99] Deception in recruitment is actively instigated at the leadership level and intentionally employed to mollify any apprehensions the individuals might hold concerning the nature and purposes of the group.[100]

Once the newcomer decides to enter the cult on the basis of misrepresented or concealed facts, the identity, tenets, and purposes of the sect are revealed through a graduated and calculated procedure. Aspects of the rigidly structured lifestyles inherent to high-demand sects which are initially hinted at are later presented as doctrinal tenets to be strictly followed.[101] High-demand sects have regularly been found to utilize elements of physiological exhaustion present in traditional "thought-control" methods.[102] This procedure induces a heightened susceptibility to suggestions, reduces objective thought processes, and allows passive acceptance of the contents of constant lecturing and small group indoctrination.[103] It has been suggested that the elements of capacity and knowledge necessary to "informed consent"[104] are manipulated so that

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Pioneers
Seeking creative conscientious young men & women to
pioneer new paths toward the betterment of mankind.

Many others like it were paid for by the Unification Church under the auspices of one of the cover groups the church hides behind. C. STONER & J. PARKE, *supra* note 95, at 30-32.

99. *Id.*

100. Interview with Jean Merrit, *supra* note 1.

101. *Id.*

102. Ms. Merrit states that "destructive cults" utilize one or all of the components of physiological depletion which includes sleep deprivation, inadequate diet, and constant sensory overloading. Interview with Merrit, *supra* note 1. *See also* W. SARGEANT, BATTLE FOR THE MIND, A PHYSIOLOGY OF CONVERSION AND BRAINWASHING (1957), where the author states:

> It has also been pointed out that those who wish to disperse wrong beliefs and undesirable behaviour patterns and afterwards implant sane beliefs and attitudes are more likely to achieve success if they can first induce some degree of nervous tension to secure the person's undivided attention and possibly increase his suggestibility. By increasing or prolonging stresses in various ways, or inducing physiological debilitation a more thorough alteration of the person's thinking processes may be achieved. The immediate effect of such treatment is, usually to impair judgment and increase suggestibility; when tension is removed the suggestibility likewise diminishes, yet the ideas implanted while it lasted may remain.

Id. at 196.

103. Deposition of Shelly Turner, Turner v. Unification Church, No. 75-0424 (D.R.I. 1978), *aff'd*, (1st Cir. 1979). "We had groups, and after each lecture we'd sit in our groups and we'd discuss things. We had a leader in the group. Everything was, every place you went you had a leader. And we had meals, prayers, things like that. Most of the time it was lectures, though." *Id.* at 196.

104. *See* W. PROSSER, THE LAW OF TORTS 101-06 (4th ed. 1971). Elements of capacity include age, experience, maturity, and the psychological ability to comprehend the consequences. The process of physiological debilitation severely impairs the capacity of the individual to appreciate the significance of the true purposes of the group which are only revealed when the individual is well into the indoctrination process.

information about the group is revealed inversely to the newcomer's ability to appreciate its significance.[105] Therefore, the autonomous and independent choice presumed by the free exercise guarantee[106] is markedly undermined by deceptive techniques employed in a highly systematized and purposive manner.

D. Disclosure Legislation: A Regulation on "Manner of Recruitment"

A model disclosure statute designed to prevent fraud during public recruitment by high-demand sects might appear as follows:

Disclosure of Organizational Identity in Public Recruitment

(A) The provisions of this section are to be applied to any profit or nonprofit, charitable or noncharitable corporation, organization, association or group of persons who solicits or contacts or otherwise approaches persons, not already associated with the group, in public places for the direct or indirect purpose of securing future contact for activities related to the represented group.

(B) The persons during the initial contact shall disclose:

(1) his or her legal name,
(2) the name of the represented group,
(3) and if subordinated to a larger group or organization the name of such group or organization.

The statute should survive an equal protection challenge since it is equally applicable to both religious and secular groups which publicly recruit membership. However, due to their nature, the statute will be particularly applicable to high-demand sects which employ deceptive recruitment practices.[107]

The previous sections indicate that religious motivation will not immunize persons from conviction under fraud statutes[108] and that "good faith" is paramount in determining religious exemptions from secular regulations.[109] In *Cantwell v. Connecticut*,[110] the Supreme Court opined that persons may not commit frauds on the public "under the cloak of religion"[111] and sanctioned the implementation of disclosure legislation to combat fraudulent religious solicitation.[112] The Supreme

105. *See* Delgado, *supra* note 2, at 54.
106. *See* notes 146-51 and accompanying text *infra*.
107. This statute would have *de minimus* effect on all but those groups which make fraud a practice in recruitment, *e.g.*, high-demand sects. Common experience with most public evangelical groups, *e.g.*, Jehovah's Witnesses, shows that they make no attempt at concealment but rather graphically detail the sect's doctrines and beliefs.
108. *See* notes 73-81 and accompanying text *supra*.
109. *See* notes 82-85 and accompanying text *supra*.
110. 310 U.S. 296 (1940).
111. *Id.* at 306.
112. The Court stated:
Without a doubt a state may protect its citizens from fraudulent solicitation of funds, by

Court has further stated "the manner in which [religious recruitment] is practiced at times gives rise to special problems with which the police power of the states is competent to deal."[113] Disclosure legislation would neither burden nor infringe upon the free exercise of religious recruitment, but would represent a nondiscriminatory regulation of the manner in which the activity is carried out. To wit, recruitment could not be performed in a manner which deceived or defrauded the listener. Since this type of legislation would merely represent a regulation of manner, the courts would be hard pressed to find such legislation in violation of religious freedom as applied to high-demand deceptive recruitment.

III. THOUGHT-REFORM TECHNIQUES: A SUBSTANTIAL THREAT

A. Free Exercise and the Substantial Threat Doctrine

If the application of disclosure legislation is deemed a direct infringement of religious exercise, rather than a regulation of "manner," then a "substantial threat to the legislation's public safety, peace or order"[114] must be demonstrated to sustain validity. It is not submitted that the techniques employed, or the harmful psychological consequences, *per se* raise a substantial threat. Adults have an absolute right under the free exercise clause to choose and practice any religion regardless of how bizarre it may be.[115] Freedom of religion "embraces the right to maintain theories of life and of death and of the hereafter which are rank

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requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

Id. at 306.

Although the Court was concerned with the fraudulent solicitation of funds, it is probable that fraudulent religious recruitment would be considered directly analogous and subject to similar limitations.

113. Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

114. Sherbert v. Verner, 374 U.S. 398, 403 (1963). The Court cites examples of conduct posing a substantial threat such as the *Reynolds* case (polygamy); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (refusal to take smallpox vaccination on religious grounds); Prince v. Massachusetts, 321 U.S. 158 (1944) (misdemeanor for nine year old girl to sell religious literature in violation of child labor laws); Cleveland v. United States, 329 U.S. 14 (1946) (Mormon convicted under federal kidnapping statute). The Court finds such activity to be beyond the purview of the free exercise clause. Although no definitions or criteria are given, the enumerated cases suggest that activities which pose a real threat to important social institutions, *e.g.*, the family, public health, safety or morals constitute such a "substantial threat."

115. In Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 924 (1976), the Tennessee Supreme Court stated the meaning of free exercise in the following manner: "The government must view all citizens and all religious beliefs with absolute and uncompromising neutrality. The day this Country ceases to countenance irreligion or unusual or bizarre religions, it will cease to be free for all religions." *Id.* at 107.

heresy to followers of the orthodox faiths."[116] However, given the grave psychological dangers, individuals should be informed and aware of the nature of high-demand sects before being exposed to "thought-reform" techniques. Absent fraud, the unwitting indoctrinee may never have considered sect membership. Therefore, the initial deception may be viewed as following the newcomer through the indoctrination process, vitiating consent to ensuing operations.[117]

A review of cases where the courts have sustained secular prohibitions against free exercise objections supports the view that "even when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions."[118] Existing criminal statutes and health and safety regulations involving polygamy,[119] snakehandling,[120]

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116. United States v. Ballard, 322 U.S. 78, 86 (1944).

117. In Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977), a case involving the legality of conservatorship proceedings to deprogram allegedly "brainwashed" members of the Unification Church, the court struck down the statute but specifically reserved the issue of "thought-control" when allegations of fraud are presented. The court stated: "The cases reviewed demonstrate that the state may have a compelling state interest in preventing fraud under the guise of religious belief. If such is the case criminal sanctions may be imposed where there is no bona fide conviction on the part of the actors." *Id.* at 988, 141 Cal. Rptr. at 256. For a definition of "brainwashing" *see* note 142 *infra.*

118. Braunfeld v. Brown, 366 U.S. 599, 603 (1961). The Court in Sherbert v. Verner, 374 U.S. 398 (1963), stated that religious activity regulated under the substantial threat doctrine has "invariably posed some substantial threat to public safety, peace or order." *Id.* at 403.

119. *See* note 61 *supra.* In Reynolds v. United States, 98 U.S. 145 (1878), the Court stated:

> In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. . . . Upon it [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties with which government is necessarily required to deal. . . . Professor Lieber says, polygamy leads to the patriarchal principle, and which when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Id. at 165-66.

In Davis v. Beason, 133 U.S. 333 (1890), the Supreme Court interpreted the free exercise clause as a device to prevent persecution and forced adherence to beliefs rather than protecting actions "inimical to the peace, good order and morals of society." *Id.* at 341. *See generally* Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States,* 15 ARIZ. L. REV. 287 (1973).

120. *See* note 63 *supra.* The Tennessee Supreme Court in Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), deferred to legislative wisdom in holding that the handling of poisonous snakes is *per se* dangerous to life and health. The court cited the "grave and immediate danger" doctrine enunciated in West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943) and stated, "It is equally certain that this danger is grave and immediate when and wherever the practice is being indulged." *Id.* at 218, 216 S.W.2d at 711. In Lawson v. Kentucky, 291 Ky. 438, 163 S.W.2d 972 (1942), the court held that a statute which specifically prohibited the display of any snake in connection with a religious service was under the state's police power for the protection of the public safety since only experts could distinguish those snakes which were not-poisonous. In Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied,* 424 U.S. 924 (1976), the court stated:

> Tennessee has the right to guard against the unnecessary creation of widows and orphans. Our state and nation have an interest in having a strong, healthy, robust and tax-

drugs,[121] compulsory vaccination,[122] child labor,[123] and the right to refuse medical treatment,[124] have been upheld in the face of free exercise challenges. The courts have in each case found the activity to constitute a grave threat to public safety, peace or order.[125]

Although most state courts have found a paramount interest in the enforcement of drug laws for the protection of society,[126] the California Supreme Court found free exercise to be a valid defense to a conviction under drug statutes in *People v. Wood.*[127] In that case, the court exempted the Native American Church from the application of a state statute prohibiting peyote where it was found that peyote use by members was: (1) strictly limited to religious services in which prayers were addressed to the substance; (2) considered sacrilegious when used for nonreligious purposes; and (3) constituted the *sine qua non* of the religion.[128] The

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paying citizenry capable of self-support. We, therefore, have a substantial and compelling state interest in the face of a clear and present danger so grave as to endanger paramount public interests.

Id. at 113.

121. *See* note 66 *supra.*

122. Jacobson v. Massachusetts, 197 U.S. 11 (1905); Wright v. DeWitt, 385 S.W.2d 644 (1965).

123. *See* Prince v. Massachusetts, 321 U.S. 158, *rehearing denied,* 321 U.S. 804 (1944), where the defendant was convicted for violating the Massachusetts child labor law by permitting his nine year old niece to sell religious magazines in public places at night. The Court stated that the state as *parens patriae* could override the rights of religion and parenthood.

124. Court decisions on the right to refuse medical treatment have been inconsistent. However, free exercise challenges have been rejected when the life of a fetus may be endangered by such refusal and the courts have found a substantial interest in preserving a healthy family upbringing when the person has young children. *See, e.g.,* Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 978 (1964) (transfusion necessary to save the life of a fetus); Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (1964), *rehearing denied en banc,* 331 F.2d 1010 (D. C. Cir. 1964) (judge signed an emergency order allowing the hospital to transfuse a young married woman with a seven month old child); *In re* Brook's Estate, 32 Ill.2d 361, 205 N.E.2d 435 (1965) (elderly woman with no minor children allowed to refuse medical treatment).

125. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963), *citing* Reynolds v. United States, 98 U.S. 145 (1878), Cleveland v. United States, 329 U.S. 14 (1946), and Jacobson v. Massachusetts, 197 U.S. 11 (1905).

126. *See* note 66 *supra.* In United States v. Kuch, 288 F. Supp. 439 (1968), the court refused to substitute judicial for legislative judgment in affirming that marijuana use constituted a substantial threat and stated, "The Marijuana Tax Act is still based on reason, it is directed against a continuing social and health problem and the purposes of the statute cannot be accomplished without continued full enforcement." *Id.* at 448.

127. 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

128. The Court in *Woody* distinguished the *Reynolds* polygamy conviction case on two grounds:

> Polygamy, although a basic tenet in the theology of Mormonism, is not essential to the practice of religion; peyote, on the other hand, is the *sin qua non* of defendants' faith. It is the sole means by which defendants are able to experience their religion. . . . Second, the degree of danger in *Reynolds* far exceeded that in the instant case. The Court in *Reynolds* considered polygamy as a serious threat to democratic institutions and injurious to the morals and well-being of its practitioners.

Id. at 725, 394 P.2d at 820, 40 Cal. Rptr. at 76.

Woody case represents a unique situation due to the long history of sincerity, the centrality of peyote to the practice of the faith, and an absence of injury. It would have been absurd to suggest that application of the California statute protected the state from a substantial threat. Indeed, its application would have threatened a substantial state interest in preserving the diversity of our national life.[129]

The aforementioned cases provide a constitutional setting from which one may evaluate high-demand "thought-reform" techniques in determining whether they constitute activities subject to regulation under the "substantial threat" doctrine.[130] However, these cases may be distinguished from the present instance in several distinct and important ways.

The drug, snakehandling, and right to refuse medical treatment cases are instances where the individual's decision to hazard the risk is based on a fully informed consent and the harm sought to be prevented is confined to those asserting the free exercise challenge. In contrast, disclosure statutes are specifically designed to permit a meaningful consent in order to protect the newcomer from the fraudulent destruction of psychological autonomy. Furthermore, since high-demand activity threatens public safety, such legislation would not impermissibly infringe upon a sect's right to the free exercise of religious recruitment.

B. High-Demand "Thought-Control" Techniques

Effective "thought-control" does not rest on the sophisticated assemblage of specific techniques, but rather on the quantity and pervasiveness of basic practices exerted within a tightly controlled environment.[131] High-demand sects create this monitored milieu by isolating the individual from familiar places,[132] associations and ideas;[133] by

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129. The Court stated:

> [T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.

Id. at 727-28, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78.

130. *See* notes 114-30 and accompanying text *supra*.

131. Edgar Schein, an authority on "thought-control" describes the pivotal characteristic of its successful exertion in the following manner: "The only novelty in the Chinese methods was the attempt to use a combination of all these techniques and to apply them simultaneously in order to gain complete control over a significant portion of the physical and social environment of a group of people." Schein, *The Chinese Indoctrination Program for Prisoners of War: A Study of Attempted Brainwashing*, 19 PSYCHIATRY 149, 172 (1956).

132. "In most instances 'babes' are shipped out to another location to get them away from family, friends and environment." *Lefkowitz Report, supra* note 2, at 30. *See* Delgado, *supra* note 2, at 13. *See* Deposition of Shelly Turner, *supra* note 103, at 194-96. (Indoctrinee shipped between Rhode Island, Massachusetts and New Hampshire within a period of weeks).

133. *See Lefkowitz Report, supra* note 2, at 42-43. Incoming and outgoing mail is censored

destroying family and cultural ties;[134] and by constant supervision[135] and intensely regulated daily schedules.[136] In fact, high-demand "thought-control" techniques have successfully been compared to those employed by Korean captors and Chinese revolutionaries.[137]

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and examined before allowing recipients to read it; phone calls are tapped and monitored. "The totalistic view is maintained by controlling informational input. Most outside influences, including literature and T.V. which could sway the 'thought processes of the members' are excluded and pronounced as from the devil." *Id.* at 35. "One girl said she had censored mail from and to new recruits, kept phone calls from them, lied to their parents saying she didn't know where they were when they phoned or appeared and deceived donors on the street when she was fund raising." *Singer, supra* note 95, at 80.

134. *See Lefkowitz Report, supra* note 2, at 19-21. Bible verses are taken out of context and used to destroy the family past while replacing spiritual parents for natural parents.

> By this time the indoctrination has defined parents as being infected by satan's influence and parenthood is reinvested in the leaders of the cults. . . . Leaving the old familiar life setting and renouncing it for a new communal theology, the accepting of a new family with new definitions of love and the denouncing of the pasture closed and that a very brave move into a new world has, indeed, been made.

Vermont Hearings, supra note 1, at 23-24.

Virtually all ex-COG members testified that upon initial entry into a COG commune they were constantly exposed to the following verses from the Bible:

> If any man come to me, and hate not his father and mother, and wife and children, and brethren, and sisters yea and his own life also, he cannot be my disciple.
> — Luke 14:26
>
> And a man's enemies shall be they of his own household.
> — Matthew 10:36

This may be paralleled to Chinese technique of shifting personal identity from the father to the revolution.

135. *See Dymally Hearings, supra* note 5, at 20, 25, 29, 30 (parents and relatives are never permitted to see the indoctinee alone). *See also Lefkowitz Report, supra* note 2, which states that most members, especially new recruits, are never left alone "not even to go to the bathroom from the moment they join COG until they leave." *Id.* at 32. Psychiatrists state that this control eliminates possibilities for *"reality testing"* (comparing cult input to extra-cult sources) and *"consensual validation"* (determining others' views) of past values. A letter from Dr. Clarke to the Vermont Senate sub-committee stated: "Those members successfully inducted into the sects give up their right to privacy and free choice as well as their individual reality-testing functions, and are subject to the absolute authority of the cult." *Vermont Hearings, supra* note 1, at 29. Schein gives a description of the importance of consensual validation where techniques are used to remove support of beliefs, attitudes and values. "[O]n matters of opinion, people tend to rely primarily on the opinions of others for determination of whether they themselves are 'right or wrong' — whether these are obtained through mass media of communication or through personal interaction." Schein, *supra* note 131, at 153. Manipulation of mail and other sources of information as well as the prevention of personal contacts with visitors in the Chinese programs manifest an isomorphic pattern in cult practices.

136. *See Vermont Hearings, supra* note 1, at 22. "This is always a program of 'unbelievable intensity.' During this, all of the cults step up their ideological reform pressure by increased group activity, change of diet and the introduction of elements of guilt and terror." *Id. See also Lefkowitz Report, supra* note 2, at 39. One indoctrinee stated:

> I was so constantly kept busy the entire time . . . that I didn't have time to think about anything else but what they had planned for me in their program. That was it. I mean from the time I got up in the morning until I went to bed at night, which was usually very late. There was no time in between classes or eating or memorizing scriptures, reading my Bible or making little daily things that we made out every day. . . .

Id. at 38.

137. *See* Richardson, Harder & Simmons, *Thought Reform and the Jesus Movement,* 4 YOUTH AND SOCIETY 185 (1972); Spendlove, *Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults,* 18 ARIZ. L. REV. 1095 (1976). Brainwashing is defined as "a forcible attempt by indoctrination to induce someone to give up his basic political, social or religious

The systematic utilization of "physiological exhaustion,"[138] and continuous small group reinforcement effects rapid changes in the individual's ability to engage in independent and rational thought. The end product is a seriously restricted cognitive perspective and a severe impairment of psychological capacities.[139] The individual is unable to think in relative terms. Instead, the thinking process is limited to a black-white, totalistic perspective where everything external to the cult

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beliefs and attitudes and to accept contrasting regimented ideas. THE MERRIAM-WEBSTER DICTIONARY 97 (1977). The absence of physical coercion in high-demand sect indoctrination facilitates rather than impedes the process. Unlike unwilling POW's in Korea or intellectuals subject to "thought-control" in Communist China, newcomers see the indoctrinator as a friend and hold an uncommon idealism when entering the sect. Although several aspects of thought-control can be identified in secular American life, *e.g.*, military training, executive training programs, the differences are that high-demand sects use all components of thought-control in an intensive manner within a controlled atmosphere. Unlike high-demand conversion, nuns and clerics have training requirements, gradual exposure and psychological testing before entering the cloth, in contrast to instantaneous high-demand conversion. Newcomers to the high-demand sect never know what step is next or the route they are taking. This induces a feeling of lack of control necessary to successful "thought-control." Ms. Merrit, *supra* note 1, feels that physiological debilitation is a common characteristic of all "destructive cults" where due to lack of sleep and food coupled with emotional bombardment, the body's own rhythm is not honored and adverse hormonal changes take place. Being kept in a constant state of exhaustion tends to push the person to extremes. Euphoria is interpreted as conversion and reigiosity while depression is seen as guilt, sin and demonic influence. Through the breakdown of the physiological and emotional systems a disintegration of the ego defenses occurs, which permits a unique susceptibility to conversion. The sects induce regression by instilling childhood fears and reinforcing dependency through infantilization. When psychic energy levels have been drastically lowered the sect superimposes a new superego (moral standards and ideals), a group consciousness and simultaneously destroys the old identity. The superficiality of conversion is obvious because once taken out of the group and removed from the totalitarian setting the person returns to his former identity. However, this process can, in some instances, take several years. For an in depth discussion of "thought-reform" *see generally* R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF BRAINWASHING IN CHINA (1963), which explains the condition inherent to mind control and ego destruction. *See also* J. MEERLOO, RAPE OF THE MIND (1961). The term "brainwashing" is a novel introduction to the English language and was first introduced in E. HUNTER, BRAINWASHING IN CHINA (1951) to describe the phenomenon and methods used to produce marked cognitive and behavioral changes of repatriates and POWs returning from Asian "thought-reform" colleges. *See* Lifton, *"Thought-Reform" of Western Civilians in Chinese Communist Prisons,* 19 PSYCHIATRY 173 (1956).

138. *See* C. STONER & J. PARKE, *supra* note 95. In detailing the process of indoctrination the authors state:

> The second stage in adopting the belief system of a religious cult is the *increased suggestability* of the mind. Now the recruit is "softened up" and is high on both emotion and the idea of adopting lofty new goals. . . . According to Dr. Jolly (a psychologist at Texas Woman's University), a person is far more open to suggestion when he is in this state than when he is in a normal, wakeful state. "Dancing, chanting, prayer, singing, and meditation can alter the state of consciousness just as surely as hypnosis or drugs, ... When the cults get a recruit to chant or meditate, or do any other things that change his state of mind, they can then easily implant new ideas, new realities, and begin to control the thought processes."

Id. at 244.

139. According to Merrit, *supra* note 1, a clinical evaluation of persons coming from high-demand sects shows a lowering of IQ and vocabulary use, an inability to negotiate reality or to make abstractions or decisions, nightmares, and an impairment of the ability to form intimate ties and establish trust relationships.

is evil and everything within is good.[140] Sect members are conditioned to unswervingly obey the leader's commands and are actively discouraged from asserting their autonomy.[141] Members who have left high-demand sects demonstrate various types of depression and guilt,[142] subnormal mental functioning,[143] altered states of consciousness,[144] and an inability to function effectively in society.[145]

C. *High-Demand Thought Control: State Interests*

The substantial threat posed by thought control is not confined to harmful psychological affects alone. It is apparent that an individual who is unable to think critically or make independent decisions, and who perceives nondirective statements as inexorable commands, cannot effectively participate in the democratic process.[146] Thus, the state is compelled to take an active interest in the techniques employed by high-demand sects in order to preserve the autonomy of its citizenry and maintain its own integrity.

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140. *See Lefkowitz Report, supra* note 2, where it was stated that, "The anti-parent, anti-established churches, anti-government and anti-society doctrines of COG can also be viewed within the framework of a totalist environment in which everything is viewed as "the enemy" and every subject discussed is viewed in terms of black and white, there is no gray area." *Id.* at 34. An ex-moonie stated:

> Everything about my world was changed or altered in a very short period of time. The food was different. We didn't sleep much and we ran like crazy all day long. Everything was on such a high emotional plane, which is probably why I slept for a week when I first went home. . . . Now I realize that the division between good and evil is preposterous. As they present their ideas, they make a certain sense, but everything is on the level of a fifth grade mentality.

C. STONER & J. PARKE, *supra* note 95, at 260.

141. During the indoctrination period where new beliefs are introduced to supplant the old ones, members are actively discouraged from questioning the doctrine, as the following passage exemplifies:

> "Skepticism is negativism. . . ." Since partial knowledge is, according to the cults, the cause of major life problems, the recruit must admit how little he knows and accept the stricture that he may not question or analyze what he is told. If questioning is discouraged, critical analysis is impossible.

Id. at 245.

142. According to *Singer, supra* note 95, "As they take up their personal consciences again, many ex-members feel great remorse over the lies they have told, and they frequently worry over how to right the wrongs they did. *Id.* at 80. *See* Merrit, *supra* note 1 (nightmares uncommon in adults are prevalent in ex-members).

143. Singer, *supra* note 95 (former graduate students are required to take jobs as factory workers or hospital orderlies before they can regain their former levels of competence). *See* Merrit, *supra* note 1 (lowered IQ as a characteristic consequence of cult membership).

144. Singer, *supra* note 95 states:

> When they leave the cult, many members find that a variety of conditions — stress and conflict, a depressive low, certain significant words or ideas — can trigger a return to the trance like state they knew in cult days. . . . These episodes of "floating" — like the flashbacks of drug-users — are most frequent immediately after leaving the group, but in certain persons they still occur weeks or months later.

Id. at 76.

145. *See* C. STONER & J. PARKE, *supra* note 95, at 410-31.

146. *See* note 151 and accompanying text *supra.*

While adults are free to associate with religious groups of their own choosing and to submit to whatever practices that may be employed by a sect, the utilization of fraudulent recruitment practices and thought-control techniques renders previous notions of consent useless. The assumption that a person who is induced to join a high-demand sect is free to reject sect-imposed tenets ignores the rapidity with which individual identity can be destroyed. Moreover, the artificiality of sect beliefs is illustrated by instances of their repudiation upon the individual's removal from group confines.[147]

Since the first amendment presupposes the ability to make independent decisions,[148] the use of thought control methods would seem to undermine a fundamental constitutional right. Numerous state and federal courts have held that in the absence of formal consent to procedures impacting on mental autonomy, the individual's first amendment right to freedom of expression is violated.[149] Indeed, the United States Supreme Court in *Prince v. Massachusetts*[150] recognized the state's interest in protecting "the healthy, well rounded growth of young people into full maturity as citizens, with all that implies."[151] To the degree that "thought-control" abrogates individual autonomy and

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147. *See* Merrit, *supra* note 1. *See generally* T. PATRICK & T. DULACK, LET OUR CHILDREN GO (1976). Patrick, a professional deprogrammer, claims a success rate of over ninety percent; and the process rarely takes more than several days.

148. In Jefferson's Act for Establishing Religious Freedom, the preamble states, "Almighty God hath created the mind free." E. BLAKELY, AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 132 (1911). In Doe v. Bolton, 410 U.S. 179, 211 (1973), Justice Douglas, concurring, stated, "the autonomous control over the development and expression of one's intellect, interests, tastes and personality" is the foremost right of privacy. *Id.* at 211. The exertion of "thought-control" techniques derogates this right, which is considered, "an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." Superintendent of Belchertown State School v. Saikewicz, 77 Mass. Adv. Sh. 2461, 2478 (1977), N.E.2d 417, 426 (1977).

149. In State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), the court denied a religious exemption under drug laws prohibiting the use of peyote and stated: "But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox or paranoia, and his position cannot be sustained here in law nor in morals." *Id.* at 604, 148 S.E.2d 565, 569. In holding that the involuntary exertion of psychosurgical techniques without formal consent would violate one's first amendment right to generate ideas under free speech and the right to privacy a court stated: "For if the First Amendment protects the freedom to express ideas, it necessarily follows that it must protect the freedom to generate ideas. Without the latter protection, the former is meaningless." Kaimowitz v. Department of Mental Health, No. 73-19545-AW (D. Mich., filed July 10, 1973) excerpted at 42 U.S.L.W. 2063 (July 31, 1973). A federal court, in deciding the "Compulsory Flag Salute Controversy," stated that ". . . the peace and good order of the community must prevail over conscience, wherever its mental or physical health is affected." Minersville School District v. Gobitis, 108 F.2d 683, 689 (1940).

150. 321 U.S. 158 (1944).

151. *Id.* at 168. The holding in this case dealt with the state's protective power over minors as *parens patriae*. However, the idealized end product of well-rounded young people able to engage in independent thought is certainly not forwarded by "thought-control" methods exerted by high-demand sects on college-age youths.

destroys the ability to generate ideas, it cannot be said that the newcomer is effectively exercising the religious freedom protected by the free exercise clause. At a minimum, disclosure statutes would allow the state to police the context in which an individual surrenders his or her autonomy to others.

IV. DISCLOSURE LEGISLATION AND THE "BALANCING TEST"

In a case involving the denial of unemployment benefits to a Sabbatarian, *Sherbert v. Verner,*[152] the United States Supreme Court formulated a "balancing test" by which state interests are weighed against free exercise challenges to state legislation. A four step analysis was proffered whereby courts may determine whether a governmental interest is sufficient to override free exercise barriers.

The first step in this test involves determining whether the activity poses some substantial threat to public safety, peace or order.[153] If this question is answered in the positive the analysis ends and the individual's right to free exercise must give way to the state's police power. However, if answered in the negative, the second phase is activated. This phase requires the court to ascertain whether the legislation actually infringes on the free exercise guarantee. In making this determination the court must decide: (1) whether the activity regulated is central to the doctrinal basis of the individual's religion; and (2) whether the belief from which the act springs is sincerely held.[154] If centrality and sincerity are found the third stage begins, and the burden is then cast on the state to demonstrate a "compelling state interest."[155]

Although this term has been subject to various labels,[156] the Court in *Sherbert* stated: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests give occasion for permissible limitations."[157] There-

152. 374 U.S. 398 (1963).

153. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

154. In a footnote the Court stated, "No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-Day Adventist creed, based upon that religion's interpretation of the Holy Bible." *Id.* at 399.

155. *Id.* at 406.

156. In United States v. O'Brien, 391 U.S. 367 (1968), the Court stated:

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if . . . it furthers an important or substantial governmental interest. . . .

Id. at 376-77.

157. The *Sherbert* Court quoted Thomas v. Collins, 326 U.S. 516, 530 (1945).

fore, when balancing the countervailing interest, a showing of sincerity and centrality must be met with a commensurate demonstration of an important state interest in order to override the free exercise barrier. Finally, if the court finds in the state's favor it is incumbent upon the state to show that the regulation is the least restrictive alternative available to combat the problem.[158]

The significance of the *Sherbert* standard is demonstrated by a case involving the criminal contempt conviction of a person who refused to serve jury duty on religious grounds.[159] The Supreme Court reversed and remanded to the Minnesota Supreme Court, "for further consideration in light of *Sherbert v. Verner*. . . ."[160] The state court later held that until experience demonstrated that indiscriminate invocation of the religious guarantee showed a threat to effective functioning of jury duty, an exemption should be afforded on religious grounds.[161] Hence, the state may not merely assert a "compelling state interest" in the abstract, but must present cogent evidence that such an interest exists.[162] However, it should be noted that with the sole exception of *People v. Woody*,[163] the balancing test has never been applied to regulations which protect public safety or the rights of others.[164]

The foregoing analysis provides a framework from which one may determine the constitutional validity of the application of legislation incidentally affecting religious organizations. Although the *Sherbert* standard has only been applied to activities regulated under extant state legislation, it may be favorably applied to potential legislation in the following manner. First, since the proposed disclosure legislation would be designed to protect the public from fraud and to regulate activities posing a substantial threat to public health, safety and order, the courts should hold the operation of the "balancing test" in abeyance.[165] Second, since fraud is not in any sense an exercise of religious beliefs, disclosure legislation should not be found to represent an infringement of free exercise.[166] Finally, disclosure legislation merely regulates the

158. *See* notes 173, 174 and accompanying text *supra*.

159. *In re* Jenison, 265 Minn. 96, 120 N.W.2d 515 (1963).

160. *In re* Jenison, 375 U.S. 14 (1963).

161. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972), where the Court noted that "in the generality of cases, we must searchingly examine the interests that the state seeks to promote. . . ." *Id.* at 221.

162. *In re* Jenison, 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963).

163. 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

164. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court explicitly stated that compulsory primary school education did not interfere with the rights of others, "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* at 230.

165. *See* note 153 and accompanying text *supra*.

166. *See* notes 86-94 and accompanying text *supra*.

"manner of recruitment," not the content, and should not be found to violate free religious exercise.[167]

If high-demand religious recruitment was somehow viewed as an activity protected under the free exercise guarantee, and "disclosure statutes" were seen as an infringement of this freedom, it would become necessary to decide the issues of sincerity and centrality. These issues, however, could be readily laid aside. When applied to high-demand sects, the intentional employment of patterned fraud in recruitment and indoctrination would reveal a lack of sincerity.[168] Furthermore, it is questionable whether deceptive practices and the employment of "thought-control" techniques could be considered central to the tenets of any religion.

Even assuming a finding of religious sincerity and centrality, it is submitted that the state would meet its burden by demonstrating a "compelling state interest."[169] The state could show a substantial interest in preserving the psychological health of its citizenry;[170] protecting the integrity and autonomy of the individual;[171] and in protecting the public from fraud.[172] Any one of the above interests could be construed as compelling. However, under the "least restrictive requirement doctrine,"[173] the state must also show that no alternative forms of regulation would achieve the same purpose while preserving first amendment rights.

V. THE LEAST RESTRICTIVE ALTERNATIVE: DEPROGRAMMING V. DISCLOSURE

The Supreme Court in *Sherbert* stated that it is "plainly incumbent upon the appellees [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing upon First Amendment rights."[174] An analysis of the methods presently utilized to cope with this problem will demonstrate that disclosure legislation is the sole constitutional means to deal with high-demand fraudulent recruitment and psychologically harmful indoctrination techniques.

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167. *See* notes 44, 45, 52-54, 57-59 and accompanying text *supra.*
168. *See* notes 95-106 and accompanying text *supra.*
169. *See* notes 155-57 and accompanying text *supra.*
170. *See* notes 149-51 and accompanying text *supra.*
171. *See* note 148 and accompanying text *supra.*
172. *See* notes 73-81 and accompanying text *supra.*
173. *See* note 174 and accompanying text *infra.*
174. In Sherbert v. Verner, 374 U.S. 398 (1963), the Supreme Court stated, "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407.

As a self-help remedy, deprogramming[175] has been utilized by parents with the assistance of professional deprogrammers to expunge the altered world perspective of indoctrinees. The process usually involves abduction and physical restraint,[176] and is not only patently illegal but also directly violative of the absolute right to religious belief.[177] It entails assaults on the sect member's physical and mental integrity, and has been subject to both criminal and civil actions initiated by deprogramming targets.[178] Even where the target is the child of the deprogrammer, beneficient motive or purpose will not shield the defendant from prosecution.[179] In response to criminal charges, deprogrammers have pleaded the defense of necessity, or "choice of evils."[180] However, since at common law such a defense was designed to encompass physical forces,[181] for example epidemics or floods, some courts have been reluctant to extend it to forces of human agency to justify unprivileged behavior.[182] Furthermore, deprogramming has been condemned by the Civil Liberties Union, The New England Psychological Association, and various religious organizations.[183] However, deprogramming differs fundamentally from "thought-control" in that it only seeks to erase sect-induced tenets and does not attempt to supplant them with a new set of ideas.[184]

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175. *See generally* T. PATRICK, *supra* note 147, where the author, a professional deprogrammer, gives a first hand account of his methods.

176. Patrick further states, "[D]eprogramming is the term, and it may be said to involve kidnapping at the very least, quite often assault and battery, almost invariably conspiracy to commit a crime, illegal restraint." *Id.* at 56.

177. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (absolute protection of religious belief); United States v. Ballard, 322 U.S. 78 (1944) (the law knows no heresy); Mandelkorn v. Patrick, 359 F. Supp. 692, 697 (D.D. C. 1973) (complaint alleging "forced deprogramming" states a cause of action for conspiracy to deprive sect member of religious freedom).

178. People v. Patrick, 541 P.2d 320 (Colo. 1975) (conviction of false imprisonment affirmed); Helander v. Patrick, (S.D.N.Y., filed May 16, 1977) (unsuccessfully deprogrammed cultist recovered damages for intentional infliction of emotional distress); Weiss v. Patrick, 453 F. Supp. 717 (D.R.I.) *aff'd*, 588 Fed. 818 (1st Cir. 1978) (dismissal of civil action for conspiracy to violate civil rights, assault and battery, and false imprisonment).

179. Miller v. United States, 138 F.2d 258 (8th Cir. 1943), *cert. denied,* 320 U.S. 803 (1944) (stepfather convicted for kidnapping in aiding wife to control seventeen year old daughter); United States v. Atchinson, 524 F.2d 367, 369 (7th Cir. 1975) (illegal purpose is not necessary).

180. United States v. Patrick, No. Cr-74-320s (W.D. Wash., filed Dec. 11, 1974) (defense of necessity upheld); People v. Patrick, N-320-778 (S.D.N.Y., filed March 30, 1973) (defense of necessity allowed for factual determination by the jury).

181. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 381 (1972) (pressure that impels defendant to act must arise from physical forces, in contrast to duress which is caused by human forces); W. PROSSER, *supra* note 104, at 124-26 (4th ed. 1971) (defense of necessity usually involves excuse of invading property rights rather than personal rights).

182. People v. Patrick, 541 P.2d 320 (Colo. App. 1975) (defense rejected, court held that there must be an imminent public or private injury).

183. *See Deprogramming: Documenting the Issue,* 183-86, 191-97 (prepared for the American Civil Liberties Union Conference on Religious Deprogramming, in New York City, Feb. 5, 1977).

184. *See Dymally Hearings, supra* note 5, at 60 (purpose of deprogramming is to free rational thought and not to inculcate parental values and beliefs).

Self-help remedies have recently been supplemented by the use of temporary conservatorship and guardianship statutes in an effort to legalize the activities of professional deprogrammers.[185] However, when legislation is designed to preserve property, its use for judicial inquiry into religious beliefs may result in a finding that the statute is void for vagueness.[186]

While psychiatric examinations and potential future recognition of documented "thought-control" techniques may justify the use of guardianship and conservatorship statutes, absent a full adversary hearing establishing: (1) that the beliefs adhered to are due to "brainwashing" rather than autonomous and sincere choice; and (2) the vitiation of consent by fraudulent practices, their employment may also contravene the fourteenth amendment procedural due process guarantees.

The demands of procedural due process are a direct function of the gravity of potential harm to the individual.[187] A Massachusetts court held that notice for temporary guardianship is not required when based on factors of necessity.[188] Therefore, temporary conservators or guardians could be appointed over members where the individual might lose his property, or be physically harmed or removed from the jurisdiction.[189] The standard is imminence of threat. With respect to procedural due process, deprogramming is not unlike involuntary civil commitment and would require due process demands of commensurate criteria.[190]

Aside from due process, the absolute protection afforded to religious

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185. Katz v. Superior Court, 73 Cal. App.3d 952, 141 Cal. Rptr. 234 (1977). *See* Spendlove, *supra* note 137, at 1103-06, where a team of two attorneys and one psychologist have utilized conservatorship statutes successfully on a number of occasions.

186. In Katz v. Superior Court, 73 Cal. App.3d 952, 141 Cal. Rptr. 234 (1977), the court opined, "Although the words 'likely to be deceived or imposed upon by artful or designing persons' may have some meaning when applied to the loss of property which can be measured, they are too vague to be applied in the world of ideas." *Id.* at 970, 141 Cal. Rptr. at 244. Both the California conservatorship and guardianship statutes have been amended and narrowly limited to persons who are either unable to care for basic physical needs or who are unable to manage their financial resources, and unable to resist fraud and undue influence. (1976 Cal. Stats., ch. 1357, § 24 at 5997, amending Cal. Prob. Code § 175 (West Supp. 1977)).

187. *See* Goldberg v. Kelly, 397 U.S. 254 (1970), where the Court declared:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.

Id. at 262-63.

188. Bumpus v. French, 179 Mass. 131, 133, 60 N.E. 414, 415 (1901).

189. *See generally* T. PATRICK & T. DULACK, *supra* note 147.

190. *See* Lessard v. Schmidt, 349 F. Supp. 1078, (E.D. Wis. 1972), *vacated and remanded per curiam on other grounds,* 414 U.S. 473 (1973). The court held that persons facing involuntary commitment are entitled to the following due process protections: written and oral notice of their rights, a probable cause hearing within 48 hours of detention, a full hearing within two weeks of detention, legal counsel and proof beyond a reasonable doubt that the person is dangerous to himself or others based on a recent attempt.

belief might effectively preclude the use of any method to alter or modify the religious beliefs of the member. The operation of any "balancing test" would focus on the objectionable practices and require means which directly relate to the activity rather than their by-products. Deprogramming is directed toward the beliefs of the individual, not the deceptive and injurious practices employed by high-demand sects. Without a finding that the translation of the individual's belief resulted in activities raising a "compelling state interest,"[191] deprogramming would not meet constitutional muster as a measure to combat high-demand sect practices.

It is apparent that "disclosure legislation" requiring identification in recruitment is a lesser infringement of religious belief and action than is deprogramming. Unlike legalized deprogramming, disclosure legislation does not directly infringe upon the constitutional rights of religious sects or their members. In addition, it does not unreasonably burden a sect's free exercise of religious worship. It neither prohibits the doctrinal practices of sects, with the possible exception of "heavenly deception," nor does it require actions repugnant to religious beliefs. Disclosure legislation merely regulates the manner of recruitment in order to provide the newcomer with the ability to make a meaningful choice in religious matters. Indeed, it is apparent that this form of legislation is the least restrictive means of dealing with a highly sensitive problem.

CONCLUSION

This note proposes state legislated "disclosure statutes" requiring secular and religious organizations which publicly recruit membership to disclose their identity to potential newcomers. This type of legislation is considered an effective and constitutionally valid means to combat high-demand deceptive recruitment practices which induce the individual to undergo a series of techniques designed to destroy autonomy and rational thought. An analysis of the free exercise clause indicates that it was primarily intended to afford religious equal protection rather than provide greater license to religiously-motivated action. The limits of religious freedom are transgressed when the activity infringes on the rights of others. Thus, narrowly drawn legislation based on the state's police power to protect the public from fraud is not subject to religious challenge under the free exercise guarantee.

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191. *See* Gillis, *supra* note 97. Heavenly deception is the term used by Unification Church members to describe the tenet whereby deception and fraud is justified; to wit, everything external to the sect is infected by satan — satan is the master deceiver — therefore one can deceive satan and thereby defraud the public. The author has personally experienced attempts by members of the Unification Church and the Children of God to defraud during solicitation. Since fraud is frequently used in solicitation it is likely that similar tactics are utilized in recruitment.

The free exercise clause has not immunized persons from criminal convictions under fraud statutes. Indeed, deceptive practices are anathema to the purposes subserved by the free exercise clause. Put simply, fraud cannot in any sense be considered a bona fide religious practice. Disclosure legislation would neither prohibit nor burden religious exercise, but would represent a valid secular regulation of the "manner of recruitment" to protect the public from fraud.

Finally, an application of the *Sherbert v. Verner* "balancing test" reveals a "compelling state interest" in protecting citizens from fraud and preserving autonomy and psychological integrity. Since fraudulent recruitment practices lack the essential elements of sincerity and centrality, courts would be disinclined to find disclosure legislation an unconstitutional infringement of religious freedom.

The novelty which "brainwashing" poses should not prevent legislative or judicial recognition of identifiable and effective methods employed to undermine rational thought and critical capacities. The law as an evolving body must adapt to technical developments in psychological theory as well as to those in the physical sciences. The whole of the first amendment presumes an autonomous and independent exercise of the rights embodied therein. To the extent that deception vitiates the integrity of choice, and "thought-control" destroys autonomy, such legislation would vindicate rather than derogate the purposes underlying religious freedom. Considering the inadequacy of deprogramming, and the deluge of diverse and unknown high-demand sects, this regulation would not represent an unreasonable burden.

CHARLES ROSENZWEIG

Impeachment as Applied to Executive Officers, or, Can Congress Corner A Crooked Cabinet?

The impeachment power entrusted to Congress is the most potent device available for removing public officials for cause. This note reexamines that power, focusing upon the Framers' preoccupation with stemming corruption within the Executive Branch. The author analyzes why impeachment has not been used effectively in removing executive officers in practice, and, points to the recurrent failure historically in removing corrupt Cabinet-level officers by alternative means. The author proposes that a standing committee on impeachment be created by the House of Representatives, and, that a provision for automatic suspension from office upon impeachment be adopted.

When the delegates to the Federal Convention met in Philadelphia in 1787 to devise a representative form of government, they recognized that, as James Madison later observed, "the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."[1] What emerged from the Framers' deliberations was a novel tripartite system of federal authority which was to function within a framework of checks and balances.[2] The inclusion in the Constitution of an impeachment provision was reflective of the Framers' inherent distrust of the very executive power they were creating.[3] Remembering that the Revolution had been waged to free the colonists from the tyranny of a king and his privy council, they

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1. THE FEDERALIST No. 51 (J. Madison) (Cooke ed., 1961) at 349.

2. The concept of a government based upon checks and balances was embraced by Madison, who, speaking before the Committee of the Whole on June 4, 1787, counseled: "There is diversity of Interest in every Country . . . We must introduce checks, which will destroy the measures of an interested majority." 1 M. FARRAND, THE RECORDS ON THE FEDERAL CONVENTION 108 (Yale Univ. Press, 1966).

3. 3 COMMITTEE ON THE JUDICIARY — IMPEACHMENT INQUIRY 2162-63 (U.S. Government Printing Office, 1975), [hereinafter cited as IMPEACHMENT INQUIRY] ("the framers sought to avoid the creation of a too-powerful executive"). *See* Morgan, *Impeachment: An Historical Overview*, 5 SETON HALL L. REV. 689, 690, 719 (1974).

entrusted an impeachment power to Congress as an internal check against executive abuse and usurpation of power.[4]

In practice, the impeachment power has failed to serve the role envisioned for it by the Framers. Of the twelve impeachments voted by the House of Representatives since 1789, only two were directed against members of the Executive Branch.[5] As a leading authority has noted, "(o)nce employed to topple giants. . . impeachment has sunk in this country to the ouster of dreary little judges for squalid misconduct."[6] In response to the proposed impeachments of Justice William O. Douglas in 1970,[7] and President Richard M. Nixon in 1974,[8] recent commentators have consistently focused upon presidential and judicial impeachments to the exclusion of other civil officers. It is not surprising in light of this narrow focus that their general verdict has been favorable when assessing the viability of impeachment both historically and contemporaneously.[9]

An arresting consideration is whether impeachment remains a viable check against abuses and indiscretions committed by *non-judicial* and *non-elective* officers of state. Historically, William Belknap was the only non-elective executive officer to have been impeached.[10] The reasons for this desuetude are threefold. First, the nation's experience with impeachment has resulted in a loss of focus as to the applicability of impeachment to executive officers. Second, the mechanics of the impeachment process have proven both cumbersome and time-

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4. *Id.* at 2166. *See* Hamilton's remark, note 44 and accompanying text *infra.*

5. Andrew Johnson, President, in 1868; William W. Belknap, Secretary of War, in 1876. For a complete list of the federal officers impeached in the United States, *see* note 60 *infra.*

6. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 1-2 (1973).

7. 116 CONG. REC. 11912-27 (1970).

8. Sixteen impeachment resolutions were introduced between July 31, 1973 and November 14, 1973: H. R. Res. 513, 625, 631, 635, 638, 643, 648, 649, 650, 652, 661, 662, 666, 686, 692, and 703. *See* Eilberg, *The Investigation by the Committee on the Judiciary of the House of Representatives Into the Charges of Impeachable Conduct Against Richard M. Nixon,* 48 TEMP. L. Q. 209, 210 (1975).

9. Beer, *Votes of Confidence in Britain,* 43 GEO. WASH. L. REV. 365, 371 (1975) ("the impeachment process did work in the case of President Nixon . . . Congress should leave things as they are"); Krislow, *A Moderate, and Moderately Useful, Response to Watergate,* 43 GEO. WASH. L. REV. 380 (1975) ("Most leaders as well as followers are content in the knowledge that the system worked rather well"). *See also* Morgan, *supra* note 3, at 718; Thompson and Pollitt, *Impeachment of Federal Judges: An Historical Overview,* 49 N.C. L. REV. 87, 118 (1970); Koenig, *Recipe for the Presidency's Destruction,* 43 GEO. WASH. L. REV. 376 (1975). *Contra* Linde, *Replacing a President: Rx for a 21st Century Watergate,* 43 GEO. WASH. L. REV. 384 (1975) ("the constitutional crisis broke through to a solution not because of the effectiveness of the machinery, but despite its horrendous shortcomings"); Reuss, *An Introduction to the Vote of No Confidence,* 43 GEO. WASH. L. REV. 333, 334 (1975).

10. As will be developed in Part III, and particularly note 112 *infra,* there is ample historical evidence to support a conclusion that many former executive officers, at the Cabinet level at the very least, committed, or were alleged to have committed, offenses suitable for impeachment purposes. What has been lacking is congressional initiative in exercising the impeachment remedy.

consuming, rendering the power a veritable "blunderbus,"[11] and one particularly unsuitable for removing civil officers other than tenured judges. Third, the belief that the impeachment power is to be used as a "last resort,"[12] has tended to obscure the vital distinction between passing an impeachment resolution in the House against an official, and, finding that official guilty in the Senate at trial.[13]

These failings, however, are not irremediable. A conscious effort on the part of Congress, buttressed by certain refinements in the process itself, might succeed in resurrecting the impeachment power as a formidable means of the government's "controlling itself."[14] The creation of a permanent impeachment committee as part of the House of Representatives would provide a vehicle for increased vigilance for the commission of impeachable offenses. An impeachment committee would also relieve the House Judiciary Committee of its traditional role of conducting impeachment investigations in favor of a body more tailored to the responsibility.[15] Similarly, the threat of additional offenses being perpetrated by an impeached official, if considered a realistic danger, may best be alleviated by a statute providing for the suspension from office of the defendant pending the Senate's final verdict.[16]

In suggesting that the members of Congress should reexamine the impeachment power vested in them, it has seemed expedient to confine the

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11. Miller, *Implications of Watergate: Some Proposals For Cutting the Presidency Down to Size,* 2 HASTINGS CONST. L. Q. 33, 51, 73 (1975).

12. Fleishman & Aufses, *Law and Order: The Problem of Presidential Legislation,* 40 LAW & CONTEMP. PROB. 1, 4 (1976) ("As a last resort, Congress can use the threat of impeachment to curb executive encroachment"); Linde, *supra* note 9, at 394 (referring to impeachment as the "grave and extraordinary last resort of congressional guardianship"). *See also* Senator McAdoo's statement, note 78 and accompanying text *infra.*

13. As Gerald Ford explained: "In this seldom-used procedure, called impeachment, the legislative branch exercises both executive and judicial functions. The roles of the two bodies differ dramatically. The House serves as a prosecutor and grand jury; the Senate serves as a judge and trial jury." 116 CONG. REC. 11913 (1970). For a discussion of the constitutional language which outlines this distinction, see notes 27-29 and accompanying text *infra.*

14. Paraphrasing Madison's sentiments, note 1 and accompanying text *supra.*

15. As Representative Wyman remarked during the debate on whether to impeach Justice Douglas: "The House itself, before it acts to impeach, always investigates. It can investigate through the Judiciary Committee, or it can investigate through a special committee." 116 CONG. REC. 11921 (1970).

It is ironic that the investigation and drafting of articles of impeachment has devolved upon a so-called "Judiciary" Committee, because the Framers expressly decided to exclude the actual Judiciary from playing any part in the impeachment process.

The Judiciary Committee's informal status as the quasi-official impeachment committee whenever one is needed may be indicative of Congress' preoccupation with using impeachment primarily against judges. *See* note 61 and accompanying text *infra.*

For further discussion of the merits of a standing impeachment committee, *see* Part IV (A) *infra.*

16. For further discussion of the merits of a suspension provision, *see* Part IV (B) *infra.*

historical analysis of past executive misconduct to Cabinet officers. This limitation is not intended to imply that the impeachment power, as applied to the executive officers, is restricted to Cabinet members.[17] It does reflect an assumption that they are, in theory, the officers who pose the greatest danger to the body politic since they exercise powers of national scope and are supervised only by the president.

I. BACKGROUND TO IMPEACHMENT IN THE UNITED STATES

A. Constitutional Provisions

A preliminary understanding of the impeachment power as it exists on the federal level may be gleaned from an examination of six scattered references found in the Constitution.[18] The scope of the power is set out in Article II, Section 4, in what is commonly referred to as the removal clause:

> The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

In addition to indicating which government officials are subject to impeachment,[19] the removal clause prescribes what are impeachable of-

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17. While the text of Article II, § 4 of the Constitution appears to be unambiguous on its face in extending impeachment to "all civil Officers," an argument can be advanced on the basis of statements made by leading statesmen of the era that impeachment of "superior" officers only was contemplated. *See* BERGER, *supra* note 6, at 162-63.

Typical of these statements was Gouverneur Morris' assertion during the Convention debates that "certain great officers of State; a minister of finance, of war, of foreign affairs, &c. . . . will be amenable by impeachment to the public Justice." 2 FARRAND, *supra* note 2, at 53-54. Archibald Maclaine declared unequivacably in the North Carolina Ratification Convention that "impeachments cannot extend to *inferior officers* of the United States." BERGER, *supra* note 6, at 163 (emphasis added).

One prevalent view, moreover, is that the Framers associated the type of officer they considered "superior" with the "Heads of Departments" referred to in the delegation clause of Article II, § 2, cl. 2 of the Constitution. Comment, *Abolition Of Federal Offices As An Infringement On The President's Power To Remove Federal Executive Officers,* 42 FORDHAM L. R. 562, 606-7 (1974). In *Burnap v. United States,* the Supreme Court equated the term, "head of a Department," with "a member of the Cabinet." 252 U.S. 512, 515 (1920). *See also* United States v. Mouat, 124 U.S. 303, 307 (1888); United States v. Germaine, 99 U.S. 508 (1879).

18. U.S. CONST. art. I, § 2, cl. 5; art. I, § 2, cl. 6; art. I, § 2, cl. 7; art. II, § 2, cl. 1; art. II, § 4; art. III, § 2, cl. 3.

19. Note that military officers are not included since they are not "civil" officers. Civil Service employees are also not included since their positions are not subject to presidential appointment or senatorial confirmation pursuant to Article II, Section 2, Clause 2 of the Constitution. The Supreme Court has stated:

> Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

United States v. Mouat, 124 U.S. 303, 307 (1888).

fenses. The meaning of "high Crimes and Misdemeanors" has served as the most controversial point of scholarly comment.[20] One school of thought maintains that the Framers intended to limit impeachments to indictable offenses when they adopted the phrase.[21] The prevailing and better view is that the phrase encompasses a broad spectrum of non-criminal behavior as well,[22] including such amorphous offenses as "neglect" and "abuse of office."[23]

Few legal writers would be as candid or as injudicious as then Congressman Gerald Ford who, in proposing the impeachment of Justice Douglas, remarked:

> (A)n impeachable offense is whatever a majority of the House of Representatives considers to be (sic) at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body (i.e. the Senate) considers to be sufficiently serious to require removal of the accused from office.[24]

Ford's assertion may well offend the sensibilities of many persons raised with high notions of due process and equal treatment under the law because Ford's standard, or lack thereof, scents malodorously of partisan politics.[25] Nevertheless, there is no higher authority intervening

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There are literally hundreds of thousands of public officers who are subject to impeachment, and, "as a general proposition it may be stated that practically all officers of the courts and the executive branch of the Federal Government are impeachable." COMMITTEE ON THE JUDICIARY, LEGAL MATERIALS ON IMPEACHMENT, H. R. RES. 93, 91st Cong., 2d Sess. 4 (U.S. Government Printing Office, 1970).

20. Note, *Executive Impeachment: Stealing Fire From The Gods,* 9 NEW ENGLAND L. REV. 257, 265 (1974).

21. Dwight, *Trials by Impeachment,* 6 AM. L. REG. 257, 266 (1867) ("the court of impeachment must administer the same law as the criminal court"). *See also* I. BRANT, IMPEACHMENT: TRIALS & ERRORS 8, 18-19 (1972); A. HOLDER, THE MEANING OF THE CONSTITUTION 38 (1972).

The general contention is that the Framers wished to limit Congress to traditional criminal offenses. Accordingly, the Framers substituted "high Crimes and Misdemeanors" in place of George Mason's original suggestion of "Maladministration" because a majority concurred with Madison's stated objection that: "So vague a term will be equivalent to a tenure during the pleasure of the Senate." 2 FARRAND, *supra* note 1, at 550.

Interestingly enough, Madison "later told the Virginia ratifying convention that impeachment would reach *abuse of power,*" which would appear to be on a par with "maladministration" in terms of vagueness. Linde, *supra* note 9, at 393. *See* note 22 *infra.*

22. As Gerald Ford stated: "About the only thing that the authorities can agree upon in recent history . . . is that an offense need not be indictable to be impeachable." 116 CONG. REC. 11913 (1970). *See* The Impeachment Inquiry Staff of the House Judiciary Committee, *Constitutional Grounds for Impeachment, reprinted in* HIGH CRIMES AND MISDEMEANORS 18-19 (Funk & Wagnalls ed., 1974); Note, *The Exclusiveness of the Impeachment Power Under the Constitution,* 51 HARV. L. REV. 330, 335 (1937); Sloan and Garr, *Treason, Bribery, or Other High Crimes and Misdemeanors — A Study of Impeachment,* 47 TEMP. L. Q. 413, 451 (1974); BERGER, *supra* note 6, at 162; Morgan, *supra* note 3, at 713-15, 717.

23. BERGER, *supra* note 6, at 162.

24. 116 CONG. REC. 11913 (1970).

25. The push for Douglas' removal serves as a perfect example of partisanship if one credits Representative Hays' opinion that the spectre of impeachment had been raised against Justice

upon Congress' exclusive power of impeachment.[26] The nation's experience with impeachment, moreover, clearly indicates that Congress has not felt bound by definitions of criminal conduct since at least ten of the twelve impeachments voted by the House alleged conduct which did not violate criminal law.[27]

The procedures and consequences of impeachment are outlined in Article I of the Constitution:

> The House of Representatives . . . shall have the sole Power of Impeachment.
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the Concurrence of two-thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.[28]

The introduction of an impeachment resolution in the House is often analogized to a grand jury proceeding.[29] Once a statement of charges is drawn, only enough evidence need be presented to convince a majority of the members present that a trial is warranted. Once that decision is

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Douglas in retaliation to the recent rejections by the liberal Democrats in the Senate of Nixon's nominees to the Supreme Court, Judges Carswell and Haynsworth. *Id.* at 11921.

26. The possibility of the Supreme Court's exercising judicial review of an impeachment conviction may appear attractive initially as added assurance of a fair adjudication, but, there is no textual support for concluding that the constitutional grants of "the sole Power of Impeachment" and "the sole Power to try all Impeachments" to the respective branches of Congress conveyed something less than exclusive jurisdiction in cases of impeachment. It is hard to imagine, moreover, how the Court could ever decide whether a defendant had been duly convicted of an impeachable offense without impacting indirectly upon Congress' impeachment power. Even if the Court is not precluded from reviewing impeachment proceedings, one may reasonably expect the Court to decline any opportunities to do so on political question grounds. This may provide the explanation for the Court's refusal to review the decision of the Court of Claims in *Ritter v. United States* which held that:

> Our conclusion is that we have no authority to review the impeachment proceedings held in the Senate and decide whether the accusations made against the plaintiff were that he could properly be impeached thereon. . . . In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final.

84 Ct.Cl. 293, 300 (1936), *cert. denied,* 300 U.S. 668 (1937).

27. HIGH CRIMES AND MISDEMEANORS, *supra* note 22, at 18.

28. U.S. CONST. art. I. § 2, cl. 5; art. I, § 3, cl. 6; art. I, § 3, cl. 7, respectively.

29. As Representative Wyman stated: "[T]he House is the body that impeaches, and its position in relation to impeachment is analogous to that of a grand jury in a criminal proceeding." 116 CONG. REC. 11920 (1970). *See also* 44 CONG. REC. (remarks of Mr. Blackburn) (1876) at 1431. For a discussion of how the two functions differ, *see* Note, *Presidential Impeachment — Process, Problems, and Proposals,* 1975 UTAH L. REV. 199, 211.

reached, the bill of impeachment is sent to the Senate whereupon that body conducts a formal trial and determines the guilt or innocence of the impeached officer.

The consequences of a guilty verdict were limited by the Framers to removal from, and disqualification for, public office.[30] This was a significant departure from the English precedent where Parliament's House of Lords was empowered to impose criminal sanctions incident to an impeachment verdict — often entailing heavy fines, incarceration, or capital punishment.[31] The Framers care in separating impeachment from criminal prosecution may be attributable, in part, to a respect for the independence of the Judiciary, with the associated concern for due process of law for the individual.[32] Additionally, the Framers wished to insure that the passions of political animosity would never goad the Senate to a pronouncement of death.

The mere fact that a civil officer may be subject to criminal prosecution as well as to impeachment for suspected misconduct does not mean that either course may be chosen as a matter of preference to serve the same ends. Rather, impeachment was intended to be a more flexible device than any possible criminal sanctions which might be taken against an official,[33] and one which would be able to respond quickly to charges of official misconduct before the harm became irreparable.

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30. U.S. CONST. art. I, § 3, cl. 7.

31. BERGER, *supra* note 6, at 67. Contrasting the American system with impeachment in England and France, where the penalties were often so severe that political tribunals were reluctant to exercise their impeachment powers, Alexis de Tocqueville concluded that impeachment would see more frequent use in the United States because of its relative mildness, since "[T]he main object of the political jurisdiction that obtains in the United States is therefore to take away the power from him who would make bad use of it and to prevent him from ever acquiring it again." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 108-11 (Borzoi ed., 1945).

32. The Senate is not bound by its established conduct in prior impeachment trials and it has never passed any statutory guidelines on impeachment. Consequently, there is no assurance that any judicially established concept of due process will be observed. As an example, there is even some uncertainty as to what standard of proof applies in an impeachment trial. Representative Hobbs, serving as manager in the Ritter impeachment trial, stated: "First, that Impeachment trials are not criminal trials in any sense of the word . . . Second, that the burden of proof in this case is not 'beyond a reasonable doubt' as it is in criminal cases." Cullen, *Last Impeachment — High Crimes and Misdemeanors,* 49 FLA. B. J. 130, 131 (1975). The general weight of opinion from past impeachment trials, in contrast, has favored the standard of proof beyond a reasonable doubt. VIEWS OF THE MEMBERS OF THE HOUSE JUDICIARY COMMITTEE CONCERNING THE CONSTITUTIONAL BASIS FOR IMPEACHMENT, H.R. REP. NO. 93-1305, 93d Cong., 2d Sess. 6-11, 378 (1974).

33. Representative Kasson embraced this view when he said:

> Gentlemen speak of it as if impeachment were designed to inflict the proper punishment of an offense. It is not so, Impeachment has no such design. Impeachment is to protect the public from the continuance in office, and, at the discretion of the Senate, from the restoration of office of the officer guility (sic) of the misdemeanor.

44 CONG. REC. 1433 (1876).

As expressed by the Arizona Supreme Court:

> The purpose of impeachment is to serve as an *added protection to the public* against those officers who may be so powerful as to effectively block court action against themselves. It was never intended nor did it develop as a safeguard to the officer con-

Reflective of the flexible and decisive role envisioned for the impeachment power by the Framers are Alexander Hamilton's assertions that it was designed as "a method of NATIONAL INQUEST into the conduct of public men",[34] and, "those offenses which proceed from the misconduct of public men . . . are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[35]

Two other provisions of the Constitution mentioning impeachment in relation to presidential pardons[36] and trial by jury[37] are of secondary importance. It is pertinent to note, though, that the Framers carefully guarded against the possibility of a President continuing a political ally or personal friend in office against the will of the Senate.[38] They may not have exhibited equal foresight if they believed that, as George Nicholas declared in Virginia's ratification convention: "Few ministers will ever run the risk of being impeached, when they know the King cannot protect them by a pardon."[39]

B. Impeachment as a Check Upon the Executive

The impeachment power outlined in the Constitution was derived from the British system.[40] Impeachment was first conceived in England during the latter part of the fourteenth century.[41] It had evolved over the ensuing centuries prior to the American Revolution as an effective and oft-used weapon in the democratic struggle to establish Parliament's law-making authority paramount to the monarchical pretensions of divine right.[42] Since neither the king nor his actions were

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cerned. . . . The object of the removal of a public officer for official misconduct is not to punish the officer but to improve the public service.

State *ex rel.* DeConcini v. Sullivan, 66 Ariz. 348, 188 P.2d 592, 598-99 (1948).

34. THE FEDERALIST No. 65 (A. Hamilton), *supra* note 1, at 440.

35. *Id.* at 439 (emphasis in original).

36. U.S. CONST., art. II, § 2, cl. 1, provides: "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

37. U.S. CONST., art. III, § 2, cl. 3, provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

38. This precaution was probably prompted in part by the recollection of King Charles II's pardon of the Earl of Danby while the latter was embroiled in an impeachment proceeding. BERGER, *supra* note 6, at 55, n.7.

39. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 17 (reprint of 2d ed., 1836).

40. Alexander Hamilton observed that Great Britain had served as "the model from which the idea of this institution has been borrowed." THE FEDERALIST No. 65, *supra* note 1, at 440.

For a discussion of the British system as it had evolved to the late eighteenth century and the Framers' lessons from it, *see* chapter one of BERGER, *supra* note 6.

41. Morgan, *supra* note 3, at 690. *See also* BERGER, *supra* note 6, at 1.

42. Referring to the impeachment power's British roots, Representative Blackburn commented: "It used to be the theory that the King could do no wrong; but the man has never yet been found in this land who was bold enough to say that the President could do no wrong." 44 CONG. REC. 1432 (1876). *See generally* Morgan, *supra* note 3, at 690-94; BERGER, *supra* note 6, at 30-40, 43-46.

accountable to Parliament directly, impeachment developed as a means of making his ministers accountable for activities which emanated from the throne but which did not receive Parliament's tacit approval.[43] Coincidentally, an impeachment trial was being conducted in England while the Framers were discussing the role for impeachment in America's representative system of government.[44] Aware of the role impeachment had played in England, it is little wonder that the Revolutionary War generation considered it, "a bridle in the hands of the legislative body upon the *executive servants* of the government" in the United States.[45]

The Framers apparently hoped that the impeachment power would prove an even more effective check upon executive misconduct and usurpation of power in America than in England since they chose to make the Chief Executive answerable to Congress through impeachment as well as his subordinates. In opting for a "Chief Magistrate"[46] who would be accountable for his misdeeds through impeachment, George Mason lambasted the suggestion that the British system of ministerial responsibility for executive conduct be followed:

> Shall any man be above Justice? Above all that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.[47]

One prominent scholar in the area of impeachment contends that the Framers were concerned almost exclusively with impeachment of the President.[48] It is true that the records of the Convention debates speak mainly to the applicability of impeachment of the President, but this emphasis on presidential impeachment may be attributable largely to the novelty of the idea. Perhaps, too, it was assumed that the Chief Executive would be quick to remove any subordinates tainted by charges

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43. Professor Morgan summarized this interpretation succinctly, writing:

> Impeachment is a legitimate child of history, born out of the English Parliament's long struggle to strip the King and his ministers of their absolute power. . . . The history of that period told the Framers that impeachment was indeed a powerful and important tool for controlling executive power.

Morgan, *supra* note 3, at 690. *See also* IMPEACHMENT INQUIRY, *supra* note 3, at 2162-63 ("Parliament sought to exert restraints over the King by removing those of his ministers who most effectively advanced the King's absolutist purposes").

44. Warren Hastings, Governor-General of India, was impeached for high crimes and misdemeanors several weeks before the Constitutional Convention convened and mention to his impeachment trial was made during the debates. *See* 2 FARRAND, *supra* note 2, at 550 (remarks of G. Mason). For further discussion of Hasting's impeachment and its impact upon the Framers, *see* IMPEACHMENT INQUIRY, *supra* note 3, at 2170.

45. THE FEDERALISTS No. 65 (A. Hamilton), *supra* note 1, at 441 (emphasis added).

46. 2 FARRAND, *supra* note 2, at 65.

47. *Id.*

48. BERGER, *supra* note 6, at 91.

of misconduct since he would be subject to impeachment personally, "if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct so as to check their excesses."[49]

The early statesmen undoubtedly recognized that impeachment was less suited for effecting necessary removals than summary dismissal from office because of the complicated involvement of both houses of Congress.[50] Yet it was never disputed that impeachment was a viable alternative. Indeed Madison spoke specifically to this point when he explained that impeachment was designed to reach unworthy officers who "could be removed even against the will of the President; so that the declaration in the Constitution was intended as supplemental security for the good behavior of the public officers."[51]

Although the Framers may have exhibited more outward concern with impeachment of the President, it should be noted that they did not anticipate a Cabinet as such.[52] It was assumed as a matter of course that the new government would need "certain great officers of State," and that these "ministers" would be subject to impeachment.[53] The closest hint of a Cabinet-type body, however, was a suggestion that a privy council comprised of the Chief Justice and the heads of the executive

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49. 1 ANNALS OF CONG. 387 (1789) (remarks of J. Madison). Removal of a subordinate was not without its attendant risks for the President, however, since Madison also stated without opposition that the improper dismissal of a "meritorious" minister would, in itself, constitute just cause for impeachment of the President. *Id.* at 498.

50. Theodore Sedgewick commented upon the cumbersomeness of the impeachment process before the first Congress, saying that impeachment was a "tardy, tedious, desultory road" to take in removing subordinate officers. 1 ANNALS OF CONG. 460 (1789). This observation was made in support of the idea that the President's power of removal was concomitant with the power of appointment, despite the objections of some congressmen who contended that presidential removals required the advice and consent of the Senate as in the case of appointments. *See* BERGER *supra* note 6, at 140. The Congress adopted the view that the President may summarily dismiss his or her subordinates, which reflects a pragmatic logic that it is safer for the body politic to adopt stringent procedures for appointments and peremptory ones for dismissals.

51. 1 ANNALS OF CONG. 372 (1789).

52. The Cabinet is "a creation of custom and tradition dating back to George Washington's administration," and, as such, "functions at the pleasure of the President." 1977-78 U.S. GOVERNMENT MANUAL 89 (U.S. Government Printing Office).

53. 2 FARRAND, *supra* note 2, at 53-54 (remarks of G. Morris). Putting Morris' statements in context, he had proposed that the President be popularly elected to a two-year term, and not be liable to impeachment. In explaining why the President's unimpeachability did not pose a significant threat, he said: "There must be certain great officers of State; a minister of finance, of war, of foreign affairs, & c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence." *Id.*

Morris' views as to the power of the Executive form a sharp contrast to those of a recent scholar who wrote: "Like well-invested money in trust, presidential power has been multiplying these last few decades almost without regard to the initiatives of presidents." Polsby, *A Critical Introduction,* 40 LAW & CONTEMP. PROB. 3, 7 (1976).

departments be instituted.[54] Each council member was to be "responsible for his opinion on the affairs relating to his particular Department,"[55] and amenable to impeachment and removal from office "for neglect of duty, malversation, or corruption."[56] The proposal was not adopted because its opponents feared that such a body would lessen presidential responsibility for the actions of the Executive Branch.[57]

The number of executive officers and employees exercising substantial authority within their prescribed spheres have grown to staggering proportions in recent years, spawned by the mushrooming number of executive departments and agencies.[58] Consequently, it is no longer realistic to expect the President, in addition to his or her other duties, to be responsible for the conduct of his or her subordinates. To meet the security problems arising from the tremendous expansion of the Executive Branch, both in size and power, Congress needs to seize anew the reins of power given it by the Constitution by utilizing impeachment "as a bridle . . . upon the executive servants of the government."[59]

C. The Nation's Experience with Impeachment

The impeachment power has led a relatively obscure existence since its inclusion in the Constitution 190 years ago. Bills, or articles, of impeachment have reached the Senate for trial on only twelve occasions.[60] Of this dozen, four were convicted, four were acquitted for lack of the

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54. 2 FARRAND, *supra* note 2, at 342-44 (proposal of G. Morris and C. Pinckney). This proposal was referred to the Committee on Detail but never came before the full Convention for a vote. IMPEACHMENT INQUIRY, *supra* note 3, at 2166, n.25a.

55. 2 FARRAND, *supra* note 2, at 344.

56. *Id.*

57. It was James Wilson's experience that a council "oftener serves to cover, than prevent malpractices." *Id.* at 97. Similarly, Hamilton believed that "all multiplication of the Executive is rather dangerous than friendly to liberty." THE FEDERALIST No. 70, *supra* note 1, at 461-62.

58. The number of persons directly employed in the Executive Branch has been estimated at nearly five million. PANEL OF THE NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, WATERGATE — IMPLICATIONS FOR RESPONSIBLE GOVERNMENT 63 (A Special Report Prepared at the Request of the Senate Select Committee on Presidential Campaign Activities) (1974).

As stated by Senator Sam Ervin in 1974: "We have . . . witnessed in recent years — not all in the present Administration — a dangerous imbalance of power tilting away from Congress toward the President. Congress has no doubt contributed to that condition." *Id.* at viii-ix.

59. THE FEDERALIST No. 65 (A. Hamilton), *supra* note 1, at 441.

60. Those impeached were: William Blount, Senator (1797); John Pickering, District Judge of New Hampshire (1803); Samuel Chase, Associate Justice of the U.S. Supreme Court (1804); James H. Peck, District Judge of Missouri (1831); West H. Humphreys, District Judge of Tennessee (1862); Andrew Johnson, President (1868); William W. Belknap, Secretary of War (1876); Charles Swayne, District Judge of Florida (1902); Robert W. Archbald, Circuit Judge Commerce Court (1912); George W. English, District Judge of Illinois (1926); Harold Louderback, District Judge of California (1932); Halsted L. Ritter, District Judge of Florida (1936).For interesting recounts and analyses of these proceedings, *see generally* BRANT, *supra* note 21; Swindler, *High Courts of Congress: Impeachment Trials, 1797-1936.* 60 A.B.A.J. 420 (1974).

required two-thirds consensus, two were acquitted outright upon the evidence, and, two were saved from a verdict because their trials were discontinued.[61]

More telling of the departure from the Framers' intentions than Congress' reluctant use of its impeachment power is the observation that it has been used primarily as a means for ousting judges.[62] The applicability of impeachment to judicial officers was not addressed directly in the Convention debates,[63] which indicates the Framers' apparent lack of concern with the removal of judges.[64] The nation's experience with impeachment, however, shows that nine of the twelve impeachments conducted in our history have been directed against members of the Judiciary. It may be suggested that this departure from the Framers' original focus upon the Executive Branch has devolved largely through inadvertence. The first few presidential administrations were comparatively free from scandals involving Cabinet officers.[65] The Jeffersonian Republicans, on the other hand, were quick to test im-

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61. Convicted were: Pickering, by a 19-7 vote; Humphreys, by a 39-0 vote; Archbald, by a 68-5 vote; and, Ritter, by a 56-28 vote.

Acquitted for a lack of a two-thirds consensus were: Chase, by a 19-15 vote; Johnson, by a 35-19 vote; Belknap, by a 37-25 vote; and, Louderback, by a 45-34 vote.

In Belknap's case, twenty-two of the twenty-five senators voting for acquittal wrote separate opinions to say that they based their decisions solely upon the grounds of lack of jurisdiction over the defendant. Belknap had cagily resigned several hours before the House actually passed its impeachment resolution against him — thereby terminating his "civil officer" status and rendering him unsuitable for impeachment under Article 2, § 4 of the Constitution. *See* 44 CONG. REC. 1426, 1429 (1876); Swindler, *supra* note 60, at 425-26.

Acquitted outright were: Peck, by a 21-22 vote; and, Swayne, by a 35-47 vote.

Having their trials discontinued were: Blount, after a Senate majority indicated that a Senator was not a "civil officer" for impeachment purposes, and, English, after the House formally requested the Senate to discontinue the trial following English's voluntary resignation.

(Votes, where given, represent the highest number cast for conviction among the several charges filed against each defendant).

62. *See* Berger quote, text at note 6 *supra.*

63. BERGER, *supra* note 6, at 146 ("the Framers were troubled almost entirely by transgressions of the President and his advisors; the misbehavior of judges was all but unmentioned").

Hamilton's discussion of the impeachment power in the Federalist Papers, Numbers 65 and 66, also contains no mention of the impeachment of judicial officers, accepting as common knowledge "that the powers relating to impeachments are as before intimated, an essential check in the hands of that body (i.e. the legislature) upon the encroachments of the executive." THE FEDERALIST No. 66, *supra* note 1, at 446.

64. *See* Part III *infra.* The relatively unsmeared records of the early Cabinets may be attributed in part to the small size of the Cabinet itself. The Cabinet has grown from four members in George Washington's Administration to thirteen in Jimmy Carter's Administration.

65. Flushed with the success of Judge Pickering's conviction on March 12, 1804, the Jeffersonian Republicans in the House confidently aimed for larger game. A resolution to impeach Justice Chase was introduced in the House in less than one hour after the Senate reached its verdict on Pickering, and passed almost immediately. Gibbons, *The Interdependence of Legitimacy: An Introduction To The Meaning of Separation of Powers,* 5 SETON HALL L. REV. 435, 449-52. The Jeffersonians "lost the chance to cleanse the Court of Federalists," however, when six Republican Senators broke party discipline and voted for Chase's acquittal. *Id.* at 452. *See also* BRANT, *supra* note 21, at 87; Swindler, *supra* note 60, at 422-23.

peachment as a possible device in breaking the Federalists' stronghold upon the Judiciary.[66] When Cabinet-level corruption did become a more common phenomenon,[67] a new generation of statesmen were occupying the seats in Congress; one less steeped in English history, so that "the shades of despotic kings and conniving ministers,"[68] which had appeared so prominently before the Framers had faded from memory. But it would be too simplistic to advance this theory as the only, or even the primary, reason for the historical reluctance on the part of Congress to impeach executive subordinates. The overriding explanation is that certain procedural problems exist in applying the impeachment process to executive officers; problems which may not be as acute when dealing with judicial officers.

II. Problems with Impeachment as Applied to Executive Officers

Assuming that the impeachment power fits into our constitutional framework primarily as a check upon the Executive Branch, quick action should be regarded as a corequisite.[69] The impeachment process has proven ineffective in responding to those situations calling for prompt action — not because it was ill-designed for the task, but because Congress has blunted its effectiveness. A number of factors have contributed to Congress' inability to answer executive malfeasance with impeachment.

A. Time — The Molasses Factor

The primary reason for Congress' apparent failure to oust Cabinet officers through impeachment is that the process is too time-consuming.[70] The time delay is manifested in three phases. First, an impeachment charge obviously can not be proposed before the alleged misconduct has been exposed. The underlying problem of inadequate supervision of high-ranking officers results in a considerable lapse of time from the occurrence of the particular instances of misconduct to Congress' initiation of appropriate action. The Watergate experience serves as a poignant example. The attempted break-in at the Democratic

66. *See* Part III *infra*.

67. BERGER, *supra* note 6, at 59. The post-Jeffersonian statesmen could no longer be influenced by England's use of impeachment, unlike the Framers, because England's Parliament had abolished impeachment in 1804 and replaced it with removal upon a vote of "no confidence." *See* note 132 and accompanying text *infra* for a recent proposal that the United States adopt a similar system.

68. Echoing this sentiment, impeachment has been compared to "an eighteenth-century minuet, a slow and stately exercise that is out of place in the mad pace of the last part of the twentieth century." Miller, *supra* note 11, at 72.

69. B. WOODWARD & C. BERNSTEIN, THE FINAL DAYS 11 (1976).

National Headquarters occurred on June 17, 1972, and it came to the attention of the Washington *Post* that same day.[70] Unexplicably, the House did not become involved formally until February 6, 1974, when it authorized the Committee on the Judiciary to undertake an impeachment investigation with respect to then President Nixon.[71]

Second, the investigation itself tends to deteriorate into a long and exhaustive process. The House's Watergate Committee was able to rely upon the findings of numerous other investigatory bodies and sources in conducting its own examination of Nixon's involvement in the break-in and subsequent cover-up.[72] After a full five months in operation, the Committee was still preparing its report when Nixon resigned on August 9, 1974.[73] The final fruits of these *ad hoc* House investigations typically are not a case of too little, too late, as much as they are of too much, too late. For instance, the final report of the Watergate Committee extends over 3,888 pages.[74] It is difficult to believe that 3,888 pages were required to meet the probable cause threshold passed upon by the House had it come to a timely vote. Once the House decides that impeachment is warranted, it must then draft formal articles of impeachment to be delivered to the Senate.

The third phase impacting upon the length of the impeachment is the Senate trial. Upon receipt of the articles of impeachment specifying the charges, the Senate must then conduct adversary proceedings to determine whether the defendant is guilty of any of the charges. The trials of

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70. H. R. Res. 803, 93d Cong., 2d Sess. (1974). The Committee had already begun an ostensible Watergate investigation with a view towards impeachment several months earlier on its own initiative. IMPEACHMENT IQUIRY, *supra* note 3, at 6. This presumptive action again raises the question whether the Judiciary Committee is, in practice, acting as a quasi-official standing committee on impeachment. *See* note 15 *supra*.

71. Eilberg, *supra* note 8, at 210. Besides the renowned efforts of reporters Woodward and Bernstein, the Watergate Special Prosecution Task Force worked for twenty-eight months as an independent and prosecutive agency within the Department of Justice. There was also a Senate Watergate Committee as well as various FBI personnel compiling data on Nixon's involvement in the events surrounding the Watergate scandal. *See* Watergate Special Prosecution Force Report, *Policy and Procedure in the Investigation and Prosecution of Government Officials* (Chapter Two), *reprinted in* 12 CRIM. L. BULL. 26 (1976).

72. Note, *supra* note 29, at 200, n.13 (citing *Resignation of President Nixon, The President's Letter to the Secretary of State,* 10 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1021 (1974)). The Committee had reached an agreement on its first article of impeachment on July 27, 1974 and it is probable that Nixon's decision to resign was prompted by a desire to avoid the impending impeachment. Reuss, *supra* note 9, at 333.

73. B. WOODWARD & C. BERNSTEIN, *supra* note 69, at 248. This report was released on July 12, 1974, and it catalogued in chronological fashion, and without commentary, the abuses of power involving Nixon.

74. The preoccupation demonstrated by past impeachment committees generally with compiling vast amounts of raw data may stem partially from the foreknowledge that certain of its members usually serve as the managers, or prosecutors, in conducting the prosecution at the Senate trial. This may lead to a desire for the most complete evidentiary base possible — even to the point of overkill and at the sacrifice of quick action.

Johnson and Belknap, the only members of the Executive ever impeached, each spanned four months.[75] The remaining trials ranged in length between one and eleven months,[76] except in the case of Judge Humphreys, an ardent secessionist and Confederate supporter, who was convicted by unanimous vote in record time, a brief eighteen days.[77]

The cumulative effect of these time delays is to minimize the effectiveness of impeachment as a means for removing *any* civil officer. Senator McAdoo commented after the Ritter impeachment trial:

> (T)he nature of the process is such that, as evidenced in the recent proceedings, it seriously interrupts for long periods the necessary transaction of important legislative business, places an almost intolerable burden of hearing and weighing testimony upon Senators already charged heavily with other responsibilities, and for this reason alone is always resorted to with extreme reluctance, even in cases of flagrant misconduct.[78]

This ineffectiveness is even more evident in the case of executive officers because their terms of office can not extend beyond the incumbent President's own term, unless they happen to be renominated by a subsequent President and re-subjected to Senate ratification.[79] Congress may understandably be reluctant to expend its valuable time and energies toward a one or two year impeachment proceeding if it will result merely in a reduction of the offender's term by a matter of months.[80] The House did, on at least one occasion, decide against impeaching a Cabinet officer solely because his term of office was nearing a close[81] —

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75. Johnson, February 25, 1868 - May 12, 1868; Belknap, April 4, 1876 - August 21, 1876.

76. Blount, February 2, 1798 - January 9, 1799; Pickering, February 30, 1803 - March 12, 1804; Chase, March 12, 1804 - February 27, 1805; Peck, April 29, 1829 - January 31, 1832; Swayne, January 24, 1905 - February 25, 1905; Archbald, July 8, 1912 - January 13, 1913; English, March 25, 1926 - May 23, 1926; Louderback, February 24, 1933 - May 23, 1933; Ritter, March 3, 1936 -November 11, 1936.

77. Humphreys, June 9, 1862 - June 27, 1862.

78. 80 CONG. REC. 5934 (1936). The lamentable result, McAdoo continued, is that "the practical certainty that in a large majority of the cases misconduct will never be visited with impeachment is a standing invitation for judges to abuse their authority with impunity and without fear of removal." *Id.*

79. The requirement that the President make appointments "by and with the Advice and Consent of the Senate" is delineated in Article II, § 2, clause 2 of the Constitution.

80. As expressed by Professor Hans A. Linde: "The time span built into the process of impeachment . . . is as fatal to its ultimate logic as to its practicality . . . .[A]ny procedure likely to extend for more than a year is of little use during the second half of a four-year presidential term." Linde, *supra* note 9, at 389.

81. George Robeson, Secretary of the Navy under President Grant, was accused of accepting bribes from A. G. Cattel & Co. in return for navy contracts after it was discovered that he had made personal bank deposits of $320,000 and had received a "gift" of a house from the Cattel family. A congressional investigation reported that "a system of corruption has grown up . . . likely to be known hereafter as 'Cattellism'," and referred the matter to the House

which is a sorry excuse for permitting someone suspected of an impeachable offense to continue in public office without trial.

The time delays enumerated above may not pose as serious a hindrance when the removal of a judicial officer is considered. Judges serve for indefinite lengths of time due to their tenured status. The realization that it may take months, or even years, to remove a particular judge[82] may, therefore, exert less sway upon the decision of whether to initiate the impeachment process against that officer. An assumption that judges are not in as ready a position to commit treasonous acts as are high-ranking executive officers may also underpin a belief that the timeliness of the process is less self-defeating in the removal of judges.[83] On the positive side, the extensive periods for deliberation which mark both the actual impeachment and trial stages may be justified, within general bounds of reasonableness, by the greater assurance of a fair adjudication thereby offered.

Any advantages accruing from the time delays in the case of judicial officers begin to pale when the removal of high-ranking executive officers is at issue. Primary emphasis should be placed, instead, on rendering a prompt decision as to the defendant's continuing fitness for public office. If the accused is acquitted in a timely manner, his or her full energies may be devoted to the duties of his or her office — unencumbered by the distraction of a prolonged impeachment proceeding. Conversely, if the accused is convicted in a timely manner, he or she will be removed from office that much quicker, and be replaced by someone more deserving of public trust.[84]

The need for quick action and adjudication is no more apparent than

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Judiciary Committee for possible impeachment action. That committee concluded that it was too near the end of Robeson's term for impeachment to be feasible. C. VANN WOODWARD, RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT 153 (1974) (citing H. REP. NO. 784, 44th Cong., 1st Sess. 1-198 (1876)).

82. Judge Peck's case serves as the extreme example to date: The first motion in the House for impeachment was made in December, 1826, and the matter was not resolved finally in the Senate until January, 1832. Swindler, *supra* note 60, at 424, 427.

83. The Humphreys impeachment marks the only instance in which a judge has been charged with treason. The trial was in essence a *fait accompli* since no Southern Senators were present because of the South's secession from the Union. The quickness of the result was not spurred by any great need to remove Humphreys. He posed no present danger, in fact, for he was serving as a judge in the Confederacy at the time and did not appear at trial or offer any defense. BRANT, *supra* note 21, at 129. *See also* Swindler, *supra* note 60, at 424.

84. The likelihood of an erroneous judgment may be greater under a more streamlined process, but the "guilty" person continued in office would undoubtedly be supervised more carefully thereafter which would minimize the risk of further abuses. The "innocent" person removed from office is a hapless victim to the principle that an office-holder who has lost the public's trust is a liability to the government he or she serves. For the views of the Supreme Court of Arizona, *see* note 33 *supra*. The Framers, moreover, were obviously aware of this danger; yet, were content with cushioning its harshness by separating the criminal consequences for one's acts from impeachment and removal. *See* notes 30-32 and accompanying text *supra*.

in the prospective instance of a corrupt President or Vice President. The concept of an impeachable President, hailed by the Framers as a decided improvement upon the English model,[85] epitomizes the axiomatic tenet of democratic government that no one shall be above the government or its laws.[86] A viable impeachment power was intended, as Benjamin Franklin counselled, as a welcome alternative to the more time-honored recourse for removal: assassination.[87] While the impeachment mechanism should be primed and readied to respond smoothly in the event of a corrupt or power-hungry presidential officer, the President is not as likely to commit impeachable offenses as is a subordinate officer — even if in a position to do greater harm.[88]

B. Executive Conduct — Behind Closed Doors

While the time delays associated with the impeachment process have deterred impeachments of executive officers, the problem is not entirely of Congress' own making. The activities of Cabinet officers are not readily amenable to scrutiny by anyone, let alone Congress. One reason is that many Cabinet officers operate with virtual autonomy; there is no vigilant "boss" peering over their shoulders. The President is their immediate superior, titularly at least, and he or she may well formulate the policies and objectives to be pursued by the Cabinet officers in running their respective departments. When the President does inquire routinely into the operations of the executive departments, he or she is likely to rely trustingly upon each Cabinet officer's personal reports and records — eschewing the more arduous path of conducting an independent investigation. Realistically, the President does not have the time to watch even immediate subordinates closely.[89] Consequently, preceding Presi-

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85. Without the threat of impeachment, Patrick Henry admonished, "your President may easily become King." 3 ELLIOT, *supra* note 39, at 50.

86. Lamb, *The Duty of Judges: A Government of Laws and Not of Men,* 44 A.B.A.J. 623, 624 (1958).

87. FARRAND, *supra* note 2, at 65.

88. Three reasons may be advanced. First, the President's conduct is more visible to the nation and more closely scrutinized as a matter of media routine than is true with subordinate officers. Second, and more speculatively, a President would appear to have little motive, short of lusting for perpetual rule, for risking his or her popularity and prestige for the sake of self-aggrandizement since he or she is already at the apex of success. Third, the President is an elected official, whose character and tendency towards integrity have been laid bare before the public to a greater extent than in the case of appointed subordinates.

Of course, the Senate has an opportunity to examine the characters of all Cabinet appointees pending confirmation, but, as a matter of courtesy, "nominations to the Cabinet are rarely rejected" — twice since 1845. HARRIS, THE ADVISE AND CONSENT OF THE SENATE 265 (1968). Paradoxically, appointees to inferior executive posts are scrutinized more carefully than their Cabinet-level superiors. *Id.* at 266.

89. The Framers clearly expected that the President would supervise the conduct of his subordinates, since failure to do so would, as Madison later said: "[S]ubject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the

dents have placed a premium upon appointing persons whom they know personally and trust implicitly to the key Cabinet posts.[90] The wishful logic would seem to be that friendship offers some pretense of security against betrayals of the public trust.[91] John Ehrlichman observed in 1972, shortly before attaining notoriety for his involvement in the Watergate scandal, that: "The Cabinet officers must be tied closely to the chief executive, or to put it in extreme terms, when he says jump, they only ask how high."[92] Because the conduct of Cabinet officers does not tend to be supervised closely by the President, an obvious potential for corrupt dealings exists.[93] Augmenting this opportunity arising from the officers' virtual autonomy, is the relative anonymity enjoyed by many of them while filling their posts.[94]

Since many Cabinet officers are well-insulated in their respective

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United States, or neglects to superintend their conduct so as to check their excesses." 1 ANNALS OF CONG. 372-73 (1789).

On the other hand, the Framers did not anticipate the eventual enormity of the task since they did not envision more than a few executive departments. *See* Morris' remarks, note 53 *supra.*

90. Arthur Miller, Chief Consultant to the Senate Select Committee on Presidential Campaign Activities during the Watergate investigation, wrote in a memorandum to that body: "Watergate may be perceived as the result of bringing into positions of immense governmental power individuals whose basic loyalties ran to the leader rather than to the people or to the law." *Reprinted in* Miller, *supra* note 11, at 42-43.

91. President Warren Harding learned through experience that friendship stands as a tenuous basis for trusting one's subordinates, having once confided to Editor William Allen White: "I can take care of my friends all right, but my damn friends, my God-damned friends, White, they're the ones that keep me walking the floor nights!" WHITE, AUTOBIOGRAPHY 619 (1946).

92. Sundquist, *The Case for an Easier Method to Remove Presidents,* 43 GEO. WASH. L. REV. 472, 480 (1975) (footnotes omitted).

93. The Supreme Court has repeatedly cited the public interest in close scrutiny of public officials in the context of libel suits brought against the press. This interest has become particularly important in recent years because of the increasing size and complexity of the federal government, as intimated by Chief Justice Hughes in *Near v. Minnesota:*

> [T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press. . . ."

283 U.S. 607 at 719-20 (1930). *See also* Sullivan v. New York Times Co., 376 U.S. 254, 269-71, 275 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43, 345 (1973).

94. It has been suggested that the tendency towards appointing loyal and relatively obscure figures to key executive positions is of recent origin — paralleling the development of electronic means of mass communication by the President with the electorate. Sundquist, *supra* note 92, at 480. Presidents no longer need to draw upon the independent political strength of national leaders such as Jefferson, Hamilton, Webster, Clay, Calhoun, Davis, Seward, Sherman, and Bryan — all of whom had been leading rivals of the respective Presidents naming them to their Cabinets. The author states:

> Such men or women can be defiant, and cause trouble; they have to be conciliated, because if they resign they can do so with a splash. Far better, Presidents learned, to appoint nameless and faceless men, men without their own power bases, who are totally dependent upon the President who took them from obscurity and made public figures of them. . . .

Id.

positions, misconduct on their part is unlikely to be uncovered within a seasonable period. When it is eventually discovered, impeachment may no longer be a feasible course of action because of the attendant time delays, assuming, *ad arguendo,* that the offender is still in office.[95] A permanent impeachment committee could alleviate these problems arising from the time delays in the process itself and the lack of adequate supervision of high-ranking subordinate officers, since its primary function would include continued vigilance for signs of executive malfeasance. Additionally, such a committee would not have to wait for a formal resolution from the House authorizing it to investigate suspect conduct, as have past *ad hoc* impeachment committees.[96]

C. Claims of Executive Privilege

Another factor militating against the effectiveness of impeachment of executive officers is the potential difficulty in compelling the testimony of executive personnel or the production of documentary material held in executive departments.[97] This problem is likely to arise in connection with asserted claims of executive privilege. The repeated claims of confidentiality and executive privilege which featured so prominently in the Watergate Committee's efforts[98] serve as a striking example of the difficulties which can arise in investigating conduct within the Executive Branch. Any claim of executive privilege must emanate from the President,[99] but, any officer under investigation on impeachment grounds

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95. For a further discussion of the merits of a standing impeachment committee, *see* Part IV (A) *infra.*

96. Any officer refusing to honor a congressional subpoena during the course of an impeachment inquiry may be visited with a contempt citation. Bishop, *The Executive's Right to Privacy: An Unresolved Constitutional Question,* 66 YALE L. J. 477, 484 (1957) ("Congress undoubtedly has power to punish contempts . . . by the simple and forthright process of causing the Sergeant-at-Arms to seize the offender and clap him into the common jail of the District of Columbia or the guardroom of the capital police"). It is hard to imagine this recourse being taken against a high-ranking officer, however recalcitrant or obnoxious his or her actions.

97. A member of the Judiciary Committee wrote: "To my mind, one of the most serious failures of our Committee was its absolute failure to legally test our subpoena powers vis-à-vis the presidential claim of executive privilege." Dennis, *Impeachment Revisited,* 9 IND. L. REV. 578, 591 (1976). *See generally Impeachment Inquiry Hearings on H. R. Res. 803 Before the House Committee on the Judiciary,* 93d Cong., 2d Sess. 917-32 (1974). The Committee's subpoenas and accompanying materials are included in H. R. REP. NO. 1305, 93d Cong., 2d Sess. 233-78 (1974).

98. President Kennedy wrote that executive privilege "can be invoked only by the President and will not be used without specific Presidential approval." Letter from President John F. Kennedy to John Moss (March 2, 1962), *quoted in* Kutner, *Executive Privilege . . . Growth of Power Over a Declining Congress,* 20 LOY. L. REV. 33, 40 (1974). Similarly, the Senate Select Committee on Presidential Campaign Activities concluded that the privilege "is available only to the president and only as to communications with and by him to his personal advisors and by his personal advisors among themselves. Further, it believes that the privilege is available only with respect to the *official* duties of the chief executive." Miller, *supra* note 11, at 58-59.

99. As an example, Teddy Roosevelt, a figure noted for his bravado, refused to permit his

may well have the President's support,[100] since an unsympathetic President might be expected to dismiss an officer at the first appearance of impropriety before permitting a protracted and politically damaging impeachment proceeding to take place.[101]

It has been argued persuasively that "claims of executive privilege have no place in impeachment inquiries because the Framers made clear that impeachment was a studied breach in the doctrine."[102] Recent experience, however, demonstrates that Congress may not be relied upon to flex its muscles in resisting a President's protestations of privilege. The Supreme Court, in *Nixon v. United States,*[103] ordered then President Nixon to produce the materials subpoenaed by the Special Prosecutor for *in camera* inspection by the district court.[104] The upshot of this pronouncement was that the judicial process was able to achieve in less than three weeks what the House of Representatives had failed to do in eight months.[105] Congress' inability to use impeachment to fulfill the constitutional role envisioned for it may be seriously suspect in light of this spectacle of evidence being held by the President, "apparently beyond the reach of a body constitutionally charged with acquiring such evidence."[106]

Attorney General to respond to congressional inquiries as to why he had not instituted antitrust proceedings against the United States Steel Corporation. "Instead, Roosevelt ordered the relevant papers to the White House and dared the Senate to come after them. 'The only way the Senate or the committee can get these papers,' he chortled, 'is through my impeachment.' " Patterson, *The Rise of Presidential Power Before World War II,* 40 LAW & CONTEMP. PROB. 39, 50 (1976).

100. So it appears to Raoul Berger, who states: "[R]arely indeed would the President insist . . . upon retaining a Cabinet officer who brought disgrace upon his office and therefore upon the administration. Practical politics would demand his immediate resignation or dismissal." BERGER, *supra* note 6, at 197. Historical example, however, has not borne out Berger's hypothesis. *See* notes 119-23 and accompanying text *infra.*

101. Berger, *Congressional Subpoenas To Executive Officials,* 75 COLUM. L. REV. 65, 83 (1975). *See also* Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process,* 22 U.C.L.A. L. REV. 30, 38 (1974).

102. *See* note 97 *supra.* The most direct way of combatting any blatant attempt by the President to interfere with, or impede, Congress' constitutionally prescribed impeachment power by wrongfully withholding information is to impeach and remove him or her. Noncompliance with a legitimate congressional order should, after all, constitute an impeachable offense. This was the opinion, at least, of the House Watergate Committee which tardily adopted a third article of impeachment against President Nixon claiming that he failed, "without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas . . . issued by the Committee on the Judiciary and willfully disobeyed such subpoenas." H. R. REP. NO. 1305, 93d Cong., 2d Sess. 1-2 (1974).

103. 418 U.S. 683 (1974).

104. *Id.* at 714.

105. Note, *supra* note 29, at 200, 208.

106. *Id.* at 200.

This section has touched upon the inherent difficulties in bringing impeachment to bear against executive officers under the present system. It remains to demonstrate the need for correcting the inadequacies of the impeachment process if one is to avoid the idle pedantry of Gulliver's Laputans;[107] in short, to demonstrate the political reality of Cabinet corruption.

III. THE POLITICAL REALITY OF CROOKED CABINET MEMBERS

For the current generation of Americans, the mere mentioning of the word "Watergate" conjures up a host of images of the corruption in Nixon's Executive Branch.[108] Two Cabinet officers[109] and several members of Nixon's personal staff were sent to jail for their participation in the events surrounding the Watergate break-in, while the President's complicity in the events is uncertain still. The Watergate scandal, however, will not be recorded in history as a singular and lurid aberration from the political norm;[110] rather, it will be catalogued simply as one of a long series of national scandals which have reverberated through the Executive Branch.[111]

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107. J. SWIFT, GULLIVER'S TRAVELS, or, L. GULLIVER, TRAVELS INTO SEVERAL REMOTE NATIONS OF THE WORLD (1735).

108. Indeed, Watergate may even have become "a symbol for corruption in government" generally. PANEL OF THE NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 58, at vii (remarks of S. Ervin, Jr.).

109. John N. Mitchell, Attorney General (formerly head of the Committee to Re-elect the President) and, Maurice H. Stans, Secretary of Commerce (formerly head of the Finance Committee to Re-elect the President).

110. The only singular aspect to Watergate was the dogged inquiry by the press into the President's cover-up attempts. Bernstein, *The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940,* 40 LAW & CONTEMP. PROB. 58, 61 (1976) ("[w]ithout the *Post,* we may conclude, the Watergate investigation might have ended safely for Nixon — far from the oval office"). Even on this basis, one may question the judgment and complacency exhibited by Professor Linde, who wrote:

> [T]o bend the existing substantive and procedural arrangements of impeachment to the purposes of a faster and surer resolution of a presidential crisis like that of 1973 seems beyond the inventiveness of even the most resilient constitutional lawyer. The instinct to leave the Constitution alone means, in this case, choosing to count the Nixon episode in American history as a unique event, or so nearly unique that its outcome alone will be an object lesson sufficient to protect us against its repetition for a long time.

Linde, *supra* note 9, at 390.

111. Preceding generations were rocked by similar scandals in scope, if not in form, bearing such catchwords as "The Great Robbery," "Credit Mobilier," "Galphinism," "Cattelism," and "Teapot Dome," so that corruption within the Executive Branch would seem to be "an endemic rather than a transitory or ephemeral feature of the American political system." BERG, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM 27 (1976).

Cabinet officers have proven particularly prone to the clarion calls of corruption,[112] involving a variety of alleged or proven offenses of an

112. RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT, prepared by Historian C. Vann Woodward at the request of the House Watergate Committee on Impeachment, serves as the primary source for the following compendium of examples.

Charges of graft and collusion have been raised against many Cabinet officers, often based upon the dispensation of contracts or the payment of goverment claims under highly suspect circumstances. As examples, Alexander Hamilton, Washington's Secretary of War, tipped off select individuals that his proposed fiscal policy included the assumption by the incipient federal government of all debts incurred by the Continental Congress, thereby enabling the privileged profiteers to procure thousands of unsecured paper certificates at discount prices from unsuspecting holders; Thomas Ewing, Taylor's Secretary of the Interior, was accused by the press of making illegal payments on certain large claims against the government; Jeremiah S. Black and Howell Cobb, Buchanan's Attorney General and Secretary of the Interior respectively, accepted a tract of land which had been refused previously because of its unmarketable title in payment of a debt owed the government arising from prior embezzlements so that the debtor, one Isaac Cook, could be appointed as head of the Chicago post office (the furor arose after Cook was indicted in a matter of weeks for rifling registered mail!); Isaac Toucey, Buchanan's Secretary of the Navy, was accused of graft in the dispensation of naval contracts; Simon Cameron and Gideon Wells, Lincoln's Secretaries of War and of the Navy respectively, were investigated for fraudulent irregularities in their awarding of military contracts; William A. Richardson, Columbus Delano, William W. Belknap, and George Robeson, Grant's Treasury, Interior, War, and Navy Secretaries respectively, were each found to have received monetary kickbacks in return for official favors; John G. Carlisle, Cleveland's Attorney General, was accused of dispensing political favors in return for corporate contributions to Cleveland's campaign fund; William F. Vilas, Cleveland's Secretary of the Treasury, was implicated in a lumber industry scandal; Russell A. Alger, McKinley's Secretary of War, was accused of corruption and neglect of duty in his management of the Spanish-American War; George B. Cortelyou, Theodore Roosevelt's Secretary of Commerce and Labor, was accused of unlawfully extracting large campaign contributions from certain corporations; Richard A. Ballinger, Taft's Secretary of the Interior, was implicated on charges of collusion with fraudulent land claimants; Franklin H. Lane and Albert Fall, Secretaries of the Interior for Wilson and Harding respectively, were both accused of collusion with the oil industry in improperly leasing government lands; Harry M. Daugherty, Harding's Attorney General, was twice indicted on charges of conspiracy to defraud the government; Walter F. Brown, Hoover's Postmaster General, was accused of collusion and other unlawful acts in the dispensation of air mail contracts; Robert S. McNamara, Kennedy's Secretary of Defense, was accused of unethical conduct in awarding a huge contract for TFX Fighter-Bombers to General Dynamics Corp. in disregard of competitive bidding results. VANN WOODWARD, *supra* note 81, at 87, 99, 105, 113-14, 116-17, 147-53, 189, 198, 201-04, 215-23, 239-45, 252-53, 264-71, 299-300, 378-84. *See* N. MILLER, THE FOUNDING FINAGLERS 101-10 (1976), for details of the Hamilton scandal.

Conflict of interest situations have also led to charges against Cabinet members of conduct unbecoming their public office. The so-called Galphin affair drew national attention in the 1840's. Secretary of the Treasury William Meredith and Attorney General Reverdy had reversed a contrary ruling by the Office of the Comptroller and authorized a cash payment of $191,000 to the Galphin family claimants as part of a settlement of a pre-Revolutionary War claim against the government, when it was revealed that fellow Cabinet officer, Secretary of War George W. Crawford, had represented the Galphin interests in their suit and had pocketed $95,000 of the $191,000 as his contingent fee. *Id.* at 87-90. Other examples include: Richard W. Thompson, who accepted employment with a French canal company which was trying to promote congressional support of its plan to build a canal in Panama, while continuing to serve as Hayes' Secretary of the Navy; Augustus H. Garland, Cleveland's Attorney General, who neglected to divest his sizable stock holdings in a telephone company before taking office, which proved embarrassing when that company asked his department to initiate a suit to invalidate the patent held by its chief competitor; and, William Jennings Bryan, Wilson's Secretary of State, who refused to discontinue his

arguably impeachable nature.[113] In light of the historical prevalence of corruption in the upper echelons of the Executive Branch, it seems appropriate to consider how to discourage the repetition of similar abuses of power. A demonstrated readiness to visit censurable officers with impeachment would offer a positive step towards this end, since it could be expected to serve as a deterrent to, as well as a remedy for, executive corruption.

The President's broad dismissal power, acknowledged in the first congressional session after considerable debate,[114] may appear at first blush to be an attractive counterargument to this suggestion.[115] Restated, why should Congress have to impeach and try an officer — even supposing that the process could be improved so as to eliminate some of the time delays — when the President can summarily dismiss that officer when it becomes expedient to do so? The flaw with this counterargument is that Presidents in the past have proven loathe to dismiss their Cabinet officers.[116] President Carter's recent purge of his

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annual summer lecture series despite having to abandon his post on alternate weeks because he claimed to need the added income. *Id.* at 169-70, 187-89, 250.

Malversation of funds has been another charge commonly leveled against Cabinet officers. Examples include: Daniel Webster, Tyler's Secretary of State, who was discovered by his successor to have used funds specifically designated by Congress for secret activities *abroad* to hire undercover agents *in Maine* to lobby for local legislative support for a proposed Maine-Canada boundary negotiation; Robert J. Walker, who was found to have used government funds to help finance the purchase of the Washington *Globe,* a partisan newspaper, while serving as Polk's Secretary of the Treasury; and, John B. Floyd and Jacob Thompson, Buchanan's War and Interior Secretaries respectively, who were implicated in the misappropriation by Godard Bailey, Floyd's nephew-in-law and clerk of the Interior Department's Indian Trust Fund, of $870,000 in Indian Trust-owned bonds. These bonds were secretly released to military contractors upon presentment of bills bearing Floyd's endorsement as collateral. The "acceptances," official promises that the bills would be honored, were the cause of a further uproar when it was discovered that several million dollars worth of bogus bills for fictitious services, all bearing Floyd's endorsement, were in circulation. *Id.* at 77-79, 83-84, 106-08. For the account of the "Great Robbery" upon the Indian Trust Fund, *see also* Taylor, *The Shared Responses to the Civil War* (unpublished thesis, 1977, in John Hay Library, Brown University, Rhode Island) at 57-60.

113. The consideration of whether impeachment should be predicated upon a rigid standard of criminal conduct or a flexible and more inclusive concept of misconduct becomes relevant. *See* notes 20-27 and accompanying text *supra.* All of the alleged actions outlined in note 112 *supra* would certainly fall within the general ambit of misconduct, albeit with varying degrees of seriousness attached. It is not suggested that the enumerated officers should all have been impeached even if the House could have determined that there was probable cause for conviction in each case. It must ultimately be left to Congress to balance the perceived seriousness of an officer's misconduct against the relative imposition upon Congress' time and other functions incumbent with removing that officer via impeachment.

114. *See* note 50 *supra.*

115. *See* Berger's views, *supra* note 100.

116. Only two of the thirty-odd Cabinet officers referred to in note 112 *supra* were removed from office by presidential dismissal. Hayes fired Thompson immediately upon learning of his "dual" employment, and, Grant reluctantly dismissed Delano after Secretary of the Treasury Bristow made known his intention of resigning in protest if Grant persisted in retaining Delano. VANN WOODWARD, *supra* note 75, 170, 150.

Cabinet[117] may perhaps be the start of a new trend, but, then, even Carter declined to dismiss his friend, Bert Lance, for cause.[118] Whatever the reason for the tendency to retain Cabinet officers long after they have become political liabilities — whether personal friendship, political loyalty, stubborn defiance or indifference to public opinion, or, some other factor — Presidents have consistently tried to ride out the storm.

A few of the more celebrated instances of staunch resistance to public and official demands for dismissal should suffice in fleshing out this tendency. Recalling the Galphin affair,[119] President Taylor refused to dismiss Secretary of War Crawford, despite public indignation, and, despite a written memorandum signed by each of the other members of his Cabinet urging the President to dismiss him. Lincoln adamantly refused to dismiss his beleaguered subordinates, Secretary of War Welles and Secretary of the Navy Cameron,[120] even after the latter officer was formally censured by a congressional resolution.[121] Grant, likewise, was notorious for his loyalty in the face of adversity, declining to dismiss either Secretary of War Belknap or Secretary of the Navy Robeson,[122] despite the impending impeachment actions against them.[123] Carter's loyalty to Bert Lance despite mounting pressure for his dismissal, emerges as the most recent example.

Voluntary resignation has emerged, historically, as the most effective route for the removal of allegedly corrupt Cabinet officers.[124] Resigna-

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117. Carter's actions in demanding the resignations of his top thirty-four Cabinet members and staff aides are recounted in *Carter's Great Purge,* TIME, July 30, 1979 at 10.

118. *See* note 124 *infra.* As director of the Office of Management and Budget, Lance was not technically a Cabinet officer, but, as mentioned previously, the principles discussed in this note are not intended to be applied solely to Cabinet officers to the exclusion of other high-ranking executive officers.

119. *See* note 112 *supra.*

120. *Id.*

121. Lincoln did eventually "exile" Cameron by appointing him to the Russian ministry, where he could be kept on the government payroll without attracting much attention. VANN WOODWARD, *supra* note 81, at 114. Removal by impeachment would preclude such a reassignment because of the disqualification provision in the Constitution. *See* note 28 *supra.*

122. *See* note 112 *supra.*

123. *See* note 61 *supra,* pertaining to the impeachment of Belknap. As discussed more fully in note 81 *supra,* the proposed impeachment of Robeson was tabled because his term of office was nearly at an end.

Grant also refused to dismiss Treasury Secretary Richardson, although the latter resigned of his own accord when a motion to censure was introduced in the House. VANN WOODWARD, *supra* note 81, at 148.

124. President Carter is reputed to have refused to accept Lance's resignation on two occassions. TIME, Sept. 12, 1977 at 8. Even as Carter announced Lance's final resignation at a press conference on September 21, 1977, he declared that "Bert Lance is my friend," and "[n]othing that I have heard or read has shaken my belief in Bert's ability or his integrity." U.S. NEWS & WORLD REPORT, Oct. 3, 1977 at 20. The Justice Department subsequently indicted Lance on twenty-two counts in connection with banking irregularities. The Boston Globe, May 24, 1979 at 1, 12.

tion, however, has not typically followed in quick succession to the initial charges of misconduct. Rather, it has generally come only in response to extensive public pressure for removal, and, often, with the intention of averting any impending congressional action.[125] This ironic revelation begs the question: What kind of political system must depend upon corrupt politicians to remove themselves from the very positions they have used adversely to the public interest? The harm done to the Union cause as a result of the unchecked treasonous activities of Buchanan's "Cabinet Cabel"[126] on the eve of the Civil War[127] bears reference to the possible consequences of any serious reliance upon such an illogical policy.

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125. Included among those who have resigned under adverse circumstances are Cobb, Floyd, Thompson, Richardson, Belknap, Daugherty, Fall, Mitchell, Stans, and Lance.

126. The cases of Belknap, Cameron, and Richardson constitute the most obvious examples. *See* notes 61, 121, and 123 *supra* respectively.

127. Once the Indian Trust Fund scandal had come to light, reporters and politicians alike began to delve into Floyd's other activities as Secretary of War. A hastily prepared report of the Committee on Military Affairs revealed on December 30, 1860, that Floyd had been quietly transferring large numbers of arms from Northern arsenals to Southern sites. The Mobile *Advertiser* in Alabama reported that 135,430 muskets had been removed from the arsenal at Springfield, Vermont alone, and thanked him "for the foresight he has thus displayed in disarming the North and equipping the South for this emergency." Taylor, *supra* note 112, at 60 (footnotes omitted). Nor was the nation unaware of Floyd's intentions or his loyalties. The governor of Pennsylvania flatly refused in January, 1861, to obey an order to transfer 124 heavy cannon from Pittsburgh's arsenal to two uncompleted and unmanned forts off the Southern coast. *Id.* Even as respected a commentator as Horace Greeley, editor of the New York Tribune, expressed the suspicion that Major-General David Twiggs had been placed in command of the largest military department in the country, "only after personally assuring Floyd that he would turn the entire command over to the Confederacy at the proper time." *Id.* at 64 (footnotes omitted). Twiggs' resignation and surrender resulted in a transfer to the Confederacy of $1,209,500 worth of military supplies and ammunitions alone. 1 F. MOORE, THE REBELLION RECORD 35 (1861).

There is little question that Floyd was guilty of treason, as was concluded by a congressional investigating committee — in typically late fashion. But Floyd was not alone. Interior Secretary Thompson went so far as to boast before Southern audiences that it was he who had warned the secessionists in Charleston, S.C., while serving in the Cabinet, that the U.S.S. *Star of the West* had embarked on a secret mission to reinforce the garrison at Fort Sumter — leading to the first shots of the war. A letter written from his Washington office, dated November 20, 1860, had been intercepted and published by the Northern press two months before the *Star of the West* incident, and, he had written: "My allegiance is due to Mississippi and her destiny. . . . As long as I am here, I shall shield and protect the South." Taylor, *supra* note 112, at 61 (footnotes omitted).

Treasury Secretary Cobb was accused of intentionally trying to bankrupt the federal government. There is little substance to this charge in retrospect, but he too was prone to an improvident and treasonous pen. "Writing a general message to the people of Georgia, two days before he resigned office, Cobb advised: 'On the 4th of March, 1861, the Federal Government will pass into the hands of the Abolitionists. It will then cease to have the slightest claim either upon your confidence or your loyalty. I entertain no doubt either of your right or your duty to secede from the Union.' " *Id.* at 62 (footnotes omitted).

Charges of treason were also leveled against Navy Secretary Toucey because of his efforts in dispersing the Federal fleet to the Mediterranean and the Pacific. It is enough to comment that his

Adopting an optimistic viewpoint, it would be improbable to expect any repetition of treason of the magnitude that coursed through Buchanan's Cabinet. Its example is useful, though, because it presents a striking illustration of the need for adequate supervision of Cabinet activities, as well as for a suitable means for effecting prompt and decisive action against traitorous officials. Buchanan's documented inability to fire Secretary of War Floyd, despite his recognition of the need for his removal,[128] lends further support to the proposition that the President's dismissal power is not a sufficient safeguard. The impeachment power was intended to be the government's safety valve;[129] the means for removing civil officers found guilty of corruption or treason. Yet, the impeachment of Buchanan's Cabinet members would have been of little practical import, because it is unlikely, in light of the nation's experience with impeachment proceedings, that the verdicts could have been rendered before the natural expiration of their terms. What is needed is an affirmative departure on the part of Congress from its traditional, piecemeal approach to the impeachment process.

IV. RESTORING THE CONSTITUTIONAL "BOOT" — SOME RECOMMENDATIONS

In the aftermath of Watergate, a series of proposals were introduced in Congress aimed ostensibly at strengthening the legislature's supervision of executive functionings.[130] As Representative Bolling stated:

> If there is a lesson in Watergate, it is not that we had a President who was either blind or willful — but that there was nobody watching. We cannot have a system which depends on a benign executive — or a malign one. We've got to make the Congress work; there is

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conduct was censured and his loyalty impugned in the Special Congressional Investigating Committee's report of February 2, 1861. *Id.* at 62 (footnotes omitted).

128. As the revelations against Floyd continued to mount after the Indian Trust Fund scandal:

> Even Buchanan thought the Virginian had to go. Still he hesitated. Unwilling to confront Floyd personally, he sent Thompson and Black to see Floyd, who was sick in bed. Floyd confessed all. Buchanan, however, could not bring himself to fire the man. He asked Black to seek Floyd's resignation; Black refused. Next, Buchanan persuaded Vice President John C. Breckinridge to ask Floyd for his resignation. Floyd indignantly refused and, despite his disgrace, continued to attend crucial cabinet meetings on events in the secession crisis.

VANN WOODWARD, *supra* note 81, at 107. Floyd indignantly resigned of his own accord when Buchanan refused to order the evacuation of Fort Sumter, and promptly accepted a generalship in the Confederate Army. Taylor, *supra* note 112, at 60.

129. Recall Hamilton's analogy of impeachment as "a bridle in the hands of the legislative body upon the executive servants of the government." *See* note 45 and accompanying text *supra*.

130. Remarks of Representative Richard Bolling, Chairman of the House Select Committee on Committees, February, 1974, *quoted in* Miller, *supra* note 11, at 60.

> no alternative. And if the Congress cannot be responsible, then the whole system of representative government is going down the drain.[131]

The most radical proposal was the so-called "Reuss bill" which would have allowed removal of the President by a majority vote of "no confidence" in both houses.[132] These proposals were prompted in all likelihood by Congress' sensitivity to the minimal role it played in bringing the Watergate conspirators to justice.[133] It was the press, championed by the Washington *Post*; the Special Prosecutors appointed by the President, Archibald Cox, succeeded by Leon Jaworski; and, the Judiciary, represented by Judge Sirica and the Supreme Court, which emerged at the forefront of the Watergate proceedings. The Reuss bill was the only proposal which speaks, albeit indirectly, to the ineffectiveness of the House's Watergate Committee to act promptly in preparing articles of impeachment against Nixon.[134]

While the proposals are laudable insofar as they indicate Congress' recognition of its current inability to meet its supervisory interest in whether the Executive fulfills his or her obligation to "take Care that the Laws be faithfully executed,"[135] they are misdirected. The impeachment power was designed to serve as the tool for redressing executive misconduct,[136] and, as such, it was understood to be a studied breach in

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131. The Congressional Legal Counsel Act, S. 2569, 93d Cong., 1st Sess. (1973), would have permitted suits to be brought by a Congressional Legal Counsel to compel officials in the Executive Branch or regulatory agencies, "to act in accordance with the Constitution and laws," as interpreted by the Counsel, provided that the suit was authorized by at least six Senators or twenty-four Representatives.

The creation of a new Office of Public Attorney would have conferred broad jurisdiction to that officer, "to inquire into (with power to gain access to executive records) the status and progress of complaints and criminal charges concerning matters pending in or involving the conduct of Federal departments and regulatory agencies. . . . " *Final Report of the Select Committee on Presidential Campaign Activities,* S. REP. NO. 93-981, 93d Cong., 2d Sess. 96-97 (1974) [hereinafter cited as *Final Report*]. The Report continued: "If he became aware of misconduct in the executive branch, he could assume the role of special prosecutor." *Id.*

132. H. R. J. RES. 903 (1974).

133. Miller's memorandum to the Senate Watergate Committee specifically referred to "the failure of Congress adequately to oversee the public administration," and maintained that, "the risk of another concatenation of circumstance like Watergate would be substantially reduced if Congress became more physically and structurally more able to perform the day-to-day oversight of the public administration, including the executive offices of the presidency, that is so necessary." *Reprinted in* Miller, *supra* note 11, at 59-60.

134. Indeed, if the "no confidence" proposal was ever adopted, the impeachment power would become truly anachronistic as a means of removing the President. The Reuss alternative would provide immediate action, and, it would not require that *any* recognizable form of misconduct have been committed in order to achieve removal. Additionally, the requirement of a majority vote in both houses might prove easier to meet as a general rule than the impeachment power's two-thirds requirement in the Senate.

135. *See* Note, *Congress versus the Executive: The Role of the Courts,* 11 HARV. J. LEGIS. 352, 367 (*citing* U.S. CONST., art. II, § 3) (1974).

136. *See* Part I (B) *supra.*

the doctrines of executive privilege and separation of powers.[137] The failure of impeachment to fulfill the role envisioned for it does not stem from any inherent flaws in the Framers' constitutional theory, but rather, from practical flaws which have developed in the impeachment process.[138] It is towards remedying these flaws that Congress should direct its energies.

A. A Standing Impeachment Committee

The necessity of authorizing some committee on an *ad hoc* basis to conduct an investigation each time a majority of the House contemplates impeaching someone has undoubtedly contributed to the ineffectiveness of the impeachment power. A better course for the House to take would be to create a permanent impeachment committee. The functions of this committee might include supervision of executive conduct with a view towards early detection of misconduct, investigating specific charges and complaints against impeachable officials, initiating impeachment resolutions when necessary, and, providing the House Managers for the Senate trials.

The advantages of a standing impeachment committee are manifold. First, Congress would not be as dependent upon outside sources for discovering possible abuses of power, especially since its legitimate authority to inquire into executive conduct far exceeds that of private persons or the press. Second, it would be able to maintain detailed files on the key members of the Executive Branch, thereby obviating much of the backtracking which retards the efforts of the *ad hoc* committees.[139] Third, it would not have to wait for the introduction of impeachment resolutions in the House by individual representatives before investigating alleged misconduct. Fourth, and finally, it would be able to introduce impeachment resolutions and draft articles of impeachment on its own initiative which, assuming that the House adopted the resolution formally, would place the accused on trial that much quicker. These advantages should result in more timely action than under the present system, which is of primary importance in the removal of executive officers.[140] The deterrent effect such a standing body might have towards discouraging misconduct, because of the increased risks of discovery and prompt redress, is likewise not to be underestimated.

One likely objection to such an oversight committee is that it would

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137. Berger, *supra* note 111, at 883.
138. *See* Part II *supra*.
139. *See* notes 71-74 and accompanying text *supra*.
140. Recall Hamilton's sentiments in the text accompanying note 35 *supra*.

usurp the President's responsibility for the superintendence of his subordinates.[141] There is, however, this distinction: the President would retain exclusive authority in ensuring that the executive officers were acting in accordance with his or her defined policies, and, the only concurrent authority would extend to the discovery and redress of suspected misconduct. It should be remembered too that Congress was vested with the continuing responsibility of "acquainting itself with the acts and the disposition of the administrative agents of the government . . . to oversee the administration of executive agencies . . . and to inform the public of any wrongdoing or abuses it uncovers."[142]

A more substantive objection is that a permanent impeachment committee with broad investigatory powers would constitute an impermissible intrusion upon the autonomy of the Executive Branch. There are two points which may be offered in refutation of this objection. First, the Supreme Court has tended to recognize the broad scope of Congress' investigatory authority when the inquiry is directed at allegations of malfeasance in executive offices.[143] The extent to which a permanent impeachment committee could conduct "fishing expeditions"[144] into executive conduct absent any specific showing of suspected misconduct is difficult to gauge. Some procedure for entertaining motions to quash may have to be instituted as a defense against overzealous use of the committee's subpoena power if it appears to be using subpoenas as a means of harassment. Until such time occurs, it is to be remembered that the House was granted "the sole Power of Impeachment."[145] This unambiguous and exclusive grant of power would seem to dictate logically that the House "must likewise have the sole power to determine what evidence is required for this purpose."[146]

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141. As was mentioned previously, the President's authority to dismiss his or her subordinates unfettered by a requirement that he or she obtain Senate confirmation, as in the case of appointments, was recognized *after* the adoption of the Constitution, and, arguably, its constitutional footing may not be as secure as the grant to the House of the sole power of impeachment. *See* note 50 *supra.*

142. *Final Report, supra* note 131, at xxiv, *quoting,* United States v. Rumely, 345 U.S. 41 at 45 (1953). The Senate Watergate Committee also urged both Congress and the American people to bear in mind that the free functioning of our political system can not be maintained without the "steadfast vigilance of the conduct of the public officials they choose to lead them." *Id.* at xxv.

143. Chief Justice Warren, speaking for the Court in Watkins v. United States, affirmed the broad scope of investigatory authority used properly for fact-finding pursuant to legislative purposes: "The power (to investigate). . . . is inherent in the legislative process. . . . It encompasses inquiries concerning the administration of existing laws as well as proposed. . . . It includes surveys. . . . *It comprehends probes into departments of the Federal government to expose corruption, inefficiency or waste.* 354 U.S. 178, 187 (1957) (emphasis added). *See* McGrain v. Daugherty, 273 U.S. 135, 170-74 (1927); Kilbourn v. Thompson, 103 U.S. 168, 189 (1881).

144. United States v. Nixon, 418 U.S. 683, 700 (1974).

145. U.S. CONST. art. I, § 2, cl. 5.

146. Berger, *supra* note 101, at 885. As Gerald Gunther explains: "Courts could not adjudicate the relevance of the information sought by the subpoenas without taking some position as to the scope of impeachable offenses — an issue ultimately for Congress under its 'sole impeachment' power." Gunther, *supra* note 101, at 38.

Second, congressional inquiry into the conduct of government officials by way of requests and subpoenas is a far different matter than congressional demands for the production of documents or testimony from private individuals. The primary purpose of the Constitution and the Bill of Rights was to secure the individual against governmental encroachments upon their recognized rights; "not to insulate government officers from accountability or to envelop government files in secrecy."[147] In short, there is no constitutional basis for denying Congress' authority to inquire into the activities of executive officers so long as a legitimate legislative purpose is being served. This conclusion becomes inescapable when one considers that Congress created all of the executive offices, apart from the Presidency and Vice Presidency, and there is no reason for assuming that it concomitantly divested itself of all control over them.[148]

B. Automatic Suspension — A Trial Separation

Once an impeachment resolution is passed by the House, it appears illogical to allow the impeached officer to continue in the very office he or she has been accused of abusing. Until a determination of the accused's guilt or innocence has been reached, the possibility of continued abuses hovers overhead like a menacing cloud. A more sensible course, and one befitting the gravity of an impeachment proceeding, would be to suspend the impeached officer until such time as the Senate renders its verdict. The advisability of such a provision derives some authority from various state constitutions and legislative codes mandating temporary suspension of impeached officers and appointment of interim replacements.[149] Whether Congress could adopt such a provision

147. Berger, *supra* note 101, at 871.

148. For instance, when Congress created the office of Secretary of the Treasury, it provided that: "It shall be the duty of the Secretary of the Treasury . . . to make report and give information to either branch of the legislature. . . respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office. . . . " Act of September 2, 1789, ch. XII, § 2, 2 ANNALS OF CONG. 2174-75 (1789).

149. Idaho's statute is typical:

> Whenever articles of impeachment against any officer subject to impeachment are presented to the senate, such officer is temporarily suspended from his office and can not act in his official capacity until he is acquitted. Upon such suspension of any state officer, his office must at once be temporarily filled by an appointment made by the governor, with the advice and consent of the senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled as required by law.

IDAHO CODE § 19-4015 (1949). For similar provisions, *see* ARK. STAT. ANN. §§ 12-2206, 12-2207 (1968); COLO. CONST. art. XII, § 1; FLA. CONST. art. III, § 17, cl. b.; HAWAII CONST. art. III, § 20; IND. CODE ANN. § 15 (Burns, 1974); IOWA CODE ANN. § 68.5 (West, 1949); LA. CONST. art. IX, § 2; MICH. CONST. art. XI, § 7; MINN. CONST. art VIII, § 3; MO. ANN. STAT. § 106.050 (Vernon, 1966); MONT. REV. CODES ANN. § 94-5417 (1969); NEB. CONST. art. III, cl. 17; NEV. REV. STAT. § 283.270 (1977); N.J. CONST. art. 6, § 6, ¶ 4; N.M. CONST. art. IV, § 36; N.Y. CONST. art. VI, § 24; N.C. GEN. STAT. § 123-12 (1974); N.D. CONST. art. XIV, § 198; R.I. CONST. art. XI, § 1; S.C. CONST. art. XV, § 1; S.D. CONST. art. XVI, § 5; TENN. CODE ANN. § 8-2604 (1973); TEX. CONST. art. XV, § 5; UTAH CONST. art. VI, § 20; WIS. CONST. art. VII, § 1; WYO. CONST. art. VI, § 16.

through a joint resolution, avoiding the necessity of a constitutional amendment, is uncertain.[150]

The primary attraction of suspension from office is the protection it affords against further abuses. The mere circumstance that a corrupt officer's term is coming to a close might no longer dissuade the House from impeaching that officer if it knew that he or she would be suspended from office pending the outcome at trial. Such a provision could have proven instrumental in preventing the treasonous actions of Buchanan's Cabinet officers during the "lame duck" period preceding Lincoln's inauguration.[151] A secondary advantage is that the temporary appointee may be understandably more cooperative in producing requested documents and other evidence before the Senate than would his predecessor, the accused. Additionally, the impeached officer may have more incentive to cooperate fully during the trial since he or she may have a more pressing interest in a speedy trial than might be true otherwise — assuming that the defendant expects to be victorious and wishes to regain his or her post as soon as possible.

C. Ensuring a Speedy Trial — Calling Time Out

The danger of a suspension provision is that opponents of the defendant could conceivably permit the Senate trial to drag on unreasonably in an attempt to foreclose any possibility of the defendant's ever resuming his or her post before the expiration of the administration's term. To remedy this contingency, a time limit could be placed upon the length of the trial, waivable upon the concurrence of a majority of the Senators present and the defendant. Three months would not appear unreasonable. An even shorter limit might be advisable if it appears desirable to ensure at the outset that the Senate would not have to neglect its other duties while sitting as the court of impeachment for long stretches at a time.

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150. The suspension of a civil officer from his post upon impeachment finds no authority from any of the constitutional provisions dealing with impeachment. On the other hand, the Constitution was equally silent in regard to the President's power to dismiss his or her subordinates, and it was left to the first Congress to recognize that doctrine as a logical extension of the President's power to appoint his or her subordinates. *See* note 50 *supra*. Since Congress has exclusive jurisdiction in the area of impeachment, it should be able to adopt such ancillary rules as it deems necessary to the effective operation of its impeachment power. A rule mandating suspension from office upon impeachment would be a logical extension of Congress' impeachment power and wholly compatible with the seriousness of an impeachment charge. It should be noted also that several states have enacted suspension provisions by statute. *See* note 149 *supra*.

151. *See* note 127 *supra*.

CONCLUSION

The impeachment power has exerted little impact upon the quest for responsible government due to its seldom use since the adoption of the Constitution. This poor showing is at cross-purposes with society's fundamental expectation of protection from official malfeasance. What use has been made of impeachment, moreover, has not been particularly noteworthy or startling in light of the concentration on lower court judges and the low conviction rate. The emphasis upon utilizing impeachment against members of the Judiciary is at cross-purposes with what the Framers intended. They looked to impeachment to serve as a sentinel over the Excecutive Branch, and, rightly so, since our nation's history is rife with examples of high-level executive misconduct.

Cabinet officers, in particular, have been prone to commit serious abuses of power. Congress' response to these abuses, whether real or imagined, has been unsatisfactory; one impeachment, and an ill-fated one at that. Much of the blame for this desultory showing rests with the practical difficulties in achieving any semblance of prompt action. It is for this reason that changes should be made in the process itself. The emphasis should be placed upon greater vigilance for misconduct, which might be facilitated through the creation of a standing impeachment committee.

The sudden rise and proliferation of regulatory agencies during this century has created a whole new host of high-ranking civil officers, whose independence and power may rival or even supplant in some instances that of the Cabinet officers. J. Edgar Hoover and his awesome control of the FBI comes readily to mind. The advent of the regulatory agencies is symptomatic of the tremendous increase in the size and scope of the federal government generally in recent years. The murmurings of convening a Constitutional Convention to reexamine the make-up of our federal government has arisen from a growing fear, or recognition perhaps, that the government is assuming unrecognizable proportions. How to control and cut back that governmental morass has become an issue of national concern. The proper means are unclear as yet, but perhaps a reexamination of some old values might be in order. Madison's dream, set out in the opening paragraph of this Note, of a government which can control its own excesses is utopian perhaps, but, a viable impeachment power just might be a step in the right direction.

JOHN A. TAYLOR

CASE COMMENT

Plante v. Gonzalez:[1] The Elected Official's Limited Right to Financial Privacy

All the laws man can devise will not prevent every kind of corruption. The antidote and correction lie in a continuously alert and informed interest in government on the part of the public.[2]

In 1976, the people of the State of Florida adopted a referendum[3] commonly known as the "Sunshine Amendment."[4] The intent of this mandate was to require all major public officials to [file] "[f]ull and

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1. 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd.* 575 F.2d 1119 (5th Cir. 1978), *cert. denied,* 99 S.Ct. 1047 (1979).

2. Douglas, *Honesty in Government,* 4 OKLA. L. REV. 279, 280 (1951).

3. FLA. CONST. art. XI, § 3 provides:
Initiative. The power to propose amendments to any section of this constitution by initiative is reserved to the people. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight per cent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

4. FLA. CONST. art. II § 8 provides:
A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
(a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.
(b) All elected public officers and candidates for such offices shall file full and public disclosure of their campaign finances.
(c) Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law.
(d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law.
(e) No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law.
(f) There shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.
(g) This section shall not be construed to limit disclosures and prohibitations which

[p]ublic disclosure of [their] financial interests''[5] as a means of protecting the public trust from abuse.

The Amendment was a response to numerous political scandals involving high-level elected officials[6] and a pervasive distrust of public office holders by the electorate.[7] In addition to Florida, a number of other states as well as the Federal Government have enacted legislation designed to prevent corruption in government.[8]

Generally, this ethics-in-government legislation falls into two broad

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may be established by law to preserve the public trust and avoid conflicts between public duties and private interests.

(h) Schedule - On the effective date of this amendment and until changed by law:

(1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:

a. A copy of the person's most recent federal income tax return; or

b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosures of secondary sources of income.

(2) Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to subsections (h)(1).

(3) The independent commission provided for subsection (f) shall mean the Florida Commission on Ethics.

5. FLA. CONST. art. II, § 8(a).

6. On August 20, 1974, the U.S. House of Representatives' Committee on the Judiciary favorably reported H.R. Res. 803, a resolution impeaching President Richard M. Nixon, of high crimes and misdemeanors. H.R. REP. NO. 1305, 93rd Cong., 2d Sess. (1974). Mr. Nixon resigned the Presidency on August 24, 1974. Letter from Richard Nixon to Henry Kissinger, Secretary of State, United States of America (Aug. 24, 1974). Also in 1974, Spiro Agnew resigned the Vice Presidency after indictment on bribery charges. Letter from Spiro Agnew to James O. Eastland, President Pro Tempore, United States Senate (February 1974).

In the State of Florida, the Controller, Treasurer and Superintendent of Education were indicted for influence peddling. A Florida Legislative committee recommended that one State Supreme Court justice be impeached; a second justice resigned under fire; a third justice was reprimanded by the state board on judicial conduct.

In 1975, former U.S. Senator Edward Gurney was indicted on influence peddling charges and shortly thereafter U.S. Congressman Robert L.F. Sikes (D-Fla.) was reprimanded by the House of Representatives. *Plante v. Gonzalez,* 575 F.2d 1119, 1122 (5th Cir. 1978). Congressman Sikes was later stripped of his chairmanship of the powerful House Appropriation Subcommittee on Military Construction due to his actions in conflict of interest. *Congressional Quarterly Almanac,* 30-31 (1976).

7. In *'76 Nationwide Survey - People Speak Their Minds,* U.S. NEWS AND WORLD REPORT, May 17, 1976, at 21, the author stated:

> Government, two years after the Watergate scandal broke wide open, remains a dirty word for most citizens. They view elected officials almost uniformly as untrustworthy charlatans who will say or do anything to get into office, then ignore wishes of the voters who put them there. Civil servants are widely regarded as capricious oppressors whose sole aim is to make life miserable for taxpayers.

8. PUB. L. NO. 95-521, 92 Stat. 1824 (1978). ALA. CODE § 536-25-14 (1977). ALASKA STAT. § 39.50.020 (1978). ARIZ. REV. STAT. § 38-542 (1974). ARK. STAT. ANN. § 12-3006 (Supp. 1977). CAL.

categories. The traditional type either prohibited officials from acting in conflict of interest[9] or required them to reveal potential conflicts of interest before voting on a bill or entering into a contractual relationship.[10] Current statutes expressly discourage conflicts of interest by requiring disclosure of a wide variety of financial data[11] such as the value of individual assets and liabilities, total net worth (or net deficit), and the names of persons, companies or organizations contributing substantially to the income of office holders.[12] The constitutionality of the Florida Sunshine Amendment, one of the newer type anti-corruption statutes, was challenged in *Plante v. Gonzalez.*[13]

This comment analyzes whether the right to run for public office, the right to freedom of beliefs and association, and the right to personal privacy have been impermissibly burdened by the Sunshine Amendment. The scope of this analysis is limited to the peculiarities of the Florida Amendment since each state's financial disclosure statute dif-

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GOV'T CODE § 87200 et seq. (West 1976). COLO. REV. STAT. § 24-6-202 (1974). CONN. GEN. STAT. ANN. § 1-83 (West Supp. 1979). DEL. CODE tit. 29, § 5855 (f) (Supp. 1978). D.C. CODE ENCYCL. § 1-1182 (West Supp. 1978). HAWAII REV. STAT. § 84-17 (1976). ILL. ANN. STAT. ch. 127, § 604A-101 et seq. (Smith-Hurd Supp. 1979). IND. CODE ANN. § 4-2-6-8 (Burns Supp. 1978). KAN. STAT. ANN. § 46-247, 75-4301 (Supp. 1978). KY. REV. STAT. ANN. § 61.710 (Bobs Merril Supp. 1978). LA. REV. STAT. ANN. § 38:2213 (West Supp. 1979). ME. REV. STAT. tit. 1, § 1017 (1979). MD. ELEC. CODE ANN. art. 33 § 29-1 et seq. (1976). MASS. GEN. LAWS ANN. ch. 268B (West Supp. 1979). MINN. STAT. ANN. § 10A.09 (West 1979). MO. ANN. STAT. § 105.460 (Vernon Supp. 1979). NEB. REV. STAT. § 49-1496 (1978). NEV. REV. STAT. § 281.561 (1977). N.M. STAT. ANN. § 5-12-10 (B) (1974). N.Y. PUB. OFF. LAW § 74(3)(j) (McKinney Supp. 1978). N.C. GEN. STAT. § 120-96 (Supp. 1975). N.D. CENT. CODE § 16-22-03 (Supp. 1977). OHIO REV. CODE ANN. § 102.02 (Page 1978). OKLA. STAT. ANN. tit. 26, § 15-104 (West Supp. 1978). OR. REV. STAT. § 244.070 (1977). PA. STAT. ANN. tit. 46, § 143.5 (d) (Purdon 1969). R.I. GEN. LAWS § 36-14-15 (Supp. 1979). S.C. CODE § 8-13-810 (1977). S.D. COMP. LAWS ANN. § 12-25-28 (1975). TENN. CODE ANN. §§ 8-4125 (Supp. 1978); 4126 (1973). TEX. REV. CIV. STAT. ANN. art. 6252-9b (Vernon Supp. 1978). UTAH CODE ANN. § 67-16-7 (1978). VA. CODE § 2.1-358(d) (1979). WASH. REV. CODE ANN. § 42.17.240(1) (Supp. 1979). W. VA. CODE § 6B-1-1 (1979). WIS. STAT. ANN. § 19.43 (West Supp. 1979).

9. A conflict of interest may be defined as any circumstance in which the personal interest of a public official in a matter before him in his official capacity may prevent or appear to prevent him from making an unbiased decision with respect to the matter. Rogers, *Conflicts of Interests: A Trap for Unwary Politicians,* 11 OSGOODE HALL L.J. 537 (1973).

10. *See* Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws,* 73 MICH. L. REV. 758 (1975). FLA. STAT. ANN. § 122.311 (West 1973), prohibiting public officials from acting in conflict of interest, is typical of the older category statutes.

In 1974, the Florida Legislature enacted a sweeping reform of its conflict laws. FLA. STAT. ANN. § 112.3145) (West 1973). For the first time in that state certain elected and appointed officials were required to make public disclosure of personal financial information. *See* Goldtrap v. Askew, 334 So. 2d 20, 22 (Fla. 1976) where the Florida Supreme Court held, "[t]he disclosure of personal finances to the extent prescribed in Section 112. 3145 advances the legitimate interest of the State in preventing the wrongful diversion of governmental authority to private financial gain."

See note 8, *supra,* for other state financial disclosure statutes.

11. *See* note 4, *supra,* FLA. CONST., art. II § 8(h)(1).

12. *See* note 8, *supra,* for other state statutes.

13. 575 F.2d 1119 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 1047 (1979).

fers from the others. Notwithstanding some specific differences, these statutes generally have a great deal in common and raise substantially similar constitutional questions. To the extent that a state's financial disclosure provisions are similar to the Sunshine Amendment, the court's reasoning in *Plante* will be persuasive.[14]

Following an overview of the background of *Plante,* this comment examines each of the aforementioned rights as they relate to the Sunshine Amendment. In addition, it discusses the standard of review established by the *Plante* court to test the privacy claims raised by the implementation of mandatory financial disclosure statutes. The comment concludes with a critique of the only major case that is inconsistent with the holding reached in *Plante.*

I. STATEMENT OF THE CASE

In *Plante v. Gonzalez,*[15] five Florida State Senators filed suit in the Federal District Court for the Northern Division of Florida seeking a declartory judgment that the financial disclosure requirements of the Sunshine Amendment violated their right to privacy guaranteed by the first, fourth, fifth, ninth and fourteenth amendments to the United States Constitution.[16] The District Court granted defendants' motion to dismiss for failure to state a claim upon which relief may be granted.[17] On June 30, 1978, the dismissal was affirmed by the United States Court of Appeals.[18]

In its opinion, the Circuit Court addressed two important constitutional issues: (1) whether mandatory public disclosure of personal financial data has a chilling effect on the decision to become a candidate for office, thereby depriving the electorate of its right to vote for candidates of its choice; and (2) whether financial disclosure provisions of the Sunshine Amendment violate the Senators' federally protected right of privacy?[19]

The Circuit Court, consistent with precedent and the concept of

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14. As the court observed, "[w]hile many state courts have ruled on the constitutionality of similar plans, this appears to be a case of first impression for the lower federal bench." *Id.* at 1123-24. The following state court decisions have received U.S. Supreme Court dispositions: Illinois State Employees Ass'n. v. Walker, 57 Ill. 2d 512, 315 N.E. 2d 9 (1974), *cert. denied sub. nom.* Trooper's Lodge No. 41 v. Walker, 419 U.S. 1058 (1974); Montgomery County v. Walsh, 274 Md. 502, 336 A. 2d 97 (1975), *appeal dismissed,* 424 U.S. 901 (1976); Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed,* 412 U.S. 925 (1973); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed,* 417 U.S. 902 (1974).

15. 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd.,* 575 F.2d 1119 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 1047 (1979).

16. Plante v. Gonzalez, 437 F. Supp. 536, 538, (N.D. Fla. 1977).

17. FED. R. CIV. P. 12(b)(6).

18. Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 1047 (1979).

19. *Id.* at 1123.

privacy developed by the United States Supreme Court,[20] held that mere deterrence of persons from seeking public office does not constitute sufficient grounds to invalidate financial disclosure provisions. With respect to the privacy issue, the court ruled that financial privacy is not within the autonomy branch[21] of the right to privacy. Moreover, the standard of review to determine whether the Sunshine Amendment had violated the Senators' interest in confidentiality is a balancing test, comparing the interests the law serves with those it hinders. The court declared that mandatory financial reporting for elected officials is constitutional, and the goals of avoiding conflicts of interest and educating the electorate justify public disclosure of financial reports.[22]

II. THE RIGHT TO RUN FOR OFFICE

In *Plante v. Gonzalez*[23] the plaintiffs alleged that mandatory disclosure of personal financial data would deter many persons from seeking or holding public office,[24] thereby placing an unconstitutional burden on the right to run for political office.[25] However, the "right" to be a candidate for public office has never be considered to be an *independent,* fundamental constitutional right.[26] To the extent that the

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20. Griswold v. Connecticut, 381 U.S. 479 (1965) (statute forbidding use of contraceptives unconstitutionally intrudes upon the rights to privacy); Roe v. Wade, 410 U.S. 113 (1973) (constitutional right of privacy encompasses a woman's decision to have an abortion); *See generally,* Brandeis v. Warren, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890); Henkin, *Privacy and Autonomy,* 74 COLOM. L. REV. 1410 (1974); O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment Protected Privacy,* 13 NEW ENGLAND L. REV. 662, 665 (1977).

21. *See* note 80 and accompanying text *infra.*

22. 575 F.2d at para. 11, 1119-20 (5th Cir. 1978).

23. 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd.,* 575 F.2d 1119 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 1047 (1979).

24. Complaint for Appellant at para. 11, Plante v. Gonzalez, 437 F. Supp. 536 (N.D. Fla. 1977); *See also* City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 262-63, 466 P.2d 225, 227, 85 Cal. Rptr. 1, 3 (1970), for an illustration of the deterrent effect on a financial disclosure statute on local officials. City feared wholesale resignation of municipal officials, who refused to make required disclosure. It maintained that disclosure would "have a crippling effect upon the affairs of municipal government." *Id.*

Baltimore Sun, Mar. 8, 1979, at A8, col. 1, where it was reported:

> Joseph A. Califano, Jr., was indignant. The strict new federal ethics code, championed by President Carter, was so strict, he said that many of his top officials would be forced to resign. The Secretary of Health, Education and Welfare warned yesterday of 'an unprecedented brain drain of talent,' if a tough restriction on post-government employment stays in effect.

Id.

25. Complaint for Appellant, Plante v. Gonzalez, 437 F. Supp. 536 (N.D. Fla. 1977).

26. Bullock v. Carter, 405 U.S. 134, 142-43 (1972). For the purposes of this comment, independent fundamental rights are those rights which are *per se* accorded the most vigorous constitutional protection — strict scrutiny. The right to vote is one such right. Other rights such as the right to run for political office, have only minimal constitutional safeguards. Only if the free exercise of a fundamental right (i.e., the right to vote) is infringed upon by burdens on the right to run,

United States Supreme Court has invalidated state imposed regulations on candidacy,[27] it has generally done so as a means of protecting the fundamental right to vote.[28]

In *Bullock v. Carter,*[29] plaintiffs challenged a Texas statutory scheme which, without write-in or other alternative provisions, required payment of fees as a prerequisite to placing a candidate's name on the ballot. Plaintiffs alleged that they were unable to pay the required fees and as a result were barred from running. The Court noted that "the rights of voters and the rights of candidates do not lend themselves to neat separation . . . [i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on the voters."[30] This preliminary step is necessary because regulations which affect candidates almost always have at least a theoretical, correlative effect on the voters.[31]

In *Lubin v. Panish,*[32] the United States Supreme Court invalidated a California statute under which an indigent was denied nomination papers for the office of county supervisor because he was unable to pay the filing fee required of all candidates. In both *Bullock* and *Lubin* the filing fee statutes stood as an absolute bar to candidacies of indigents. While the state has substantial interests in keeping ballots manageable[33] and assuring a place on the ballot for serious candidacies,[34] the courts in *Bullock* and *Lubin* concluded that "selection of candidacies solely on

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will the right to run be protected by strict scrutiny. In this sense the right to run for office is considered to be merely a "dependent" fundamental right. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-19, (1978) where the author states: "the Court has refused to recognize a special constitutional right to candidacy." *Id.* at 775.

Cf. rights that have been determined to be fundamental: Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); NAACP v. Alabama, 377 U.S. 288 (1963) (freedom of association). *See* note 28 *infra* (right to vote).

27. Lubin v. Panish, 415 U.S. 709 (1974), Bullock v. Carter, 405 U.S. 134 (1972) (filing fees); Storer v. Brown, 415 U.S. 724 (1974) (petition requirements); Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (loyalty oaths).

See also Note, *supra* note 10, at 763 n.26, where the author states: "[r]egulation for a legitimate state purpose is invalid if it unnecessarily chills the exercise of protected rights. NAACP v. Alabama, 377 U.S. 288 (1963); Shelton v. Tucker, 364 U.S. 479 (1960)."

28. Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

29. 405 U.S. 134 (1972).

30. *Id.* at 144. Similarly, in Lubin v. Panish, 415 U.S. 709 (1974), the court struck down candidate's filing fees, holding that:

> the interests involved are not merely those of parties or individual candidates; the voters can assert their preference only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of the voters.

Id. at 716.

31. Bullock v. Carter, 405 U.S. 134, 143 (1972).

32. 415 U.S. 709 (1974).

33. *Id.* at 717-18.

34. *Id.* at 718.

the basis of ability to pay a filing fee without providing any alternative means is not necessary to the accomplishment of the state's legitimate election interests.'"[35] By denying indigent candidates a place on the ballot, indigent voters were denied the ability to assert their policy preferences through these candidates.

It is apparent that when constitutionally protected rights are adversely affected by a statute or regulatory scheme, a rigorous standard of review is demanded. Thus the rule formulated in *Bullock* and followed in *Plante* requires strict scrutiny[36] of regulations on candidacy only when such burdens significantly interfere with the free exercise of the franchise; otherwise, a rational relationship will be the standard of review.[37] The *Plante* court maintained that the decisive factor in determining the appropriate standard of review was whether the disclosure provisions of the Sunshine Amendment are so restrictive as to deny to an identifiable segment of the electorate a meaningful right to vote for the candidates of their choice.[38]

Financial disclosure statutes, such as the Sunshine Amendment,[39] do

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35. *Id.* at 718.

36. *See* note 37 *infra* for discussion of "strict scrutiny" and other standards of review.

37. *See* TRIBE, *supra* note 26, at § 16-2 (1978). The theory of minimum rationality governs the relation between means and ends. The court must reach and determine whether the classification drawn or regulations promulgated are reasonable in light of their purposes. The rational relationship standard assumes that all legislation must have a legitimate public purpose or set of purposes based on some conception of the common good. Courts have traditionally displayed great deference toward the legislature's definition of the general good. *Id. See generally* Tussman & Ten Broeck, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

The idea of strict scrutiny acknowledges that certain political choices or regulatory schemes — *i.e.,* those which burden fundamental rights — must be subjected to rigorous analysis in order to preserve and protect the substantive values of equality and liberty. This demanding standard of review is generally understood as admonishing lawmakers and regulators to be cautious of their purposes and of the effects of their choices. Legislative and administrative regulations are to be strictly scrutinized and held unconstitutional absent a compelling governmental justification if they distribute benefits or burdens in a manner of inconsistent with fundamental rights. TRIBE, *supra* note 26, at § 16-6. *See also* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (strictly scrutinizing but upholding limitations on certain campaign contributions); Roe v. Wade, 410 U.S. 113, 155, 163-64 (1973) (strictly scrutinizing but upholding certain abortion laws).

One commentator suggested that *Bullock v. Carter, Lubin v. Panish* and other related cases involving restrictions on candidacy might be read as applying an "intermediate standard" of judicial scrutiny. For full discussion *see* Note, *supra* note 10, at 763-65. Gender-based classifications and a number of important but not "constitutionally fundamental" interests have triggered forms of review poised between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny. For the evolution of the intermediate standard and a detailed description of its various forms *see* TRIBE, *supra* note 26 at §§ 16-30, 31.

38. *See* Note, *supra* note 10, at 766, where the author states:

> Showing a burden on certain individuals' ability to run for public office probably would not be sufficient; to be successful, the argument would have to show that the burden fell on potential candidates in such a way as to exclude candidates representing certain views, thereby depriving some voters of the ability to "assert their preferences".

39. FLA. CONST. art. II § 8. For the text of this amendment *see* note 4 *supra.*

not erect insurmountable barriers to any known candidacies[40] nor do they create discriminatory classifications which are to be viewed as inherently suspect.[41] Unlike *Bullock* and *Lubin* — where filing fee statutes clearly denied representation to poor groups supporting candidates unable to pay filing fees — mandatory public disclosure of personal financial information by government officials is not targeted at a particular candidate or groups of candidates,[42] nor does it impact on an identifiable segment of voters or supporters.[43]

Rather than eliminating certain categories of candidates from the ballot, financial disclosure is designed to improve the electoral process by increasing voter knowledge about the candidates for public office.[44] The lower court in *Plante* found at least four substantial state interests which were served by the Sunshine Amendment: (1) assistance in detecting and prosecuting officials who have violated the law; (2) banishing the appearance of dishonesty in government and the creation of public

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40. The requirement that a candidate collect a certain number of voter-signatures in order to qualify for a place on the ballot, which has been upheld in American Party of Texas v. White, 415 U.S. 767 (1974) and Storer v. Brown 415 U.S. 724 (1974), would seem to create a substantially greater obstacle to candidacy than the personal financial disclosure of the Sunshine Amendment.

41. The fourteenth amendment declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The amendment prohibits government action which is influenced by prejudice and aimed at discrete and insular minorities. Legislative classifications of persons based on race, nationality and alienage have all been held to be constitutionally suspect of violating the fourteenth amendment's equal protection clause. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). A classification restricting a constitutionally safe-guarded interest denies equal protection unless it can be shown that the classification promotes a compelling state interest, is closely related to important state objectives, and a less restrictive classification would not adequately promote the state's objectives. The *Plante* court noted that "there is no reason to believe that those most sensitive to their privacy will be Democrats or Republicans, liberals or conservatives, blacks or whites." 575 F.2d 1119, 1127 (5th Cir. 1978). Furthermore, the court stated that the Sunshine Amendment does respond to important state objectives. *Id.*

42. In Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974), the court considered a statute that *was* targeted at particular candidates and their supporters. The court invalidated a statute which provided that the names of no party or candidate shall be allowed on the ballot unless they shall have first submitted to a loyalty oath stating that they do "not advocate the overthrow of local, state or national government by force or violence." *Id.* at 441. Like filing fees, the loyalty oath stood as an absolute roadblock to candidacy for those who failed to submit to the oath, thereby burdening the right to vote of an identifiable segment of electorate. As the Court there observed, "[a]t stake . . . are appellants' interests as party members in casting an effective ballot." *Id.* at 449.

43. *But see* Note, *supra* note 10, at 766, where the author states: "[d]isclosure of financial ties may in fact be a greater burden for the rich, who 'presumably' have more ties to disclose, than there are for the poor." As a practical matter financial reporting requirements may impose a burdensome task upon individuals with extensive assets. But no court has determined this factor to be a sufficient basis for invalidating a financial disclosure statute.

On the other hand, "[p]ublic officials whose worth or investments do not require disclosure may find that fact understandably embarrassing." City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 270, 466 P.2d 225, 233; 85 Cal. Rptr. 1, 9 (1970).

44. *See also* notes 9 and 10 and accompanying text *supra*.

confidence in government officials; (3) deterring actual corruption and conflict of interest; and (4) informing voters of interests to which public officials might respond while in office.[45]

The United States District and Circuit Courts for the State of Florida concluded that on its face the Amendment bears a rational relationship to legitimate state interests, and with this there can be little argument. Both courts further held that in practice the Amendment is reasonably suited to achieve its stated goals and that it does "significantly promote them."[46] Even if the right to run for public office were considered to be fundamental,[47] and even if the right to vote was somehow implicated, the state's interest in disclosure statutes is strong enough to justify the modest infringement on these rights.[48]

III. THE RIGHT TO PRIVACY

The plaintiffs in *Plante v. Gonzalez*[50] also attacked the Sunshine Amendment's[51] provisions as an invasion of their right to privacy.[52] They maintained that their rights to personal and family privacy were unnecessarily and impermissibly intruded upon by the financial disclosure mandate.

"[T]he right to be let alone"[53] has historically been an important element of American jurisprudence.[54] The people of this country have jealously guarded their right to be free from government intrusion upon

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45. Plante v. Gonzalez, 437 F. Supp. 536, 542 (N.D. Fla. 1977).

46. Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978). One commentator counsels that there exists a deeply embedded judicial deference to legislative purpose "which has often led the Supreme Court to treat the rationality requirement as the equivalent of a strong presumption of constitutionality." TRIBE, *supra* note 26, at § 16-2.

47. There is no support in the cases for such a view. *See* notes 26-28 and accompanying text *supra*.

48. One commentator has stated:

> The Supreme Court has considered the first, second and fourth of these goals in the context of campaign contribution disclosure. The Court held them strong enough to outweigh any infringement on first amendment rights caused by the Act. *Buckley v. Valeo,* 424 U.S. at 66-68 (cite omitted). The Supreme Court of Florida, in upholding the legislative precursor of this amendment, found that "Florida has a compelling interest in protecting its citizens from abuse of the trust placed in their elected officials." *Goldtrap v. Askew,* 334 So. 2d 20, 22 (Fla. 1976).

Note, *supra* note 10, at 767, quoting Plante v. Gonzalez, 575 F.2d 1119, 1135 (5th Cir. 1978).

49. Storer v. Brown, 415 U.S. 724 (1974).

50. 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd.*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 1047 (1979).

51. FLA. CONST. art. II § 8. For text of this amendment *see* note 4 *supra*.

52. Complaint for plaintiff at paras. 10 and 12, Plante v. Gonzalez, 437 F. Supp. 536 (N.D. Fla. 1977).

53. Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

54. *See* Brandeis & Warren, *supra* note 20. *See generally* Gerety, *Redefining Privacy,* 12 HARV. CIR. R./CIV. LIB. L. REV. 233 (1977); A. WESTIN, PRIVACY AND FREEDOM (1967).

or unreasonable publication of their private affairs.[55] The Senators in *Plante* asserted that the right to economic privacy is a constitutionally protected right and that it is a privilege "long recognized at common law as essential to the orderly pursuit of happiness by free men."[56]

The right to privacy is protected by the Constitution and common law safeguards against specific invasions of privacy.[57] In *Griswold v. Connecticut,*[58] the Supreme Court of the United States in an opinion by Justice Douglas reasoned that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[59] These penumbras are, Justice Douglas maintained, the repository of the right to privacy. The penumbrial right approach suggests that the right to privacy has its origin in guarantees implicit in several constitutional provisions rather than being located within a particular provision or in specific language. While individual justices have variously located the roots of this right in the first amendment,[60] the fourth and fifth amendments,[61] the penumbras of the Bill of Rights,[62] the ninth amendment or in the fourteenth amendment,[63] "[t]hese decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."[64]

In reviewing the Senators' claims, the *Plante* court held that financial privacy for elected officials is not a fundamental right.[65] The court sup-

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55. For a detailed discussion on the autonomy and confidentiality of interests of privacy *see* notes 80-130 and accompanying text *infra.*

56. Brief for Appellant at 19, Plante v. Gonzalez, 437 F. Supp. 536 (N.D. Fla. 1977), *quoting* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

57. *See* W. PROSSER, THE LAW OF TORTS, § 117 at 816 (4th ed. 1971); RESTATEMENT OF TORTS, § 867 (1939); Fried, *Privacy*, 77 YALE L.J. 475 (1968).

58. 381 U.S. 479 (1965).

59. *Id.* at 484-86. The exact origins of the constitutional rights to privacy are in some doubt. Only a plurality of justices adhered to Douglas' penumbrial rights view. *See* 381 U.S. at 486-99, where three justices, in a concurrence written by Goldberg, J., argued that certain fundamental rights, such as privacy, in addition to those mentioned in the first eight amendments, are protected from governmental infringement through the ninth amendment. For a thorough analysis of *Griswold, see Symposium — The Griswold Case and the Right to Privacy,* 64 MICH. L. REV. 197 (1965).

60. Stanley v. Georgia, 394 U.S. 557 (1969) (mere private possessions of obscene matter cannot itself be made a crime even if the matter was unprotected by the first and fourteenth amendments).

61. Katz v. U.S., 389 U.S. 347 (1967) (government cannot invade privacy of personal telephone conversations even in public telephone booth).

62. *See* note 59 and accompanying text *supra.*

63. Meyer v. Nebraska, 262 U.S. 390 (1923) (parents have the right to send children to the school of their choice).

64. Roe v. Wade, 410 U.S. 113, 115 (1973).

65. In quoting San Antonio School District v. Rodriguez, the court stated: "[T]he Supreme Court has warned against giving heightened attention to cases involving new 'fundamental interests.'" 575 Fd. 2d 1119, 1134 (5th Cir. 1978).

ported its holding by repeating a warning found in *San Antonio Independent School District v. Rodriguez*[66] against discovering new fundamental interests. It also maintained that attaching fundamental status to financial privacy "would draw into question many common forms of regulation, involving disclosure to the public and disclosure to government bodies."[67] The court reached the conclusion that financial privacy[68] is not a fundamental right.[69]

Unlike other fundamental rights, such as the right to vote,[70] interstate travel,[71] freedom of association,[72] trial by jury,[73] and freedom of speech,[74] the "concept of a constitutional right to privacy still remains largely undefined."[75] However, *Whalen v. Roe*[76] clarified the cases which have recognized privacy rights by noting the involvement of two distinct kinds of interests.[77] One interest is the individual's desire to avoid disclosure of personal matters, referred to in *Plante* as the *confidentiality* interest.[78] The other is the interest in making certain kinds of important decisions without government interference, known as *autonomy*.[79] In addition to confidentiality and autonomy, a further interest that is arguably constrained by mandatory financial disclosure, and which was raised in *Plante,* is that of freedom of association and beliefs.

A. Autonomy

The basis of autonomy right is a person's "interest in independence in making certain kinds of important decisions."[80] The *Plante* court,

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66. The *Rodriguez* Court stated: "[i]t is not the providence of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." 411 U.S. 1, 33-34 (1973).

67. Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

68. Financial privacy is limited for private citizens and is even more limited for elected officials. *See* note 109 and accompanying text *infra.*

69. *See* note 70-75 and accompaning text *infra.*

70. Dunn v. Blumstein, 405 U.S. 330 (1972).

71. Shapiro v. Thompson, 394 U.S. 618 (1969).

72. NAACP v. Alabama, 357 U.S. 449 (1958).

73. Duncan v. Louisiana, 391 U.S. 145 (1968).

74. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

75. Kurland, *The private I,* THE UNIVERSITY OF CHICAGO MAGAZINE 7, 8 (Autumn, 1976) *quoted* in Whalen v. Roe, 429 U.S. 589, 599 (1977).

76. 429 U.S. 589 (1977).

77. *Id.* at 599-600.

78. *Id. See* Stanley v. Georgia, 394 U.S. 557 (1969); California Bankers Association v. Schultz, 416 U.S. 21 (1974). For a discussion of the confidentiality interest *see* notes 107-130 and accompanying text *infra.*

79. Whalen v. Roe, 429 U.S. at 599-600. *See* Roe v. Wade, 410 U.S. 113 (1973), Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965), Meyer v. Nebraska, 262 U.S. 390 (1923), Allgeyer v. Louisiana, 165 U.S. 578 (1897), Paul v. Davis 424 U.S. 693 (1976). For a discussion of the autonomy interest *see* notes 80-106 and accompanying text *infra.*

80. Whalen v. Roe, 429 U.S. 589, 599 (1977).

citing *Paul v. Davis*,[81] defined the scope of this interest as limited to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education."[82] The court stated that when areas of intimate family decision making are the subject of state interference, the regulation must involve a compelling state interest *and* it must be the least restrictive alternative.[83] The question is whether disclosure of personal financial data has such an adverse impact on the conduct of important family matters as to warrant strict scrutiny; that is, whether the impact on the family *per se* caused by financial disclosure is equivalent to or greater than those instances where the court has struck down state interference.[84]

The *Plante* court summarily dismissed the impact of the disclosure requirement on intimate family concerns.[85] Instead, the court turned briefly to cases involving financial privacy,[86] proclaiming:

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81. 424 U.S. 693 (1976).

82. *Id.* at 713.

83. Cases which have employed this test include Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Loving v. Virginia, 388 U.S. 1 (1967) (miscegenation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (education of children); Skinner v. Oklahoma, 316 U.S. 535 (1942) (compulsory sterilization); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (pornography); Whalen v. Roe, 429 U.S. 589 (1977) (disclosure of drug prescriptions).

Any regulations burdening rights which are deemed to be constitutionally protected, "unless shown . . . to promote a *compelling* governmental interest, (are) unconstitutional" Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

Additionally, one Court has stated:

> [T]he state cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision" . . . and must be "tailored" to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means. . . .

Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

84. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

85. The appellants, relying on language from Meyer v. Nebraska, 262 U.S. 390, 399 (1923), contended that the individual's liberty interest includes the right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Brief for Appellant at 15, Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). The *Plante* court questioned the validity of this view because "Meyer comes to us from the heyday of substantive due process analysis." Plante v. Gonzalez, 575 F.2d 1119, 1129 (5th Cir. 1978).

On the other hand, defendants cited language from Palko v. Connecticut, 302 U.S. 319 (1937), asserting that only those rights "implicit in the concept of ordered liberty" which are either the subject of state regulation or are substantially affected thereby, are to be closely scrutinized. Plante v. Gonzalez, 575 F.2d 1119, 1129 (5th Cir. 1978). The *Plante* court states *"Palko's* specific holding was overruled in Benton v. Maryland, 395 U.S. 784 (1969)." *Id.* However, even the court admits that this language quoted by the defendants was quoted with approval in Roe v. Wade, 410 U.S. 113, 152 (1973), 575 F.2d 1119, 1129 at n.16 (5th Cir. 1978). *See also* Whalen v. Roe, 429 U.S. 589, 599 (1977), and Paul v. Davis, 424 U.S. 693, 712 (1976).

In any event, the *Plante* court concludes that "even if these statements maintain their full precedential weight, their words provide no easy answers. Therefore, we turn to cases concerning financial privacy, and to the considerations which support the autonomy branch of the right to privacy." 575 F.2d 1119, 1129 (5th Cir. 1978).

86. California Bankers Association v. Schultz, 416 U.S. 21 (1974) (disclosure requirements of

> There are two ways in which financial privacy could fall within the autonomy branch of the right to privacy. Financial privacy might itself involve the kind of crucial decision-making protected by the Constitution. Alternatively, financial disclosure might have such a strong impact on making familial decisions, those decisions which are clearly within the privacy right, that it must be prohibited to protect those choices.[87]

This approach is advantageous because it provides a clear standing for testing the interest at stake. It seeks to determine whether financial privacy is an autonomy interest equivalent to or greater than those to which the Supreme Court has accorded protection — such as abortion, contraception, sterilization, miscegenation and other areas related to the intimacies of sex and family life.[88]

It has been observed[89] that if "a public official's financial interests can be considered an intimate personal aspect of the aura of privacy surrounding the home, then personal finances deserve the same zealous protection offered the marital bedroom."[90] The *Plante* court had little difficulty placing financial privacy outside the autonomy right *per se*.[91] This decision is amply supported by the fact that our government has traditionally required that detailed financial information be disclosed to it, and further, that much of it be made available to the public.[92]

A more difficult problem confronted the court when it sought to determine whether mandatory financial disclosure *indirectly* affects

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Bank Secrecy Act); Buckley v. Valeo, 424 U.S. 1 (1976) (campaign disclosure); City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 446 P.2d 225, 85 Cal. Rptr. 1 (1970) (sweeping financial disclosure statute for elected officials).

These cases, as well as the cases set forth in note 149 *infra*, discuss an interest referred to as "financial privacy". In essence, the focus here centers on an individual's right to prevent disclosure of his financial affairs — both personal and professional. Forced public revelation of an individual's economic interests is claimed by some, including the plaintiffs here, to impinge upon their ability to order their financial affairs.

87. 575 F.2d 1119, 1130 (5th Cir. 1978).

88. *See* note 83 *supra*.

89. *See* Note, *Right of Privacy — Mandatory Financial Disclosure Statements from Public Officials — Unwarranted Intrusion, or Legitimate Public Concern?*, 45 TUL. L. REV. 167 (1970).

90. Note, *supra* note 89, at 172-73. *See also* note 97 and accompanying text *infra* for the distinction made between privacy interests of public officials versus those of private individuals.

91. As the court stated, "Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process. . . . They might deter some decisions. More basically, however, disclosure laws do not involve decisions as important as those in the earlier decided cases." 575 F.2d 1119, 1130-31 (5th Cir. 1978).

92. Americans have for some time been forced to disclose extensive financial data to their government in the form of an annual federal income tax return. *See* U.S. v. Sullivan, 274 U.S. 259 (1927) (conviction for failure to file income tax return notwithstanding a fifth amendment defense). Social Security laws, Securities and Exchange Commission regulations, the Bank Secrecy Act and Federal and State Lobbying statutes are just a few of the many instances where the government insists on substantial financial reports. *See also*, note 8, *supra*, listing state financial disclosure statutes requiring reports from elected officials.

constitutionally protected rights by burdening the process by which intimate family decisions are made. Relying on a series of United States Supreme Court holdings that have "limited the horizontal reach of the privacy right in similar situations,"[93] the *Plante* court concluded that despite the substantial impact public revelation of personal financial information *might* have on important family decision-making, it does not unconstitutionally interfere with a protected interest.[94]

The *Plante* court's rationale seems to be supported by *Whalen v. Roe,*[95] where an indirect burden on the autonomy interest was also at issue. In *Whalen,* the Supreme Court sanctioned a state statute requiring physicians to disclose to the state the names and addresses of patients who received prescriptions involving a class of drugs for which there was both a lawful and unlawful market.[96] While the reported information was not to be publicly disclosed unless required in a criminal prosecution, the plaintiffs alleged that the mere disclosure of this information to the state interfered with their interest in deciding whether to take the drugs. Plaintiffs' doctors maintained that the reporting requirements might induce patients to refuse needed medication and might make some physicians reluctant to prescribe the classified drugs even when their use was medically indicated.[97]

It is indeed a significant factual distinction that the statute in *Whalen* did not require public disclosure of the reported information. Nevertheless, neither of the statutes prohibited any particular conduct nor did they deprive the litigants of the right to make decisions independently. In *Whalen,* the physicians and patients were as free before the enactment of the statute to prescribe and ingest medically necessary controlled drugs as they were subsequent to the enactment. Likewise, the Senators in *Plante* were as unfettered to pursue legal economic opportunities and manage their personal financial affairs prior to the enactment of the Sunshine Amendment as afterward. Thus, no demonstrable burden on the Senators' autonomy interest was proved.

In addition to *Whalen,* the *Plante* court discussed state regulation of abortions and compared United States Supreme Court holdings in that area to state imposed financial disclosure regulations. The court endeavored to show that if reporting and regulation of abortion is permissible, financial disclosure by elected officials must stand.

In *Planned Parenthood of Central Missouri v. Danforth,*[98] the

93. 575 F.2d 1119, 1131 (5th Cir. 1978).
94. *Id.*
95. 429 U.S. 589 (1977).
96. 1972 N.Y. Laws, ch. 878; N.Y. PUB. HEALTH LAWS §§ 3300 et. seq. (McKinney Supp. 1975-76).
97. Whalen v. Roe, 429 U.S. 589, 600 (1977).
98. 428 U.S. 52 (1976).

Supreme Court ruled that record keeping requirements of abortions performed within the state would not impermissibly interfere with a woman's decision to have an abortion.[99] Again, the confidentiality of the reported data represents an important factual difference. Although the intimate nature of the abortion decision clearly raises substantial privacy interests, the *Danforth* court nevertheless concluded that there was "no legally significant impact or consequence on the abortion decision"[100] as a result of record keeping and reporting requirements. If *Danforth* found no harmful effects on the abortion decision caused by a reporting requirement, it is difficult to see how such effects can be found to exist with respect to the routine management of one's financial affairs.[101]

Plante's reliance on the parallel to *Whalen* and the abortion funding cases is persuasive to the extent that it attempts to demonstrate that cer-

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99. *Id.* at 81. The law enacted by Missouri's 77th General Assembly stated in part:

> 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding the sum of medical knowledge through compilation of relevant maternal health and file data and to monitor all abortions performed to assure that they are done under and in accordance with the provisions of the law. . . .
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> 3. All information . . . "shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state or national public health officers."

100. 428 U.S. 52, 81 (1976).

101. The *Plante* court also referred to the following abortion decisions in sustaining this point: Poelker v. Doe, 432 U.S. 519 (1977) (the City of St. Louis, in electing, as a policy of choice, to provide publicly financed hospital services for childbirth but not for nontherapeutic abortions, held not to violate any constitutional rights); Maher v. Roe, 432 U.S. 464 (1977) (equal protection does not require a state participating in the medicaid program to pay for nontherapeutic abortions for indigent women simply because it pays expenses incident to childbirth). In *Maher,* the United States Supreme Court also upheld a requirement that women seeking state funded abortions make a prior written request and receive prior authorization by the Department of Social Services. The court declared that since the state could insist upon a prior showing of medical necessity to insure that its money was being spent for authorized purposes, these requirements were not unreasonable. Like the disclosure regulations in *Plante,* these "prerequisites" were found to pose no obstacle to the litigants' autonomy interest. *Id.* at 480. Beal v. Doe, 432 U.S. 439 (1977) (finding of a nontherapeutic abortion is not a condition of participation in the Medicaid program). In *Beal,* the court invalidated a provision under which no financial assistance would be extended for medically necessary abortions unless two physicians in addition to the attending physician, had examined the patient and concurred in writing as to the medical necessity of the abortion. The Court held that this requirement interferes with the attending physician's medical judgment. Curiously absent from the Court's opinion is any discussion of the potential impact of this provision on the woman's choice to have an abortion.

While none of these cases directly faced the disclosure issue, each of them, in part, stands for the proposition that governmental institutions are not required to provide free nontherapeutic abortions to indigent women. This ruling was made with the full knowledge that many of these poor women would have no choice but to give birth absent government subsidized abortions. The *Plante* court maintains that "although the cost of an abortion operates as a much stronger influence on the choice involved than does financial disclosure in this case, the court held that government actions which did not work as a bar to abortions would not be subject to scrutiny." 575 F.2d 1119, 1131-32 (5th Cir. 1978).

tain secondary effects on an important family decision are not violative of an individual's autonomy interest.[102] As the court succinctly noted, "if such strong secondary effects on the family do not demand scrutiny, the financial disclosure law cannot require a close examination because of its impact on the family."[103]

It is noteworthy that the Senators failed to state the kinds of family decision-making that would be chilled by mandatory financial disclosure.[104] Nor did they discuss specific instances where disclosure had a direct or indirect determinative effect on the family decisions of those officials in Florida that have complied with the Sunshine Amendment, or of those officials in other jurisdictions with similar statutes.[105] On the record of this case, the Amendment does not appear to have a cognizable impact on the way in which intimate family decisions are made.[106]

B. Confidentiality

In *Whalen v. Roe,* the Supreme Court defined confidentiality as "the individual interest in avoiding disclosure of personal matters."[107] Each person has a right not to have private affairs made public affairs by the government. While it is clear that a right of confidentiality exists, the court in *Fritz v. Gorton*[108] stated:

> As with other rights, it is not absolute. There are inherent limitations of a unique and significant nature regarding any claim to the right of privacy on the part of candidates and incumbent officials. It seems too obvious for argument that the candidate who enters the public arena voluntarily presents or thrusts himself forth as a subject of public interest and scrutiny.[109]

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102. However, one should be mindful that the common underlying issue of these cases was whether there was an "independent constitutional right to a state-financed abortion. . . ." Maher v. Roe, 432 U.S. 464, 468 (1977). The issue was not whether an individual has the right to terminate a pregnancy. This latter matter was decided in Roe v. Wade, 410 U.S. 113 (1973).

103. 575 F.2d 1119, 1132 (5th Cir. 1978).

104. For example, the decision to undergo psychotherapy or certain potentially embarrassing medical treatments, either for the Senators or the members of their families, might be impermissibly burdened if expenses for these treatments required disclosure.

105. *But see* City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

106. *See also* notes 141-42 and accompanying text *infra.*

107. 429 U.S. 589, 599. *See also* Brandeis & Warren, *supra* note 20, at 216, where the authors state:

> Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.

108. 83 Wash. 2d 275, 517 P.2d 911, *appeal dismissed,* 417 U.S. 902 (1974).

109. 83 Wash. 2d 275, 294, 517 P.2d 911, 923 (1974). One commentator has stated, "[i]t must be remembered that the usual legal standards of privacy do not apply to public officials." Note, *supra* note 89, at 169. A second commentator has stated: "[b]y becoming a candidate for public

The fine line separating a public official's legitimately private matters and those matters which are rightfully a subject of public concern was first examined by the Supreme Court in *New York Times Company v. Sullivan.*[110] The court held that a public official is prohibited from recovering damages for a defamatory falsehood relating to official conduct unless he or she proves that the statement was made with knowledge of its falsity or with reckless disregard of the truth.[111] The *Sullivan* court reasoned that it is of the utmost consequence that people discuss the character and qualifications of candidates before casting their votes.[112]

It is important to note that the Supreme Court has taken an expansive view of what constitutes official conduct[113] and of matters which have a bearing on an official's fitness to hold office. The question is whether a public officeholder's personal finances have such a real or potential impact on his or her official conduct as to be a legitimate issue of public concern. This question finds a ready answer in the voluminous chronicles of indictments and convictions of powerful elected officials who were unable to resist the temptation to act, in their official capacities, to further their private financial interests.[114] What stocks, bonds, real estate, or sources and amounts of income an officeholder possesses can, and frequently does, have a strong influence on his or her official conduct. This influence is forceful not only in terms of conflict-of-interest but it also has a decisive effect on legitimate policy determinations.[115] As such, the personal financial profile of a candidate or an official is a vital element in any analysis of his or her fitness to hold public office.

Notwithstanding the foregoing discussion of the confidentiality rights of public officials, the *Plante* court ruled that the Senators *do* have an interest in the nondisclosure of personal financial information.[116] The

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office a person's life ceases to be private in those particulars that relate to his fitness for public office." Note, *supra* note 10, at 774.

110. 376 U.S. 254 (1964).

111. *Id.* at 279-80.

112. *Id.* at 281.

113. TRIBE, *supra* note 26, at § 12-12. *See also* Garrison v. Louisiana 379 U.S. 64, 77 (1964), where the Court stated that, "Anything which might touch upon an official's fitness for office is relevant."; Fritz v. Gorton, 83 Wash. 2d 275, 288, 517 P.2d 911, 924 (1974), where the Court held, "The crux of evaluating the capabilities and motivations of any candidate for public office or incumbent public official is information bearing upon fitness for office."

114. *See* note 6 and accompanying text *supra.*

115. Honest, sincere lawyer-legislators, physician-legislators, banker-legislators, farmer-legislators, *et. al.* all may have policy views which are prejudiced by education, training, experience and the impact which proposed legislation may have on their future ability to produce income.

116. 575 F.2d 1119, 1132 (5th Cir. 1978).

issue facing the court concerned the appropriate standard of review of their privacy claims.[117]

Plante held that a balancing test which compared the individual's interest in the confidentiality of personal matters versus the state's interest in the disclosure of the financial data of public officials is appropriate.[118] The standard developed by the *Plante* court is similar to that employed in *Whalen v. Roe*[119] and *Nixon v. Administrator of General Services.*[120] Both of those cases focused on the confidentiality component of the right to privacy. In *Whalen,* the United States Supreme Court confronted a privacy challenge to a state statute requiring physicians prescribing certain drugs to report to the state health department the name and address of the patient involved. The State of New York argued that it had a vital interest in controlling the distribution of dangerous drugs[121] and that the possibility of public disclosure of the reported data was remote,[122] unless it were to become necessary in a criminal prosecution. Thus, the standard of review to be applied in cases where *public* disclosure is a problem was not specifically addressed.

Nixon involved a privacy challenge to the Presidential Recordings and Materials Preservation Act.[123] The Act mandated that all of Richard Nixon's presidential materials be screened by professional archivists and that all personal data be removed and returned to him. The Act explicitly stated as its purpose "the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term

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117. *Id.*

118. This balancing test has been favorably received by all commentaries available to date and all major reported cases on this subject with the exception of City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 446 P.2d 225, 85 Cal. Rptr. 1 (1970), which has been heavily criticized. *See* Note, *supra* note 10; Note, *supra* note 89; Stains, *A Model Act for Controlling Public Corruption Through Financial Disclosure and Standards of Conduct,* 51 NOTRE DAME L. REV. 636 (1976); Note, *A Constitutional Right of Privacy Protects Personal Financial Affairs of Public Officials from Overbroad Disclosure Requirements. City of Carmel-by-the-Sea v. Young,* 49 TEX. L. REV. 346 (1971); Comment, *Financial Disclosure By Public Officials and Public Employees in Light of City of Carmel-by-the-Sea,* 18 U.C.L.A. L. REV. 534 (1971). *See also* notes 149-71 and accompanying text *infra* for discussion of the above cases.

119. 429 U.S. 589 (1977).

120. 433 U.S. 425 (1977).

121. 429 U.S. 589, 598 (1977).

122. It was expressly prohibited by N.Y. PUB. HEALTH LAW § 3371 (McKenney Supp. 1975-76) and *upheld* in Whalen v. Roe, 429 U.S. 589 (1977).

123. 44 U.S.C. § 2107 Title I § 101(a) which states in part: "The Administrator . . . shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which are recorded or caused to be recorded by any officer or employee of the Federal Government and which - (1) involve former President Richard Nixon or other individuals. . . ." Section 104 of 44 U.S.C. § 2107, in pertinent part, directs the Administrator to promulgate regulations governing public access to the tape recordings and materials.

'Watergate.' "[124] It also identified as important interests the need to preserve the materials for historical purposes and use in future judicial proceedings.[125] However, insofar as *Nixon* concerned viewing and analysis of purportedly private and personal materials by professionals, it did not involve *public* disclosure.[126]

Although public disclosure was not the main issue in either of the aforementioned cases, significant interference with private and deeply personal matters was at issue. Regardless of whether these matters were made public, the medical affairs of New York citizens and extremely intimate dialogues between former President Nixon and his confidants were compromised and subjected to review by persons representing the government without authorization by the parties in interest.

In *Whalen* and *Nixon* the interests of the individuals in maintaining the confidentiality of intimacies were balanced with the legitimate state interests in fighting drug trafficking or exposing wrongdoing in the Nixon White House. The *Plante* court concluded that in the absence of *specific* guidance from the Supreme Court of the United States,[127] "the balancing test is appropriate here. The constitutionality of the [Sun-

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124. *Id.* at § 104(a)(1).

125. *Id.* at §§ 104(2)-(7).

126. As the Court stated: "*Nixon* does not resolve our problem. The case involved not public disclosure but viewing and screening of public and private documents by archivists." 575 F.2d 1119, 1133 (5th Cir. 1978).

127. *But see* notes 149-71 and accompanying text *infra*.

The Supreme Court of the United States has taken summary action on four cases concerning similar schemes of mandatory financial disclosure for elected officials from state courts. Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed,* 412 U.S. 925 (1973); Illinois State Employees Association v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied sub. nom.*, Troopers Lodge No. 41 Fraternal Order of Police v. Walker, 419 U.S. 1058 (1974); Montgomery County v. Walsh, 274 Md. 489, 336 A.2d 97 (1975), *appeal dismissed,* 424 U.S. 901 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed,* 417 U.S. 902 (1974).

The precedential value of the above cases was an issue discussed in *Plante*, 575 F.2d 1119, 1125-26 (5th Cir. 1978). It is well established that denial of certiorari is of no precedential value. Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-19 (1950). However, summary affirmance and appeal dismissals are dispositions on the merits. Hicks v. Miranda, 422 U.S. 332 (1975). But "[a]scertaining the reach and content of summary actions may itself present issues of real substance." *Id.* at 345. As one commentator observed,

> Summary dismissal for want of a federal question is of ambiguous import, where, as in *Stein* and *Fritz,* the appeal is based on the claim that the state statute infringes on fundamental rights. The claim may fail to state a substantial federal question because there is no fundamental right or because a compelling state interest clearly outweighs the individual rights.

Note, *supra* note 10, at 760.

The *Plante* court relied on a recent holding in Mandel v. Bradley, 432 U.S. 173, 177 (1977) which stated: "The precedential significance of the summary action . . . is to be assessed in light of all of the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case." The court observed that the different facts in *Mandel* were differences between Pennsylvania and Maryland statutes. *Plante* noted that the United State Supreme Court's review of differing disclosure statutes in four states cannot control findings with respect to the Sunshine Amendment. Even the defendants in *Plante* stated, "under the qualifications of *Mandel*

shine] amendment will be determined by comparing the interests it serves with those it hinders."[128] After applying this test, the *Plante* court held that the state's need for financial disclosure outweighed the Senators' interest in the confidentiality of that information.

Plante summarily concluded that the use of a rationality standard[129] is unsuitable since a state could conceivably develop a rational basis for imposing financial disclosure requirements on nearly any person, in any situation. However, the court observed that the Senators were not ordinary citizens but were elected public officials.[130]

C. *Association and Beliefs*

The Sunshine Amendment[131] requires disclosure of either a copy of one's federal income tax return or an itemized list of the sources and amounts of one's income exceeding $1,000.[132] By distinguishing *NAACP v. Alabama ex rel. Patterson*[133] and *Buckley v. Valeo,*[134] the *Plante* court determined that disclosure of personal financial information does not appear to directly raise first amendment issues of freedom of association and beliefs.[135]

In *NAACP,* the Supreme Court of the United States held that an order requiring the NAACP to produce records containing the names and addresses of all its members and agents was an unconstitutional restraint upon the members' right to freedom of association. Alabama's goal was to obtain the identities of those associated with the organization. As such, the government's purpose *per se* had a chilling effect on the group's membership.[136] The purpose of the Sunshine Amendment, however, is merely the disclosure of income and net worth in an effort

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v. Bradley such decisions have limited meaning beyond the scope of the facts presented by an appellant in his statement of jurisdiction." Brief for Defendant at 16.

Thus, *Plante* concluded, "The dismissals by the Supreme Court caution us against finding the Amendment unconstitutional. They did not relieve us of our duty to undertake an independent examination of the merits." 575 F.2d 1119, 1125-26 (5th Cir. 1978).

128. *Id.* at 1134.

129. *See* notes 24-49 and accompanying text *supra.*

130. *See* note 109 and accompaning text *supra.*

131. FLA. CONST. art. II § 8. For the text of the amendment *see* note 4 *supra.*

132. FLA. CONST. art. II § 8(h)(1).

133. 357 U.S. 449 (1958).

134. 424 U.S. 1 (1976).

135. *See* notes 137-48 and accompanying text *infra. See also* Note, *The Constitutionality of Financial Disclosure Laws,* 59 CORNELL L. REV. 345, 346 (1974) for a discussion of possible first amendment arguments.

136. In fact, the Court stated that the N.A.A.C.P. "made an uncontroverted showing that on past occasions revelation of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. 449, 462 (1958). Nothing approaching such a showing was even attempted much less proved by the Senators in *Plante.*

to combat conflict of interest.[137] *Plante* reasoned that if membership in groups or organizations is disclosed as a by-product of financial reporting requirements it occurs "only tangentially."[138]

The United States Supreme Court rejected first amendment challenges to mandatory campaign contribution disclosure provisions in *Buckley v. Valeo*.[139] There the Court upheld the Federal Election Campaign Act's requirements that candidates for federal elective offices and their political committees keep detailed records of contributions and expenditures and file them as public documents with the Federal Election Commission.[140] As in *Plante,* the statute in *Buckley* was designed to fight influence-peddling and conflict of interest through campaign financing disclosure. It is obvious that the threat to first amendment rights is more direct when the names of a candidate's financial supporters are made public than when the sources of a candidate's income are revealed, since it is through the medium of a campaign donation that many citizens seek to advance their own political beliefs and associations. No such goal can be achieved by means of employing a candidate in a private matter.

As a practical matter, *Plante's* contention that associations and beliefs are only tangentially disclosed, if at all, by the Sunshine Amendment's financial reporting mechanisms is questionable. In reaching this conclusion, the court appears to have understated the informational value of the federal income tax return — even one which has been artfully prepared. The average itemized tax return can reveal such items as medical problems, religious beliefs and political views, union membership as well as the financial information sought by the Sunshine Amendment. The court admitted that the threat to first amendment protection of beliefs and associations as a result of tax return disclosure exists,[141] but concluded that "when considering the Amendment on its face this threat is too remote to raise the issue."[142]

While the Sunshine Amendment requires disclosure of federal tax returns, it provides the alternative of a sworn statement which identifies each separate source and amount of income which exceeds $1,000.[143] The alternative method of satisfying the requirements of income

137. *See* note 45 *supra,* for other goals of the Sunshine Amendment.

138. 575 F.2d 1119, 1132 (5th Cir. 1978). *See* notes 141, 142 and accompanying text *infra* for a critique of this view.

139. 424 U.S. 1 (1976).

140. 2 U.S.C. § 434 (1977).

141. The court stated: "[w]ithout implying any views on the merits of a suit which properly raised the issue, we feel a substantial constitutional issue might be raised by disclosure of one's income tax returns. . . . The issue must await another case." Plante v. Gonzalez, 575 F.2d 1119, 1133 (5th Cir. 1978).

142. *Id.* at 1133.

143. FLA. CONST. art. II, § 8(h)(i)(a) and (b).

disclosure would, the court presumed without discussion,[144] not reveal the detailed information on associations and beliefs which the Supreme Court has found to be protected in other circumstances.[145] The income-source approach would not on the surface compromise any first amendments rights of the Senators, but whether the same can be said for the disclosed source is a matter of some dispute.[146] It is noteworthy that similar issues were raised and rejected in the context of disclosure of the identities of certain campaign contributors. With personal financial disclosure, the incidental infringement of the first amendment rights of third parties are generally viewed to be justified by the public's overriding interest in electing government officials with integrity.[147] In rejecting the first amendment theory, the *Plante* court held that there was no need to submit the Sunshine Amendment to the exacting scrutiny demanded in first amendment cases.[148]

IV. CITY OF CARMEL-BY-THE-SEA AND OTHER PRECEDENTS

Numerous state courts have considered the validity of statutes requiring public officials to disclose personal financial data.[149] Only the

144. Plante v. Gonzalez 575 F.2d 1119, 1132-33 (5th Cir. 1978).

145. NAACP v. Alabama ex. rel. Patterson, 375 U.S. 449 (1958). *See also* note 120 and accompanying text *supra*. Shelton v. Tucker, 364 U.S. 479 (1960) (public school teachers required to publish a list of all organization memberships and contributions held violative of first amendment); Bates v. City of Little Rock, 361 U.S. 516 (1960) (compulsory disclosure of the membership lists of local N.A.A.C.P. chapters would work unjustified interference with members' freedom of association); Louisiana ex. rel. Gremillion v. NAACP, 366 U.S. 293 (1961) (disclosure of N.A.A.C.P. membership lists may not be required consistently with the first amendment).

146. As the Court stated: "This argument is troubling only because the rights of third parties [may] intrude." Plante v. Gonzalez, 575 F.2d 1119, 1137 (5th Cir. 1978). Such a problem exists when lawyer-legislators, physician-legislators or psychologist-legislators are compelled to disclose the names of clients or patients. Since the Senators had not asserted the rights of their clients or patients, the court did not consider the issue. Such an issue is rightly the subject for a separate analysis. *See* Chamberlin v. Missouri Election Commission, 540 S.W. 2d 876 (Missouri, 1976) (upholding a requirement that lawyer-legislators reveal for publication the names of their clients and the fees received from them); *Contra,* Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska, 1977) (held that rules were necessary to provide exemptions from income-source disclosure requirements in suit brought by physician-legislator).

147. For an excellent treatment of this subject and, in general, a thorough analysis of the parallels between campaign disclosure and personal financial disclosure *see generally* Note, *supra* note 135.

148. Plante v. Gonzalez, 575 F.2d 1119, 1132-33 (5th Cir. 1978). *See also* note 116 and accompanying text *supra* for discussion of the confidentiality interests at issue and the standard of review of the Senators' claims.

149. Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed,* 417 U.S. 902 (1974); *In re* Kading, 70 Wis. 2d 508, 235 N.W. 2d 409 (1976); Dwyer v. Kahan, 397 N.Y.S. 2d 535, 88 Misc. 2d 73 (1976); Hunter v. City of New York, 391 N.Y.S. 2d 289, 88 Misc. 2d 562, (1976), *aff'd* 396 N.Y.S. 2d 186 (App. Div., 1977); Evans v. Carey, 385 N.Y.S. 2d 965, 953 App. Div. 2d 109 (1976), *aff'd* 391 N.Y.S. 2d 393, 40 N.Y.2d 1008, (1976); Kenny v. Byrne, 144 N.J. Super. 243, 365 A.2d 211 (Super. Ct., App. Div., 1976); Lehrhaupt v. Flynn, 323 A.2d 537 (Super.

California Supreme Court, in the *City of Carmel-by-the-Sea v. Young,*[150] found the disclosure statute to be unconstitutionally intrusive on the right to personal privacy.

The statute challenged in *Carmel* required all elected officials,[151] candidates for public office, certain high-level appointed officials and their spouses and minor children to make an annual disclosure of: "the nature and extent of their investments, including the ownership of shares in any corporation . . . or financial interest in any business entity, which is subject to regulation by any state or local public agency, if such investment is in excess of ten thousand dollars. . . ."[152] The *Carmel* court held that the protection of one's financial affairs against compulsory public disclosure was an aspect of personal privacy guaranteed by the fourth amendment which also falls within the penumbra of fundamental rights into which the state may not intrude absent a showing of compelling need.[153]

As was noted in *Plante v. Gonzalez,*[154] the right to personal financial privacy has never been accorded fundamental status nor is it similar in nature to the fundamental interests involved in contraception and abortion.[155] *Carmel's* reliance on *Griswold v. Connecticut*[156] to find a constitutional right to personal financial privacy is misplaced because financial privacy is not "some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[157] The large number of government intrusions in this area which Americans experience daily is conclusive evidence of this view of financial confidentiality.[158]

Ct., Ch. Div., 1974), *aff'd* 356 A.2d 35 (Super. Ct., App. Div., 1976); County of Nevada v. MacMillen, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974); Goldtrap v. Askew, 334 So.2d 20 (Fla. 1976); Illinois State Employees Ass'n. v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974), *cert. denied sub. nom.*, Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974); Stein v. Howlett, 52 Ill. 2d 570, 289 N.E. 2d 409 (1972), *appeal dismissed,* 412 U.S. 925 (1973); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), *appeal dismissed,* 424 U.S. 901 (1976); Klaus v. Minnesota Ethics Commission, 309 Minn. 430, 244 N.W. 2d 672 (1976); Chamberlin v. Missouri Election Commission, 540 S.W. 2d 876 (Mo. 1976); *See also* note 118 *supra.*

150. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

151. 53 Cal. Op. Atty. Gen. 52 (1970)

> The Attorney General of California interpreted this term to encompass "all elected officials of each branch of government, their chief deputies if any, and all other persons in policy making and policy controlling governmental positions, . . . except members of purely advisory boards and commissions. . . ."

152. *Id.* at 60-61.

153. 2 Cal. 3d 259, 268, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970).

154. 437 F. Supp. 536 (N.D. Fla. 1977), *cert. denied,* 95 S. Ct. 1047 (1979).

155. *See* notes 64-75 and accompanying text *supra. See also* Plante v. Gonzalez, 575 F.2d 1119, 1131 (5th Cir. 1978).

156. 381 U.S. 479 (1965).

157. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

158. *See* note 92 *supra.*

Carmel's reliance on a fourth amendment theory of privacy is equally misguided and unfortunate. In one of the California court's prior decisions, *People v. Edwards,*[159] the fourth amendment's prohibition of illegal searches was used to prohibit the search of outside trash cans that were "adjunct(s) to the domestic economy."[160] On that precedent it declared in *Carmel:* "personal financial affairs are clearly more than 'the adjunct to the domestic economy' referred to in *Edwards;* instead they would appear to constitute the primary supporting pillar of that economy."[161] *Carmel* not only confuses the usage of the term "domestic economy" but it misapplies the fourth amendment's search and seizure doctrine.[162]

The fourth amendment is not the source of a generic right of privacy; rather it protects the right to privacy only to the extent that one can subsume official action under the heading "search and seizure."[163] The disclosure statutes in *Plante* and *Carmel* do not constitute improper searches or seizures within the constitutional meaning of those terms. As Justice Mask declared in his dissenting remarks on *Carmel*:

> there is no recognizable relationship between mere disclosure of sizable pecuniary interests by those who choose to be officeholders or candidates and the constitutional right to security of persons and effects and freedom from unreasonable searches and seizures. To an analysis of this statute the Fourth Amendment is a non sequitur.[164]

It is clear on the facts of *Plante* that neither the Senators themselves nor any of their belongings have been subjected to an intrusive search or a possessory seizure as a result of the adoption of the Sunshine Amendment.[165]

Carmel's application of the fourth amendment search and seizure doctrine is curiously inappropriate to a statute mandating financial disclosure by public officeholders. The *Carmel* decision is clearly out of

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159. 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

160. *Id.* at 458 P.2d at 718, 80 Cal. Rptr. at 638.

161. 2 Cal. 3d 259, 268, 466 P.2d. 225, 231, 85 Cal. Rptr. 1, 7 (1970).

162. U.S. CONST., amend. IV states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

163. Comment, *Financial Disclosure By Public Officials and Public Employees in Light of Camel-by-the-Sea v. Young,* 18 U.C.L.A. L. REV. 534, 541 (1971), where the author refers to Katz v. United States, 389 U.S. 347, 350 (1967) by stating, "[T]he Fourth Amendment cannot be translated into a general constitutional 'right of privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further and often have nothing to do with privacy at all."

164. 2 Cal. 3d 259, 278, 466 P.2d 225, 239, 85 Cal. Rptr. 1, 15 (1970) (Mosk, J., dissenting).

165. FLA. CONST. art II. § 8. For the text of the amendment *see* note 4 *supra.*

step with prevailing judicial thought[166] and is based on reasoning which is inexplicably unconventional.

The *Plante* court, consistent with established precedent in the state courts, balanced the interests of the Senators and the citizens of Florida. The District court in *Plante* found that the Sunshine Amendment advanced a number of important state interests including deterrence of political corruption, creation of public confidence in elected officials, detection and investigation of violations of the law, and informing voters of interests to which public officials might respond while in office.[167]

These admittedly strong state interests were compared with the Senators' individual interest in maintaining the privacy of their personal financial affairs.[168] In *Carmel*, the court found that newspaper publications of a public officer's assets can be expected to bring unwanted solicitation from a variety of salespersons and could expose the public officer and his or her family to various criminal attacks from kidnappers.[169] Other public officials whose financial statements reveal a poverty status may find that circumstances "understandably embarrassing."[170]

While the *Plante* court admitted that the financial privacy of any individual is a serious concern deserving strong protection, it concluded that the public interests demands public disclosure by elected officials.[171] The need for workable safeguards for the public trust override the individual officials' interests in personal financial privacy.

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166. *See* note 149 *supra.*

167. 437 F. Supp. 536, 541-42 (N.D. Fla. 1977).

168. 575 F.2d 1119, 1134-36 (5th Cir. 1978).

169. 2 Cal. 3d 259, 270, 466 P.2d 225, 233, 85 Cal. Rptr. 1, 9 (1970).

See Vance, *TERRORISM: Scope of the Threat and Need for Effective Legislation,* 78 DEPARTMENT OF STATE BULLETIN 53 (March, 1978), where the author states:

> Terrorism is one of the most inhumane phenomena of our time. . . . International airplane hijackings have increased in the past 2 years. . . . Worldwide the number of terrorist attacks — including bombings, assassinations, ambushes and arson — has been higher in the past 2 years than in any previous comparable period. . . . Cooperation among terrorist groups, with totally different goals appears to be growing.

Id. at 53.

170. 2 Cal. 3d 259, 270, 466 P.2d 225, 233, 85 Cal. Rptr. 1, 9 (1970).

171. 575 F.2d 1119, 1136 (5th Cir. 1978). The court also briefly addressed the Senators' complaints that certain features of the Sunshine Amendment were in excess of what was necessary to accomplish its goals. They objected to assigning specific dollar values to assets, contending that dollar ranges would be adequate. The Senators were concerned about the requirement that secondary sources of income be disclosed. They also contended that publication of their financial statements was unnecessary; disclosure to a state agency such as the Florida Commission on Ethics would be sufficient.

The court quickly disposed of each of these objections, taking the view that the State's interest in having this information outweigh the Senators' interest in privacy of personal financial data. The court declared, "We do not say it is wise; the people of Florida, by a four to one vote, have done that. We do say that on its face, it is constitutional" 575 F.2d 1119, 1138 (5th Cir. 1978).

On the secondary source of income issue, *see* note 146 *supra.*

V. CONCLUSION

Nearly sixty-six years ago, Justice Brandeis observed, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric lights the most efficient policeman."[172] In the context of revelations of widespread self-dealing and corruption in public office Brandeis' advice has taken on a new and important meaning.

The electorate is now demanding that their officials avoid both conflict of interest and the *appearance* of conflict of interest. They have given life to this demand through the adoption of compulsory disclosure of personal financial information.[173] There is a broad-based popular belief that an individual steps from the category of purely private citizen to that of public citizen when he or she seeks or accepts public office. The prevailing view is that, as a result of this transformation, the rights of an elected official must be subordinated to the extent that they compete or conflict with the superior right of the public to achieve honest and efficient government.[174]

The constitutionally based guarantee of a right to personal privacy provides no shelter from the rigors of disclosure clamored for by the voters. The vitally important state interests in restoring honesty and confidence in our elected officials must take precedence over their claims for financial secrecy. Florida's Sunshine Amendment and others like it are important tools to be used by an enlightened and vigilant citizenry in safeguarding the public trust.

While the Senators' claims in *Plante* serve as a clear reminder that financial disclosure is not willingly nor universally accepted, many of the feared effects of disclosure, particularly with respect to resignations, appear to have little basis in fact. The many rewards of public service are as potent as ever in motivating political activism. What remains to be seen is whether the additional sacrifice of personal privacy by the many honest and hard-working officials will succeed in stamping out conflict of interest and creating public confidence in our elected officers.

MARTIN CONROY FOSTER

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172. Brandeis, *What Publicity Can Do,* HARPER'S WEEKLY, Dec. 20, 1913, at 10.

173. This phenemon has occurred in an overwhelming majority of the states and in the federal government. *See* note 8 and accompanying text *supra.*

174. Lehrhaupt v. Flynn, 323 A.2d 537 (N.J. Super. Ct., Ch. Div., 1974), *aff'd* 356 A.2d 35, 42 (N.J. Super. Ct., App. Div., 1976).

BOOK REVIEW

TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL
By Robert A. Friedlander. Dobbs-Ferry, New York:
Vol. I. pp. xx, 572; Vol. II. pp. 743. $75.00

When an American thinks of terrorism, he may think of the Baader-Meinhoff Gang of West Germany, he may think of the PLO in the Middle East, or he may decline a vacation in Italy for fear of damage to his kneecaps. If terrorism touches the United States, as in the case of the Symbionese Liberation Army and Patty Hearst, he rushes for assurance that it is not an international conspiracy. Assured, he breathes a sigh of relief and relegates the problem to that terrorism which affects foreign states.

Is terrorism a problem which affects only others? In the United States we have seen many cases of air hijacking, a form of terrorism. Today, we take for granted the security measures implemented at every airport in the United States which involve the x-ray of our luggage and the electronic, and sometimes personal, search of our bodies. In addition, we accept the limitation on our freedom to meet, or see off a friend at the gate, because as an additional security measure, most airports allow only passengers with tickets to approach the departure gate.

We take for granted the tight security measures taken whenever a dignitary such as the President of the United States travels, which include local and state police, FBI and Secret Service, equipped with two-way radios and helicopters stationed throughout the travel route. On the Pope's recent visit to the United States, the cost of security in each of the cities visited was estimated in the hundreds of thousands of dollars.

Such security measures have greatly minimized terrorist attacks within the United States. However, if any doubt of United States involvement with terrorism remains, it must be dispelled by a glance at the newspaper accounts of the failure of the Iranian government to protect the sanctity of the American Embassy in Teheran. Not only is international law violated by the occupation of the U.S. Embassy and the taking prisoner of the Americans therein,[1] but international law is fur-

1. *See* Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. 95. Both the United States and Iran are among the more than 100 parties to this treaty.

ther insulted by the assertions of Iranian representatives that the American hostages are to be ransomed by the return to Iran of the Shah.[2]

It is Professor Friedlander's thesis that the whole world is involved with and must today deal with, terrorism. Because of this universal threat, it is vital to understand terrorism in order to deal effectively with it. Professor Friedlander provides some of this understanding through a breakdown of the problem. First, the problem is broken down into its historic aspects, where it is noted that while terrorism became particularly visible during the 1960's and 1970's, it has been present for as long as there has been organized society. Second, the author speaks of what he terms the "politico-ideological" and "socio-psychological" factors, which form an analysis of the basic political and ideological motivations of international terrorism. Finally, the author provides an analysis of the past and current attempts to deal with terrorism.

Professor Friedlander finds that the difficulty in attacking terrorism stems from lack of definition. There is no uniform agreement as to what constitutes terrorism, or with what types of terrorism the international community should be concerned. The author is principally concerned with the international or transnational, as opposed to municipal or domestic terror, because it is the international element which creates the threat to world public order.[3]

The most difficult definitional problem is the lack of universal agreement on the greater menace: individual or group terrorism *vis-a-vis* state or government terrorism. It is precisely this which generally divides the industrial democracies from the emerging and underdeveloped states, and prevents agreements that could lead to universal solutions, such as extradition[4] or an international criminal court.[5] The author provides an example of the disparity of ideas between states by the following quote from the debate in the United Nations Ad Hoc Committee on International Terrorism, in discussing a definition of terrorism:

> Acts committed by individuals against innocent persons for their own personal gain or emotional satisfaction should not be condoned; the exercise of the right to self determination and independence recognized by the United Nations as the inalienable right of all peoples should not be affected; peoples struggling to liberate themselves from foreign oppression and exploitation [have] the right to use all methods at their disposal including force.[6]

The failure to find a universal solution particularly affects the United

2. New York Times, Nov. 6, 1979, at 1, col. 5-6.
3. R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL CONTROL 6 (1979).
4. *Id.* at 108.
5. *Id.* at 131.
6. *Id.* at 341.

States and other western democracies because individual countermeasures, such as airport security, affect the liberties of their citizens. As the author points out, "part of the cost to be paid in protecting the public against terror-violence is the reduction of individual rights in a free society. The more effective the restraints, the greater the diminution of civil liberties."[7] Further, "[i]f the state truly wishes to protect itself from the threat and destruction of terrorist violence, then social order must be strengthened at the expense of individual freedom."[8] So long as any state is available as a refuge for terrorists no international solution will be universal, and each state, or small group of states, will have to find its own protection.

Professor Friedlander provides an indepth analysis of the background and problems provided by international terrorism. He is not optimistic about the future. As he states, "Terrorism has always existed in one form or another. Terrorism will continue to exist in one form or another. This is the lesson of history and the reality of life. The problem is one of control — not of elimination."[9] This is even more sobering when considered with the fact that one-third of all terrorist incidents are directed against the United States, American Citizens, and U.S. governmental personnel.[10]

Is there hope for the international rule of law? Professor Friedlander concludes with a quotation expressing some hope:

> Not only is the credibility of international law at stake in the U.N. debate on terrorism but also the type of world in which we and our children are going to live. A convention, by itself, will not make the world safe from terrorism, but failure to achieve a generally acceptable convention could only encourage increased resort to anarchy, violence, and terror. It is hard to believe that responsible governments will, in the end, decide to run that risk.[11]

But what is a responsible government? A sobering answer to this question is provided by the reply of the Libyan Ambassador when asked why Libya is a sanctuary for terrorists as well as financier for terrorist movements around the world. "One man's terrorist is another man's freedom fighter, wouldn't you agree? And who is to decide? Who is to decide?"[12]

The text covers only 151 pages of this two volume work. The remain-

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7. *Id.* at 112-13.
8. *Id.* at 114.
9. *Id.* at 135.
10. *Id.* at 139.
11. *Id.* at 151, *quoting* an address by U.S. Ambassador Bennet before the Sixth (Legal) Committee of the U.N. General Assembly. Press Release, Dept. of State Bureau of Public Affairs, January, 1973, at 7.
12. Delaney, *World Terrorism Today,* 9 CALIF. W. INT'L L. J. 450, 451 (1979).

ing 420 pages of volume I, and all 726 pages of Volume II contain supplemental documents. Among the documents are reports dating back to a League of Nations debate on Terrorism in 1934,[13] a League resolution condemning international terrorism that same year,[14] and various United Nations reports, resolutions, declarations, and conventions of the General Assembly and Security Council starting with the 1948 Universal Declaration of Human Rights[15] through the Nov., 1977 General Assembly Resolution on the Safety of International Civil Aviation.[16]

Although volume II has not yet been received by this reviewer, the table of contents indicates that it contains conventions, resolutions, recommendations and documents relating to the interference with air transport; Federal Aviation Administration statistics on United States and world-wide aircraft hijacking; and, court decisions on piracy, interference with air transport and terror-violence. Finally, it contains reports, resolutions and other documents relating to United States approaches to terror, European attempts to control terror-violence, and Inter-American attempts at transnational and local control of terrorism.

The supplemental documents are particularly useful because these items, with the exception of the few treaties included, are not readily available in reference libraries. While the table of contents would be more helpful if it included reference numbers to U.N. resolutions and documents, this unedited documentation provides a convenient source for in-depth study of terrorism. However, it should be remembered that the author has included only selected representative materials, not a complete documentation of any specific aspect of the problem.

STANLEY B. ROSENFIELD*

13. R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL CONTROL 217 (1979).
14. *Id.* at 249.
15. *Id.* at 441.
16. *Id.* at 525.

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BOOKS RECEIVED

THE DISPOSABLE PARENT — THE CASE FOR JOINT CUSTODY. By Mel Roman and William Haddad. New York, New York: Penguin Books. 1979. Pp. 1, 215. $3.95. Paperbound. A brief look at the history of child custody illustrates a surprising point; before the 19th century, if and when custody of children arose as an issue, children belonged to their father. Since then customs have gradually changed. Presently, American divorce courts act as though children belong primarily to their mothers. As a result, fathers are often treated as "disposable." The authors, both divorced fathers, suggest joint custody as a viable option. They define joint custody as that post-divorce custodial arrangement in which parents agree to equally share the authority for making all decisions significantly affecting the lives of their children. Child care is also split equally. Since there are a number of successful joint custody models, the authors believe that blanket legislation concerning living arrangements would be a mistake. They suggest that unless there are compelling reasons to the contrary, involving such conditions as physical or psychological incapacity of one parent, chronic alcoholism, drug addiction, or absolute disinterest in caring for the children, courts should proceed with a presumption in favor of joint custody following a divorce. Bills providing guidelines for joint custody are slated for consideration in California and Pennsylvania, and an Oregon reform bill is discussed as one model. Finally, support-services such as counseling and mediation are recommended in addition to redefining the role of the attorney in divorce cases as advisor, not advocate, with the entire family as the client.

SMALL CLAIMS COURT — A NATIONAL EXAMINATION. By John C. Ruhnka and Steven Weller with John A. Martin. Williamsburg, Virginia: National Center for State Courts. 1978. Pp. xiii, 219. $6.00. Paperbound. A two-year study of fifteen different small claims courts from across the nation is discussed in this book with two purposes in mind. First, the authors set out to demonstrate the present ability of the small claims courts to provide citizens with quick, uncomplicated, inexpensive, and just resolutions to small

civil disputes. Second, they attempt to point out possible reforms in the system. Information concerning the type of people who use the small claims courts is presented. The costs involved in bringing or defending an action, the use of attorney services, and the ability to actually collect judgments in these courts is discussed. Since areas such as trial procedures, rules of evidence, the handling of attorneys and assistance to *pro se* litigants are left up to the trial judge in the small claims trial, the authors interviewed judges to elicit their views and approaches on these aspects of the small claims trial. The pre-trial as well as the actual conduct of small claims trials and post trial process are discussed. Finally, recommendations are made in those areas which the authors feel need attention and some suggestions are offered as to the direction improvements should take. The suggestions include the need for small claims courts being open to everyone, more assistance for defendants, limiting attorney practice at trial, reducing costs to litigants, more court involvement with the collection of money judgments, and more assistance for the judges in consumer law cases. Included in Appendix A are key statutory variations of small claims courts by state.

PROJECT SEARCH: THE STRUGGLE FOR CONTROL OF CRIMINAL INFORMATION IN AMERICA. By Gordon Karl Zenk. Westport, Connecticut: Greenwood Press, Inc. 1979. Pp. viii, 176. $22.50. Clothbound. In 1968 the Law Enforcement Assistance Administration (LEAA) came into existence to manage a greatly expanded program of federal aid to state and local law enforcement agencies. The LEAA immediately initiated Project SEARCH, a prototype for a computerized interstate criminal justice information storage and retrieval system. The author chronicles the evolution of Project SEARCH from a six-state test system designed to determine the feasibility of interstate exchange of criminal history information into a permanent operation of broader focus involving all fifty states. As such, Project SEARCH came to rival the FBI's National Crime Information Center, though differing significantly from it in terms of concept, design, operation, and policy goals. Furthermore, the LEAA, using Project SEARCH, established itself as a criminal justice bureaucracy in competition with the FBI itself, at least insofar as that agency functions as the official clearinghouse for criminal justice information and statistics. The story of Project SEARCH, however, is a political tale on two levels. Not only is the power struggle within the federal bureaucracy between the FBI and the LEAA revealed, but the classic federal-state struggle is also apparent. The struggle between the FBI and LEAA is for control of the design, operation, and underlying policy of a national com-

puterized criminal information system. In terms of the federal-state conflict, Project SEARCH reflects the concerns and goals of the states in the administration of criminal justice. In particular, the project is sensitive to the issue of privacy rights and civil liberties, and the desire for a system that serves the needs of a state's entire criminal justice community, rather than just those of its state and local police. The author concludes that Project SEARCH's most important contribution to the administration of criminal justice has been its interruption of the FBI's unchecked expansion and monopoly of criminal information functions. However, the feasibility of any computerized criminal information system, including Project SEARCH, is limited by (1) the accuracy and completeness of the raw data, (2) the fact that the impact of inaccurate and incomplete data is magnified by computerization, (3) the immense costs of conversion to and maintenance of such a system, and, (4) problems of cooperation among the thousands of independent jurisdictions that comprise the American criminal justice system.

THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840. By Gerald W. Gawalt. Westport, Connecticut: Greenwood Press, Inc. 1979. Pp. xi, 254. $19.95. Clothbound. The author, an historical specialist at the Library of Congress, traces the history of the legal profession in Massachusetts from a weak, corporate guild to a powerful, individualistic profession. During the period discussed, 1760-1840, there was a general movement toward occupational specialization and professionalization. Not only lawyers but doctors, scientists, and college instructors insisted upon definite requirements for entrance into their professions. By means of specific requirements, the legal profession could eliminate untrained practitioners, create monopolies controlled by educated specialists, and establish authority for the profession. With continued emphasis on education and elitism, lawyers began to control the educational and political institutions of Massachusetts. By the early 19th century, lawyers had become part of an exclusive, prosperous, and expanding professional elite. Entrance into the profession was increasingly restricted by barriers of family connection, the cost of education, and the expenses of beginning a professional practice, thus making law an occupation providing more horizontal than vertical mobility. The book includes tables which indicate statistics of marriage patterns, paternal occupations, education, occupational and geographic mobility, as well as an analysis of professional caseloads, income, and taxable wealth to provide the reader with a distinct professional profile of lawyers during this period.

SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION. By Arthur S. Miller. Westport, Connecticut: Greenwood Press, Inc. 1979. Pp. x, 395. $22.50. Clothbound. The book contains a collection of essays written over a twenty year period (1958-1977). Each is accompanied by a headnote that both updates the specific article and relates it to the general themes of the book. The dominant theme is that of the "living" Constitution. The author states that the Constitution is a document which maintains its validity by reflecting continually changing American social conditions. The concept of the living Constitution demands that each generation of Americans must, and does, write its own constitution — not formally, but rather through a complex set of decisions emanating from all segments of government. The essays probe various themes of the living American Constitution, including: change versus stability, the need for adaptation of the fundamental law to new circumstances, the idea that the Constitution not only sets out what governments can and cannot do, but also what they must do if a democratic society is to survive, and the need for ascertaining those who in fact control or influence important societal (that is, constitutional) decisions, as well as those who formally make those decisions. Throughout the book, the concept of a "living" Constitution prevails.

The Case of the "Wife After Death": Reflections on the Admissibility of Evidence of Remarriage Under the Massachusetts Wrongful Death Statute

*Peter C. Kober**

The issue of remarriage of a wrongful death plaintiff is yet to be decided in Massachusetts. The author argues that evidence of plaintiff's remarriage should be admissible, thereby entitling defendants to fair jury trials.

In the case of *Wyatt v. Bonnell Co.*,[1] recently tried in the United States District Court for the District of Massachusetts,[2] plaintiff, who had brought the action under the Massachusetts Wrongful Death Act,[3]

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1. No. 75-1669-S (D. Mass., filed April 29, 1975), *agreement for judgment* entered March 19, 1979.

2. The basis for jurisdiction in the federal court was the diversity of the parties, pursuant to 28 U.S.C. § 1332.

3. *See* MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1973). The 1973 amendment, which changed the basis for assessing damages from one based upon the culpability of a defendant to one based upon pecuniary loss to a plaintiff, reads as follows:

> A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant; except that (1) the liability of an employer to a person in his employment shall not be governed by this section, (2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier, and (3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway. A person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this sec-

submitted a motion in limine.[4] The purpose of this motion was to prevent the defendants from commenting upon or referring to the fact that the plaintiff (the decedent's widow and administratrix of his estate), had remarried since the commencement of the action. The plaintiff contended that such comments or references would be severely prejudicial to her claim, and that such prejudice justified their exclusion. Following argument by counsel for both parties, the court allowed the plaintiff's motion and ordered the defendants to refrain from bringing the fact of plaintiff's remarriage to the attention of the jury.

This was only the first skirmish, however. The remarriage issue surfaced again at the conclusion of the presentation of evidence, when the parties submitted their requests for jury instructions. In their request, the defendants asked the court to instruct the jury that, in determining the monetary value of the decendent's life to the plaintiff, the jury was entitled to consider the plaintiff's remarriage.

Predictably, in view of its decision on the plaintiff's motion in limine, the court refused the defendants' requested jury instructions. Thus, the plaintiff succeeded in depriving the defendants of the opportunity to diffuse some of the plaintiff's evidence on the damages issue;[5] in addition, the defendants were denied the opportunity to address the remarriage issue during final arguments.[6] It is submitted that the plaintiff may even have succeeded in depriving defendants of the opportunity for a trial before an unbiased jury, for, given the fact that the defendants were refused permission to inform the jury of the plaintiff's true marital status, it was probable that certain members of the jury had no knowledge of the plaintiff's present husband. The case was ultimately settled,[7] so the effects of these deprivations were never tested by a jury verdict.

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tion for his own act. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. No recovery shall be had under this section for a death which does not occur within two years after the injury which caused the death. An action to recover damages under this section shall be commenced within three years from the date of death or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

4. A motion in limine is defined as:

A written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements. . . . Purpose of such motion is to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial and granting of motion is not a ruling on evidence and, where properly drawn, granting of motion cannot be error.

BLACK'S LAW DICTIONARY 914 (5th ed. 1979).

The motion in question was submitted to the court, and notice given to defense counsel, only after the voir dire had been completed and the jury already impaneled.

5. *See* notes 12-34 and accompanying text *infra*.

6. *See* notes 35-108 and accompanying text *infra*.

7. No. 75-1669-S (D. Mass., filed April 29, 1975), *agreement for judgment* entered March 19, 1979.

Nonetheless, several troublesome and unanswered questions remain. First, should a defendant in a Massachusetts wrongful death case be permitted to introduce evidence of a plaintiff's marriage in order to mitigate damages? Second, assuming such evidence is not admissible on the issue of mitigating damages, should it nevertheless be brought to prospective jurors' attention during voir dire in order to avoid the possibility of a nondisinterested jury determining the merits of a death case? Third, in the context of a diversity action brought in a federal court, do the Federal Rules of Evidence alter or affect the answers to the previous two questions?[8]

This article is organized as follows. Section I presents the various rationales generally articulated by courts for excluding evidence of remarriage in a wrongful death action. Each rationale is then separately critiqued. Section II highlights the factors favoring admissibility and analyzes the differences between jurisdictions. The application of the Federal Rules of Evidence in a diversity case is dealt with in Section III. The specific issue of which law federal courts in Massachusetts should apply in diversity cases is discussed in Section IV. Finally, Section V concludes with how this latter issue should be decided by Massachusetts courts.

I. THE QUESTION OF MITIGATION

The generally accepted view regarding evidence of remarriage by the surviving spouse is that such evidence is not admissible to mitigate damages in a wrongful death case.[9] There is no case law on the subject in Massachusetts,[10] but it has been suggested that Massachusetts courts should follow this majority view.[11] The previously mentioned case of *Wyatt v. Bonnell Co.*[12] did not indicate the precise basis for denying evidence of remarriage. However, it would hardly be presumptuous to conclude that the court had the majority view firmly in mind at the time of its ruling. At this point, therefore, a review of the foundation upon which the citadel of exclusion rests is in order.

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8. Ordinarily, of course, any issue controlled by law (state or federal) is guided by the letter and spirit of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). *See* note 149 and accompanying text *infra*.

9. *See* 25A. C.J.S. *Death* § 114 (1966); 22 AM. JUR. 2d *Death* § 164 (1965); 87 A.L.R. 2d 252 (1963). *See also* note 3 *supra*.

10. This is not surprising, in view of the fact that the amended Wrongful Death Act is only six years old. For the text of the Massachusetts Wrongful Death Act, *see* note 3 *supra*. All prior cases, of course, were governed by the earlier statute, in which compensation issues, such as the ones posed here, were not present.

11. *See* Zabin & Connolly, *The New Wrongful Death Act in Massachusetts Steps into the Twentieth Century*, 58 MASS. L. Q. 345, 361 (1973).

12. No. 75-1669-S (D. Mass., filed April 29, 1975). *See* note 1 *supra*.

A. Nonadmissibility: The Rationale

The cases in point articulate three distinct, albeit closely related, bases for the exclusion of evidence of remarriage in a wrongful death action. First, it is said that the loss sustained by the beneficiary is "fixed" at the time of the decedent's death.[13] Stated another way, this evidence simply is not relevant to the issue of damages.[14] As the Oregon Supreme Court has declared:

> We are of the opinion that the fact of remarriage of decedent's widower has nothing whatever to do with the measure of damages. The loss sustained by the widower, as a beneficiary, is fixed as of the date of death. What may have transpired subsequent thereto is wholly immaterial.[15]

A second ground for exclusion of this evidence is the argument that a wrongdoer should not be permitted to "benefit" from or "take advantage" of the fact of remarriage, in order to reduce the amount of compensation he will have to pay the plaintiff.[16] Some courts have so ruled on the ground that the compensation flowing from a remarriage constitutes "fortuitous benefits,"[17] which should not alter the extent of the defendant's liability. Most courts, however, indicate that their reasoning is grounded in the so-called "collateral source" doctrine,[18] which states that a defendant is not entitled to deduct from the plaintiff's damages various items of remuneration to which the plaintiff was entitled, regardless of the defendant's tortious conduct.[19] The purpose of

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13. *See, e.g.*, Johns v. Baltimore & Ohio Railroad Co., 143 F. Supp. 15 (W. D. Pa. 1956), *aff'd per curiam*, 239 F.2d 385 (3d Cir. 1957); McFarland v. Ill. Cent. R. R. Co., 241 La. 15, 127 So.2d 183 (1961); Benwell v. Dean, 249 Cal. App. 2d 345, 51 Cal. Rptr. 394 (1967).

14. *See, e.g.*, Stephens v. Natchitoches Parish School Bd., 110 So.2d 156 (La. Ct. App. 1959), *rev'd on other grounds*, 238 La. 388, 115 So.2d 793 (1959); Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965); Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972); *aff'd*, 53 Ill. 2d 591, 294 N.E.2d 689 (1973); Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973).

15. Prauss v. Adamski, 195 Ore. 1, 23, 244 P.2d 598, 608 (1952).

16. *See, e.g.*, Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887); McFarland v. Ill. Cent. R. R. Co., 241 La. 15, 127 So.2d 183 (1961); Reynolds v. Willis, 58 Del. 368, 209 A.2d 760 (Del. 1965); Cherrigan v. City and County of San Francisco, 262 Cal. App. 2d 643, 69 Cal. Rptr. 42 (1968); Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968); Seaboard Coast Line R. Co. v. Hill, 250 So.2d 311 (Fla. Ct. App. 1971), *cert. discharged*, 270 So.2d 359 (Fla. 1972).

17. *See In re* Saxe's Estate, 21 Misc. 2d 811, 194 N.Y.S.2d 972 (N.Y. Sur. Ct. 1959).

18. The first case to apply the "collateral source" doctrine in principle was Perrott v. Shearer, 17 Mich. 47 (1868). However, Harding v. Town of Townshend, 43 Vt. 536 (1870), is generally credited as being the first precedent which actually coined the phrase "collateral source."

19. *See* RESTATEMENT OF TORTS § 920, Comment e (1939).

> The plaintiff is not barred from recovery merely because he suffers no net loss from the injury, as where he is insured or where friends make contributions to him because of the loss. If his things are tortiously destroyed, the insurance carrier is subrogated to his position. In other cases the damages which he is entitled to recover are not diminished by the fact that, either as a matter of contract right or because of gifts, the transaction results in

the collateral source rule is to compensate heirs for the destruction of the expectations of what they would have received from the deceased, had he lived.[20] As stated by the California Appeals Court, "the court is not allowing a defendant to benefit by any windfalls that may come to the plaintiff even if they would have occurred had the defendant not caused the death of the deceased."[21] In this respect, therefore, the courts have rationalized that the benefits of remarriage are comparable to those arising from insurance policies[22] or inheritance.[23]

The third basis for excluding evidence of remarriage on the damages issue is that such evidence would require the factfinder to "embark upon a realm of speculation and be led into a sea of impossible calculations."[24] The jury would be required to inquire into the relative merits of past and present husbands, and to compare and value their respective earnings, companionship, counsel, and so forth — an inquiry which "would tend to complicate the issues beyond anything contemplated by the statutes under whose plain provisions relief is sought."[25] As the highest court of South Carolina described the problem:

> The assessment of the intangible elements of damage which will of reasonable necessity result in the future to the beneficiaries is, at best, most speculative. The highly speculative inquiry into the prospective value of the second marriage would not contribute to the certainty of the ultimate determination of the damages, and could

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no loss to him. Where a person has been disabled and hence cannot work but derives an income during the period of disability from a contract of insurance or from a contract of employment which requires payment during such period, his income is not the result of earnings but of previous contractual arrangements made for his own benefit, not the tortfeasor's. Likewise, the damages for loss of earnings are not diminished by the fact that his employer or a third person makes gifts to him even though these may have been given him because of his incapacity. Further, he may be able to recover for the reasonable value of medical treatment or other services made necessary by the injury although these have been donated to him (*see* 924, Comment f).

For two enlightening discussions of this doctrine, *see* Schwartz, *The Collateral-Source Rule,* 41 B. U. L. REV. 348 (1961), and Maxwell, *The Collateral Source Rule in the American Law of Damages,* 46 MINN. L. REV. 669 (1962).

20. *See* Riley v. California Erectors, Inc., 36 Cal. App. 3d 29, 111 Cal. Rptr. 459 (1973).

21. *Id.* at 33, 111 Cal. Rptr. at 461.

22. *See, e.g.,* Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887); Reynolds v. Willis, 58 Del. 368, 209 A.2d 760 (Del. 1965); Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968).

23. *See* Tyminski v. U.S., 481 F.2d 257, 269 (3d Cir. 1973); Cervantes v. Maco Gas Co., 177 Cal. App. 2d 246, 251, 2 Cal. Rptr. 75, 79 (1960); Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968).

24. The City of Rome, 48 F.2d 333, 343 (S. D. N.Y. 1930). *See also* Georgia R. & Light Co. v. Garr, 57 Ga. 277 (1875); Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887), Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965); Reynolds v. Willis, 58 Del. 368, 209 A.2d 760 (Del. 1965); Benwell v. Dean, 249 Cal. App. 2d 345, 57 Cal. Rptr. 394 (1967); Cherrigan v. City and County of San Francisco, 262 Cal. App. 2d 643, 69 Cal. Rptr. 42 (1968); Smith v. Wells, 258 S. C. 316, 188 S.E.2d 470 (1972).

25. Davis v. Guarnieri, 45 Ohio St. 470, 483, 15 N.E. 350, 357 (1887).

only serve to inject considerations which would confuse the issues.[26]

Initially, these reasons appear to be intellectually sound, or, at the very least, defensible in terms of generally accepted policy arguments. However, close observation might lead one to suspect that the courts were not fully voicing all possible concerns as to why such evidence should be inadmissible.[27] Indeed, precise analysis of the majority's view leads to the conclusion that the entire rule of not allowing in evidence of plaintiff's remarriage is virtually groundless, and that it probably owes its existence more to the ingenuity of clairvoyant plaintiffs and their counsel, practicing subtle psychology on judges and juries,[28] rather than to rigorously reasoned and logically founded principles of law. In view of the obvious lengths to which plaintiffs and their counsel are willing to go,[29] even to the point of "exaggerating" the truth[30] in order to achieve larger verdicts, this hardly bodes well for the proper administration of justice.[31] Especially when one considers those wrongful death cases that are particularly noteworthy, either because of the parties in-

26. Smith v. Wells, 258 S. C. 316, 320-21, 188 S.E.2d 470, 471-72 (1972).

27. As Justice Oliver Wendell Holmes once observed, "[t]he very considerations which judges most rarely mention . . . are the secret root from which the law draws all the juices of life." O. W. HOLMES, THE COMMON LAW 35 (1881).

28. The idea that attorneys, either through their own actions or through their clients, manipulate juries is hardly a new one. One author has suggested that lawyers in fact practice hypnosis, in the sense of giving the jury "waking suggestions." Appleman, *Jury Psychology,* PERSONAL INJURY ANNUAL 873 (1961). Another attorney attributes his success before juries to such techniques as "carrying the show," "perceptive sets" and "body language." Estes, *The Psychology of Jury Selection,* PERSONAL INJURY ANNUAL 551 (1978).

29. One plaintiff's attorney has suggested the importance of the client "dressing down," so as to avoid showing too much "economic good health" in front of the jury, for "it is difficult to appreciate the pecuniary problems of the injury claimant who sits in court with a diamond stickpin elegantly displayed." Bailey, *Tort Damages: The Plaintiff's Case,* 41 B. U. L. REV. 281, 286 (1961). Another plaintiff's attorney has written that *flattering* a jury for its "humane" generosity and show of conscience may reap great rewards. "However, he [defendant's attorney] may twist the significance of the cases [involving alleged "runaway juries"] that make headlines in the papers, the truth is that they proclaim the *splendid attitude* of the community toward human suffering and misery. In view of his attack, it is fair comment to say that *the community should be praised and exalted for its humane attitude,* and not condemned or scoffed at. The real problem is not the runaway verdict — it is the utter indifference of people to the travail and suffering they impose upon others. *This is the sin.*" Broder, *Dramatic Final Argument,* PERSONAL INJURY ANNUAL 633, 637 (1978). (Emphasis supplied.)

30. "The temptation to exaggerate is unfortunately strong, both for the plaintiff who seeks a large award and for the attorney whose fee is closely geared to the verdict." Bailey, *supra* note 29, at 288.

31. As the Supreme Court of South Carolina noted as much as two decades ago, or long before the advent of products liability litigation: "The growing tendency in recent years towards verdicts in death cases, which although not manifestly the result of passion, prejudice or improper motive, are nevertheless so large as to indicate, even in an inflated economy, undue liberality on the part of the jury, has given this court much concern. . . ." Elliot v. Black River Electrical Co-op., 283 S.C. 233, 265, 104 S.E.2d 357, 374 (1958).

One commentator indicates that there appears to be a major trend in "wild escalation of jury awards in wrongful death cases." Note, *New Standards of Review for Excessive Jury Verdicts for Grief,* 10 SUFFOLK U. L. REV. 218, 232 (1976).

volved[32] or the nature of the event causing death,[33] it is clear that the economic effects of huge jury awards may impact severely upon defendants and their role in society.[34]

B. Nonadmissibility: A Critique

Although criticism has not been lacking, courts have generally strayed little from the majority view. Only two jurisdictions, Wisconsin[35] and Mississippi,[36] have ruled that evidence of remarriage is admissible on the damages issue. A federal court[37] has also joined this minority view; and, interestingly enough, the British courts[38] have unanimously endorsed it as well. Most of the enlightening work on the subject, however, has been provided by commentators[39] who have vigorously protested the foibles of the majority position.[40]

1. The Fixed Rights Rationale

The criticisms of the nonadmissibility rule are manifold, and well-deserved. The rationale that the widow's rights are "fixed" at the time of death, for example, borders on the specious. As has been pointed out by even those who support the exclusion of evidence of remarriage, "that formulation, of course, begs the question."[41] Why the rights of the widow should be fixed, and not that they are fixed, is the threshold issue. Thus, to argue, as some courts have done,[42] that inquiry into the extent of plaintiff's damages must be measured at the date of the

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32. Certain defendants, such as air and steamship carriers, are apparently considered "target" defendants. Note, *supra* note 31, at 233.

33. Aviation disaster cases are said to involve "an element revolving around the absolute horror of the situation itself that is worth a substantial sum of money." Whitehead & Kriendler, *Evaluation of Aviation Cases for Settlement or Trial,* PERSONAL INJURY ANNUAL 827, 845 (1961).

34. It is not difficult to visualize that recurrent large verdicts may wipe out a defendant's profits and even make insurance so costly as to become prohibitive. *See The Devils in the Product Liability Laws,* BUSINESS WEEK, No. 2572 INDUSTRIAL EDITION, Feb. 12, 1979, at 72.

35. *See* Jensen v. Heritage Mutual Ins. Co., 23 Wis. 2d 344, 127 N.W.2d 228 (1964).

36. *See* Campbell v. Schmidt, 195 So.2d 87 (Miss. 1967).

37. *See* Papizzo v. O. Robertson Transport, Ltd., 401 F. Supp. 540 (E.D. Mich. 1975).

38. *See* Hall v. Wilson, (1939) 4 All Eng. 85; Willis v. Commonwealth, (1946) 73 Common W.L.R. 105; Mead v. Clarke Chapman & Co., (1956) 1 All Eng. 44 (C.A.).

39. *See generally* Comment, *Remarriage and Wrongful Death,* 50 MARQ. L. REV. 653 (1967); Shields & Giles, *Remarriage and the Collateral Source Rule,* 36 INS. COUNSEL J. 354 (1969); Comment, *Damages for Wrongful Death and the Possibility of Remarriage,* 32 U. PITT. L. REV. 119 (1970).

40. "[I]t promotes and legalizes 'bigamy' in the courtroom. The remarried spouse is allowed to reap the benefits of the monetary value of the lives of two wives, one technically alive in terms of her replacement value, the other actually alive and rendering the services of a wife." Shields & Giles, *supra* note 39, at 354.

41. Zabin & Connolly, *supra* note 11, at 361.

42. *See* note 13 and accompanying text *supra.*

spouse's death, as opposed to some other time, is *ipse dixit* logic at its worst.

The argument that such evidence is not relevant, while intellectually more defensible than the preceding one, is nonetheless equally subject to dispute. To simply state that remarriage of the decedent's spouse is "completely irrelevant"[43] to the loss occasioned by the death of the deceased is patently absurd, for it justifies the jury being "blindfolded as to all that has intervened between tragedy and trial."[44] Such a position ignores the fact that the spouse has made a conscious decision to normalize her life, and to minimize her loss. This is not to suggest that the loss is wiped out altogether, or that all wounds are healed.[45] It should be evident, however, that by actively seeking out a new source of income, counsel and companionship, the surviving spouse has realized that she stands to enrich and improve her life through remarriage. It is this very act of realization, epitomized by remarriage, which indicates that "the hardship imposed upon the widow by her husband's death may be alleviated."[46]

A defendant who was responsible for the creation of the loss should not be forced to shoulder a burden beyond that which is proportionate to the injury.[47] Evidence of remarriage, therefore, is unquestionably relevant on the damages issue. As the Supreme Court of Mississippi has astutely observed:

> [W]e feel that it is necessary to point out that the testimony showing any change in the conditions on which the suit is based is competent as against the rights of the person or persons affected; therefore, we hold that testimony may be introduced to show the remarriage of the widow, after the death of the husband, for which the suit is brought.[48]

As previously noted,[49] one federal court has held that evidence of remarriage is admissible, while a second federal court[50] has joined in the observation that such evidence is "relevant" within the meaning of Federal Rule of Evidence 401.[51] In *Papizzo v. O. Robertson Transport*

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43. Stephens v. Natchitoches Parish School Bd., 110 So.2d 156, 166 (La. Ct. App. 1959), *rev'd on other grounds,* 115 So.2d 793 (La. App. 1959).

44. Shields & Giles, *supra* note 39, at 354.

45. *Id.*, at 354.

46. Seaboard Coast Line R. R. v. Hill, 250 So.2d 311, 317 (Fla. Dist. Ct. App. 1971), *cert. discharged,* 270 So.2d 359 (Fla. 1972).

47. *See* Comment, *Remarriage and Wrongful Death, supra* note 39, at 653.

48. Campbell v. Schmidt, 195 So.2d 87, 90 (Miss. 1967).

49. *See* note 37 *supra.*

50. *See* Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927 (5th Cir. 1976), *aff'd,* 540 F.2d 837 (5th Cir. 1976).

51. Rule 401 of the Federal Rules of Evidence provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Ltd.,[52] the Michigan District Court reasoned that remarriage should be admissible "under the broad rules favoring admissibility which should be used by the federal courts."[53] Moreover, in *Conway v. Chemical Leaman Tank Lines, Inc.*,[54] the *Conway* court held that remarriage was a matter of "background" evidence within "the generous definition of 'relevant evidence' of Rule 401."[55] Although these decisions have been subject to severe criticism,[56] based on state-federal relations arguments,[57] there appears to be no serious dispute among commentators that evidence of remarriage is, in fact, relevant.[58]

It can validly be argued that the matter of remarriage bears a relation to the degree or extent of loss suffered by the surviving spouse. In a similar vein, it appears reasonable to assume that the spouse's loss — in terms of income, comfort, counsel and so forth — would naturally be affected were she to find another husband. The standard for introducing the fact of remarriage, however, is whether such evidence makes the proof of reduced damages more probable than it would be without the evidence. Clearly, it is both reasonable and logical to assume that this evidence would more easily allow proof of reduced damages. Again, evidence of remarriage would hardly foreclose either the action itself, or

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FED. R. EVID. 401. Although these precedents are not binding on Massachusetts courts, they are instructive in view of the fact that proposed Massachusetts Rule of Evidence 401 is identical to its federal counterpart. This new Massachusetts rule would be in accord with traditional Massachusetts law. *See* (Proposed) MASS. R. EVID. 401, explanatory comment.

52. 401 F. Supp. 540 (E. D. Mich. 1975).

53. *Id.*, at 542.

54. 525 F.2d 927 (5th Cir. 1976).

55. *Id.*, at 930. The holding was later affirmed by the Fifth Circuit court, without further discussion of the "relevance" question under the Federal Rules. Instead, the Fifth Circuit court found that the evidence was admissible pursuant to TEX. REV. CIV. STAT. ANN., art. 4675a (Vernon Supp. 1976-1977), but, under the same statute, could not be introduced in mitigation of damages. 540 F.2d 837 (5th Cir. 1976). It is, however, entirely a matter of speculation whether the "relevance" argument of the Federal Rules was rejected or silently affirmed in the *Conway* court's decision upon rehearing. *But see* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5201 (1978) [hereinafter cited as WRIGHT & GRAHAM]; Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 384 (1977).

56. Wellborn, *supra* note 55, at 384.

57. *Id.*, at 382-86, 415-17.

58. Professor Wellborn, while excoriating the Fifth Circuit court for its use of Federal Rule of Evidence 401 as a vehicle for avoiding Texas substantive law, at the same time observed that the state law in question was "peculiar," and "strains, if indeed it does not defy, the very concept of relevant evidence." Wellborn, supra note 55, at 381.

In its discussion of Rule 401, the Advisory Committee noted that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee Note, 56 F.R.D. 183, 215 (1972).

The Advisory Committee further commented that this relation would be defined according to principles evolved by experience or science, "applied logically to the situation at hand," such that the true test of the relevance of evidence was whether it made the matter to be proved more probable than it would be without the evidence." *Id.*, at 215-16.

a consideration of the spouse's damages.[59] The fact that such evidence would not be dispositive of the ultimate finding of damage, or even that it might be considered of "weak probative value, does not make it irrelevant."[60]

The position that such evidence is irrelevant mocks the notion that "[t]ruth finding must be a central purpose . . . [and] [t]he fundamental condition for enhancing the possibility of accurate fact finding is that as much relevant information as possible be placed before the trier."[61] Realistically, it is questionable whether the ends of truth and justice may ever be served by permitting a plaintiff to "appear in court still wearing weeds while a spouse lurk[s] in the corridor."[62] Justice cannot be served by excluding such evidence. Indeed, it has been contended that such exclusion "encourages, and more, even requires witnesses and officers of the court sworn to tell the truth, actually to lie in order to preserve the fabrication of widowhood or widowerhood."[63]

2. The Collateral Source Rule

The second reason for denying the admissibility of remarriage, namely that the collateral source rule would bar that evidence in the same way it bars introducing evidence of inheritance proceeds or insurance benefits, is much more troublesome.[64] Unlike the two previously mentioned arguments based on irrelevancy and speculation,[65] the collateral source rationale appears to be perfectly reasonable on its face. It hardly would seem just, for example, to allow a wrongdoer to reduce his damages by introducing evidence of a benefit to which the plaintiff would have been entitled in any event.

Unfortunately, the reasoning of this argument operates in a somewhat circular fashion, for it clearly begs the critical question of whether the wrongful death widow herself should be entitled to benefits above and beyond her actual loss. As the Massachusetts Supreme Judicial Court held in *Sullivan v. Old Colony Street Railway,*[66] the purpose of awarding damages to a plaintiff is to compensate him or her for the losses incurred by the tortious conduct of the wrongdoer.[67] Since the spouse, through remarriage, has already partially recouped those losses, any recovery in excess of the unrecouped losses will necessarily be

59. *See* Shields & Giles, *supra* note 39, at 352.
60. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE HANDBOOK 101 (2d ed. 1977).
61. Weinstein & Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence,* 4 GA. L. REV. 43, 72 (1969).
62. WRIGHT & GRAHAM, *supra* note 55.
63. Shields & Giles, *supra* note 39, at 354.
64. *See* notes 16-23 and accompanying text *supra.*
65. *See* notes 13-15 and 24-26 and accompanying text *supra.*
66. 197 Mass. 512, 83 N.E. 1091 (1908).
67. *Id.,* at 516, 83 N.E. at 1092.

punitive in nature.[68] It would be, for several reasons, a disservice to justice to return "to the dark age of punishing the wrongdoer under a mask of compensating claimants for actual loss."[69]

First, compensatory and punitive damages should, under no circumstances, be commingled. The Massachusetts death statute[70] clearly distinguishes them[71] by providing for punitive damages only under certain, specified conditions. Indeed, it has been suggested[72] that the whole dogma of nonmitigation, based upon the collateral source rule, is structured upon an ill-founded interpretation of the English death statute, commonly referred to as "Lord Campbell's Act."[73] The purpose of that act was to grant a cause of action to the decedent's family members, who, until that time, had been left without a remedy.[74] Insofar as the statute speaks in terms of damages "proportionate to the injury,"[75] American courts have clearly erred because they effectively permit a remarried plaintiff to recover damages disproportionate to the injury.[76] British courts, as previously mentioned, allow a defendant to introduce evidence of remarriage in order to insure that the plaintiff's damages do not exceed her actual losses.[77]

A second reason to preclude a spouse from recovering in excess of her partially recouped losses, such excess recovery being punitive in nature, is that one of the primary purposes of punitive damages is to deter future tortious conduct. It would be disingenuous to argue that the presence or absence of collateral benefits would in any way affect a potential tortfeasor's state of mind.[78]

Generally, there are many reasons why people avoid tortious conduct: fear, of their own person, property, or reputation; fear of criminal sanctions; and fear of harming others.[79] As a rule, however, the threat of civil liability does not appear to be a factor,[80] that is, a

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68. Lubin, *The Collateral-Source Doctrine,* TRIAL LAWYERS' GUIDE, 337, 345 (1960).

69. Shields & Giles, *supra* note 39, at 354.

70. For a discussion of the Massachusetts Wrongful Death Act, *see* note 3 *supra.*

71. In order to recover punitive damages under the Massachusetts Death Act, the plaintiff must allege and prove that "the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant. . . ." *See* note 3 *supra.*

72. Comment, *Remarriage and Wrongful Death, supra* note 39, at 657-59; Shields & Giles, *supra* note 39, at 358.

73. FATAL ACCIDENTS ACT, 9 & 10 Vict., ch. 93 (1846).

74. W. PROSSER, THE LAW OF TORTS 902-08 (4th ed. 1971).

75. FATAL ACCIDENTS ACT, 9 & 10 Vict., ch. 93 (1846).

76. Comment, *Remarriage and Wrongful Death, supra* note 39, at 653.

77. *See* cases cited in note 38 *supra.*

78. James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies,* 27 N.Y.U.L. REV. 537, 547 (1952).

79. James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L. J. 548, 558 (1948).

80. *Id.,* at 558-59.

surgeon will not avoid cutting off the wrong leg of a patient, a driver will not avoid driving on the wrong side of the road, and a man will not avoid punching his neighbor, merely in order to avoid a lawsuit.[81] Otherwise, one might expect that the presence or absence of insurance, which has both the purpose and effect of insulating a tortfeasor from bearing the ultimate financial responsibility for his wrongful acts, would dramatically affect the frequency with which such acts occur.[82] In fact, such a relationship does not appear to exist under any but the most extraordinary of circumstances. Consequently, any consideration of whether a potential plaintiff has collateral sources of income would appear to be even more attenuated.

Moreover, even if one accepts the very purpose of the doctrine, that is to deny a defendant the right to benefit from income sources which flow to the plaintiff as a matter of right, and over which the defendant has no control, this noble ambition must be grossly elasticized in order to bring remarriage within its purview. Despite the analogies drawn between remarriage and insurance,[83] or remarriage and inheritance,[84] it should be evident that remarriage is not comparable because it is usually uncontemplated prior to the time of injury. People purchase insurance specifically for the proverbial rainy day and they have an expectation that it will be available to them in the event of some unforeseen disaster. In a similar vein, many individuals accumulate and save real and personal property with an eye toward passing it on to their heirs. Those same heirs also have an expectation that such property will, one day, be theirs.

No one, however, looks at his spouse in such terms. People have no expectation of future spouses, simply because they do not — and should not, according to their marriage vows — view their present marriage as less than permanent. Consequently, when that marriage is destroyed by the death of one spouse, there is no immediate expectation that another source of income, counsel and companionship will enter the living spouse's world. The widow is entitled, of course, to remarry immediately, if she so desires. However, this is not commonly within the realm of her expectations. When she reaches the stage where she does remarry, therefore, the widow has already formed a new set of expectations concerning her prospective husband which were unanticipated at the time of the first marriage, and which may or may not be similar to her expectations during the previous marriage.

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81. Indeed, if a person were to ignore all of the aforementioned factors ordinarily controlling the more primitive instincts toward tortious conduct, then it would not be beyond the realm of imagination to assume that such a person would bellow, "so sue me!" while committing the tort.

82. Professor James suggests that, on the contrary, insurance may actually foster greater safety consciousness, insofar as insurers will compel their insureds to become more careful. *See* James, *supra* note 79, at 548.

83. *See* cases cited in note 22 *supra*.

84. *See* cases cited in note 23 *supra*.

More importantly, however, remarriage, unlike insurance,[85] inheritance proceeds,[86] Workmen's Compensation,[87] special salary provisions,[88] or gratuitous services[89] — all of which are typically excluded as collateral benefits — can actually fill some of the voids created by the death of plaintiff's spouse. Remarriage usually provides a regular source of income, as well as the care and comfort of a loving human being. Indeed, a remarried plaintiff may find herself in a position which might enable her to someday benefit from additional insurance or inheritance. Thus, unlike the widowed plaintiff, the remarried plaintiff does not face the immediate prospect of having to sustain herself with funds which might otherwise have been set aside for retirement or some other purpose.

Massachusetts courts have long followed the collateral source rule,[90] although its history has been properly characterized as "muddy waters."[91] Consequently, even though the rule has been favored in this Commonwealth since 1889,[92] the courts have not hesitated to circumvent its application and purpose through various distinctions. For example, in *Daniels v. Celeste,*[93] the Massachusetts Supreme Judicial Court refused to allow the jury to compensate the plaintiff for medical services given him by his wife. The court distinguished the earlier case of *Copithorne v. Hardy,*[94] which had permitted the jury to value the services rendered the plaintiff by her adult daughter. The court responded that, unlike Copithorne's adult daughter, Daniel's wife would not necessarily be entitled to remuneration for such services because the existing law prevented spouses from contracting with one another.[95] Insofar as Daniels could not have been under any legal obligation to reimburse his wife for her services, he could not claim that he had incurred any expense or loss.[96]

Similarly, in *McElwain v. Capotosto,*[97] the Massachusetts Supreme Judicial Court permitted the defendant to cross-examine the plaintiff on the issue of his receipt of Workmen's Compensation benefits. The court determined this to be relevant to the issue of whether the plaintiff

85. *See* cases cited in note 22 *supra.*

86. *See* cases cited in note 23 *supra.*

87. *See* West v. Moulders Foundry Co., 342 Mass. 8, 171 N.E.2d 860 (1961).

88. *See* Shea v. Rettie, 287 Mass. 454, 192 N.E. 44 (1934).

89. For a discussion of *Receipt of gratuitous hospitalization or medical expenses affecting damages, see* 128 A.L.R. 686 (1940), 13 A.L.R. 2d 355 (1950); *Receipt of public relief or gratuitity as affecting recovery,* 19 A.L.R. 2d 557 (1951). *See also* RESTATEMENT OF TORTS 924, comment e, *supra* note 19.

90. *See* notes 16-23 and accompanying text *supra.*

91. Schwartz, *supra* note 19, at 354.

92. *See* Copithorne v. Hardy, 173 Mass. 400, 53 N.E. 915 (1899).

93. 303 Mass. 148, 21 N.E.2d 1 (1939).

94. 173 Mass. 400, 53 N.E. 915 (1899).

95. MASS. GEN. LAWS ANN. ch. 209, § 2 (West 1963).

96. 303 Mass. 148, 151, 21 N.E.2d 1, 3 (1939).

97. 332 Mass. 1, 122 N.E.2d 901 (1954).

had failed to return to work as a result of his injuries, or as a result of his continued compensation. The court, however, barred the defendant from introducing the evidence for the purpose of mitigating damages, since the plaintiff was rightfully entitled to Workmen's Compensation benefits as a matter of his employment contract.[98] However, it was clear that the court, as in *Daniels,* had paved substantial inroads into the very heart of the collateral source doctrine.[99] Finally, in *Jones v. Town of Wayland,*[100] the Massachusetts Supreme Judicial Court held that the collateral source rule had no application where the defendant was responsible for providing the collateral benefits, and where a third party, not the defendant, was the actual tortfeasor. Massachusetts does not appear to have allowed the collateral source rule to obscure the compensatory purpose of monetary damages. If compensation was not the key to the damages issue then one could assume, arguendo, that Daniels could have recovered the value of his wife's services, that McElwain would not have been required to explain his failure to return to work, or that Jones would not have been awarded damages which were subject to a deduction for insurance benefits. Clearly, the collateral source rule is a doctrine whose tenets go to the heart of any damages issue raised under Massachusetts law. It should also be viewed as a doctrine which is, itself, an exception to the more general principle that, in this Commonwealth, damages are to be awarded only as compensation for injuries actually suffered.

In view of these observations, it is submitted that it would be consistent with equitable principles, in light of the Massachusetts view of the collateral source rule, to admit evidence of remarriage in mitigation of a wrongful death plaintiff's damages. The compensatory portion of the death act was never meant to be punitive,[101] nor was it meant to award damages that are disproportionate to the actual amount of injury suffered by the surviving spouse.[102] The collateral source rule has always been interpreted by Massachusetts courts to deny defendants the opportunity to profit from benefits which plaintiffs could reasonably expect, and for which defendants were not responsible. The courts have been inclined, however, to prevent plaintiffs from using the doctrine as a sword to extract further riches from defendants, rather than as a shield against potentially prejudicial admission of such evidence.

3. The Issue of Undue Speculation

Finally, the notion that evidence of remarriage creates a problem of undue speculation by the fact finder is without merit. The nature of

98. *See* Shea v. Rettie, 287 Mass. 454, 192 N.E. 44 (1934).
99. *See* Schwartz, *supra* note 19, at 348.
100. 78 Mass. Adv. Sh. 157, 373 N.E.2d 199 (1978).
101. *See* note 71 and accompanying text *supra.*
102. *See* notes 59-60 and accompanying text *supra.*

damages in a wrongful death action is speculative[103] since the amount of recovery turns "on such matters as life expectancy, income, character, habits and health of the deceased, and his past contributions to his family, together with the vicissitudes of an uncertain future."[104] The criticism, therefore, should be directed at the defendant's inability to deduct from the plaintiff's damages some of the same benefits now provided by the new husband that were lost due to the death of the former spouse. As one writer commented:

> If the jury is competent to determine the economic loss to the surviving spouse on the basis of such conjectural matters as life expectancy, probability of continued economic productiveness of the deceased spouse, and probability of continued marital harmony between the deceased and the surviving spouse, they should also be competent to temper this figure with the probability of economic support from a new spouse that the surviving spouse would not have if the decedent had not been killed.[105]

Moreover, it should be evident that the amount of the actual loss to the plaintiff is even more speculative if the jury is not given all of the facts which constitute her present condition.[106] Unless all the relevant evidence is available for the jury to consider, there will be an even greater danger that the jury will award the plaintiff a verdict which is clearly excessive. If the plaintiff is to recover only the fair monetary value of the decedent,[107] then an equitable evaluation requires the realization that whatever damage "can be measured as tangibly lost for purpose of recovery must be capable of being measured for purposes of mitigation and rebuttal when tangibly restored."[108]

II. Limited Admissibility and the Quest for the Pristine Jury

In recent years, some courts have slowly come to the realization that there is "a patent offensiveness"[109] in permitting a wrongful death plaintiff to conceal, or even more repugnant, to actually lie to the jury concerning the existence of a new spouse. At the same time, however, courts have adhered to the traditional notion that, for one reason or another, evidence of the subsequent remarriage should not diminish the amount of the surviving spouse's damages. Caught in the vortex of this dilemma, some ingenious jurists have theorized that such evidence is ad-

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103. Comment, *Remarriage and Wrongful Death, supra* note 39, at 660 (1967); W. PROSSER, *supra* note 74, at 908 (4th ed. 1971).

104. W. PROSSER, THE LAW OF TORTS, at 908 (4th ed. 1971).

105. Comment, *Damages for Wrongful Death and the Possibility of Remarriage, supra* note 39, at 122.

106. Shields & Giles, *supra* note 39, at 355.

107. For text of Massachusetts Wrongful Death Act *see* note 3 *supra.*

108. Shields & Giles, *supra* note 39, at 357.

109. Watson v. Fischbach, 54 Ill. 2d 498, 503, 301 N.E.2d 303, 306 (1973).

missible, not on the issue of damages, but rather during voir dire in order to preserve "the high standards of integrity which the judicial process should maintain."[110] In other words, there is a concern that defendants, in the absence of such revelations during voir dire, will not have a reasonable opportunity to learn whether the fact-finding tribunal is acquainted with plaintiff's new spouse, and thus not free of bias.[111] As would be expected, this proposal has met with criticism from both those who favor and those who oppose the admissibility of remarriage.[112] On the one hand, such an approach has been labeled as little more than an attempt to require the jury to regard an outspoken untruth as "less of a lie";[113] and, on the other hand, it has been characterized as a concern for judicial integrity which places a "premium on form and overlooking substance."[114]

A. Admissibility: The "New Jersey Rule"

This uneasy compromise was first invoked by the New Jersey Supreme Court, in the 1968 decision of *Dubil v. Labate.*[115] The court reiterated the standard argument that damages should be unaffected by remarriage, concluding that such an exclusion was comparable to the exclusion of insurance benefits or inheritance. At that point, however, the court voiced an implied protest; it reasoned that evidence should not be excluded to the point of outright misrepresentation during examination of the jury. With the court's statement that it would be "virtually impossible to avoid mention of a remarriage without resorting to untruths,"[116] the compromise of allowing evidence of remarriage during voir dire, though with no effect on the issue of damages, was born.

The Illinois Supreme Court agreed with their New Jersey brethren by stating that disclosure of the widow's subsequent remarriage was necessary "to alleviate false testimony by the surviving spouse concerning marital status."[117] Specifically, it was held that such testimony was relevant — indeed, essential — to the selection of a fair and impartial jury; and, in addition, that the plaintiff could not be heard to bellow "prej-

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110. Glick v. Allstate Ins. Co., 435 S.W.2d 17, 23 (Mo. Ct. App. 1968).

111. *See* Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973). Texas has evidenced the same concern but has chosen to deal with it with a specific statute. *See* notes 54-58 and accompanying text *supra.*

112. Shields & Giles, *supra* note 39, at 355-56, suggest that this is a weak-willed compromise. *See also* WRIGHT & GRAHAM, *supra* note 55; Wellborn, *supra* note 55, at 415-17.

113. Shields & Giles, *supra* note 39, at 355.

114. Wiesel v. Cicerone, 106 R.I. 595, 607, 261 A.2d 889, 895 (1970).

115. 52 N.J. 255, 245 A.2d 177 (1968).

116. *Id.*, at 262, 245 A.2d at 180.

117. Hardware State Bank v. Cotner, 55 Ill. 2d 240, 249, 302 N.E.2d 257, 263 (1973).

udice."[118] In admitting this evidence of remarriage during voir dire, the Illinois Supreme Court articulated:

> There is, to us, a patent offensiveness in a rule which countenances false statements made under oath in a judicial proceeding on the theory that, unless false testimony is permitted, jurors will disregard the instructions of the court to the prejudice of the plaintiff. We believe the judicial process in its search for truth need not resort to the condonation of perjury to accomplish its objective, and we accordingly hold that prospective jurors may be told by the judge that a plaintiff has remarried.[119]

These courts recognized the danger of potential prejudice in that the jury might consider evidence which the defendant had "no legitimate interest in exploring."[120] However, these courts agreed that a proper jury instruction would negate the damage,[121] and that in any event, the risk of potential harm to the plaintiff was outweighed by the need for the preservation of judicial integrity.[122]

B. Nonadmissibility: The "California Rule"

Critical response to the New Jersey Rule occurred during the same year that the New Jersey Supreme Court held such evidence to be necessary to avoid "resorting to untruths"[123] when a California appellate court refused to follow suit. The California Appeals Court in *Cherrigan v. City and County of San Francisco*[124] impliedly conceded to the integrity problem in failing to comment about the event of remarriage, but evidently felt that the matter could be resolved simply by pointing to the new husband in the courtroom without actually mentioning his interest in the case. In the case of *Weisel v. Cicerone,*[125] the Supreme Court of Rhode Island echoed the sentiments of the California Appeals Court by categorically rejecting the New Jersey Rule. In *Weisel,* the

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118. Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd* 53 Ill. 2d 591, 294 N.E.2d 689 (1973).

119. Watson v. Fischbach, 54 Ill. 2d 498, 503, 301 N.E.2d 303, 306 (1973).

120. Hardware State Bank v. Cotner, 55 Ill. 2d 240, 249, 302 N.E.2d 257, 263 (1973).

121. *See* Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356, *aff'd,* 53 Ill. 2d 591, 294 N.E.2d 689 (1973); Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968).

122. *See* Watson v. Fishbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973).

123. Dubil v. Labate, 52 N.J. 255, 262, 245 A.2d 177, 180 (1968).

124. 262 Cal. App. 643, 69 Cal. Rptr. 42 (1968). It is interesting to note that the court in this case did not mention an earlier case, Helmick v. Netzley, 12 Ohio Misc. 97, 229 N.E.2d 476 (1967). There, the Ohio court allowed the plaintiff to use her former name throughout the trial, noting that identification of plaintiff as a remarried woman would "in all probability" have the improper effect of diminishing plaintiff's damages.

125. 106 R.I. 595, 261 A.2d 889 (1970).

Rhode Island Supreme Court summarized the rationale for admitting evidence of remarriage thusly:

> The argument against an exclusionary rule can be summarized as follows:
> 1. The integrity of the judicial process requires that plaintiff's true name and remarriage be known to the jury.
> 2. Such knowledge by the jury is essential for an adequate voir dire examination of prospective jurors.
> 3. Any risk of prejudice to the plaintiff is negated by proper instructions stating that the remarriage should have no part in their deliberations as to the amount of damages.
> 4. It must be assumed that a jury will follow the instructions of the court.[126]

Thus, having stated the rationale against exclusion, the *Weisel* court discounted the argument by observing that evidence of remarriage during voir dire "could very well have a tendency to confuse the jury and adversely prejudice the plaintiff."[127] The court stated that this would be placing "a premium on form and overlooking substance."[128] The court presumed that the jury might simply ignore any limiting instruction,[129] and reasoned that in view of this hazard, judicial integrity might just as well be served by asking the jurors if they knew the new husband by name without further elaboration relative to his true identity.

C. Analysis: Admissibility v. Nonadmissibility

Thus, the battle lines were fairly well drawn. On the one hand, it was argued that failure to identify the plaintiff as a remarried woman would make a sham of the jury system. On the other hand, it was argued that the very integrity of the trial itself might depend upon withholding such information because the jury would regard it as an invitation to deprive the plaintiff of damages which are rightfully hers. Essentially, it appears that the crux of this disagreement is the degree of confidence to be placed in a jury's determination of a factual dispute. The New Jersey Rule[130] would suggest that juries must have all available, relevant information before them in order to render a meaningful decision. Should certain information come to the jury's attention which is relevant on some points and irrelevant on others, the judge would instruct the jury as to the relevancy of the evidence. According to the New Jersey Rule,

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126. The court was unimpressed with the argument that such evidence might be relevant. *Id* at 601-02, 261 A.2d at 893.

127. *Id.* at 607, 261 A.2d at 895.

128. *Id.*

129. Professor Wright appears to concur in this fear. WRIGHT & GRAHAM, *supra* note 55.

130. *See* notes 115-22 and accompanying text *supra.*

the jury will obey the instruction. The California Rule,[131] however, harbors grave doubts concerning the ability and willingness of the jury to avoid penalizing the plaintiff for finding a new spouse.

The attack on jury competence or equanimity is hardly a new one. As much as thirty years ago, Judge Jerome Frank contended that a jury was as unlikely to comprehend, respect and apply instructions from the court "as if they were spoken in Chinese, Sanskrit, or Choctaw."[132] Rather than simply finding facts, and, when necessary, applying the legal rules given by the court to those facts, Judge Frank, in assessing the ability of the jury to understand the judge's instructions, stated:

> The jury are more brutally direct. They determine that they want Jones to collect $5,000 from the railroad company, or that they don't want pretty Nellie Brown to go to jail for killing her husband; and they bring in their general verdict accordingly. Often, to all practical intents and purposes, the judge's statement of the legal rules might just as well never have been expressed.[133]

Needless to say, few jurists — even though they may favor the California view, are willing to accede to Judge Frank's view that the jury system is little more than a dead tradition, a relic which would not exist today were it not for centuries of custom. Indeed, surveys suggest quite the contrary.[134] Nevertheless, the concern in the present context is not ill-founded. Jurors are human, replete with foibles, sympathies and prejudices. It is natural, therefore, to presume that a jury might wish to award money to a widow — simply because she is a widow — under certain circumstances, irrespective of a defendant's fault. Certainly, a jury should not award a verdict on such a basis. The concern of the California Rule, however, is that such a prejudice may naturally exist. Essentially, the California Rule envisions that a jury wants to give a widow money because it feels sympathy for her. Should it learn of the existence of her new spouse, however, the jury will believe her to be a fraud and will undervalue her damages. The issues raised by the California Rule, in short, appear to present a microcosm of the larger question of the practicality of using a dozen laypersons "as a means of introducing flexibility and equity into the legal process."[135]

For proponents of the New Jersey Rule,[136] the argument that potential prejudice to the plaintiff is greater than the need for judicial integrity is nothing less than alarming. Such an argument presumes that the judge will be unable to control the jury's behavior. The New Jersey view

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131. *See* notes 123-29 and accompanying text *supra*.
132. J. FRANK, COURTS ON TRIAL 116 (1949).
133. *Id.* at 111.
134. *See* Klaven, *The Dignity of the Civil Jury Trial*, 50 VA. L. REV. 1055, 1064-65 (1964).
135. *Id.* at 1066.
136. *See* notes 115-22 and accompanying text *supra*.

is hardly oblivious to the prejudice factor, which is the entire purpose of the limiting instruction. The proponents of admissibility recognize that both issues of probative force and potential prejudice must be viewed in a light most favorable to the proponent, "that is, to give the evidence its maximum reasonable probative value and its minimum reasonable prejudicial value."[137] As one authority has stated:

> If there is doubt about the existence of unfair prejudice, confusion of issues, misleading the jury, undue delay, or waste of time, it is generally better practice to admit the evidence, taking necessary precautions by contemporaneous instructions to the jury followed by additional admonition in the charge.[138]

Moreover, the fatal weakness of the California Rule[139] is that it does nothing to discourage the plaintiff from concealing or perjuring herself concerning her true marital status. Obviously, if the plaintiff's husband is identified to the jury during voir dire as "Mr. X, plaintiff's new husband," rather than simply as "Mr. X," the plaintiff will not later be in a position to state that she is presently a widow. For that matter, she may not be tempted to identify herself by her former married name, a name which may no longer be hers. Thus, although the California Rule might arguably be as effective as the New Jersey Rule in insuring that the jury will be composed of persons who have no prior association with plaintiff's new husband, the California Rule fails to completely fulfill the goal that a trial be a "search for truth."[140] Accuracy in fact-finding is more than merely determining who is at fault; it is preventing parties from toying with the truth. Without accuracy in fact-finding as a goal, "no sound basis for our judicial system appears."[141]

III. The Role of the Federal Rules of Evidence in a Diversity Case

As discussed earlier,[142] *Wyatt v. Bonnell Co.*[143] was a diversity action brought in the Massachusetts federal court. This case raised the somewhat intriguing problem of how the Federal Rules of Evidence, particularly Rules 401,[144] 402,[145] and 403[146] might affect the question of

137. Weinstein & Berger, *supra* note 61, at 88.

138. *Id.* at 79.

139. *See* notes 123-29 and accompanying text *supra*.

140. Watson v. Fischbach, 54 Ill. 2d 498, 503, 301 N.E.2d 303, 306 (1973).

141. Weinstein & Berger, *supra* note 61, at 72.

142. *See* notes 1-6 and accompanying text *supra*.

143. No. 75-1669-S (D. Mass., filed April 29, 1975). *See* note 1 *supra*.

144. *See* note 51 *supra*.

145. Rule 402 of the Federal Rules of Evidence provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

146. Rule 403 of the Federal Rules of Evidence provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

the admissibility of plaintiff's remarriage. Although neither the parties nor the court concerned themselves with this problem, the question of how "procedural" evidence rules relate to the "substantive" damages issue presents a further potential obstacle for the unwary, in the sense of adding constitutional dimensions to otherwise fairly routine personal injury actions.

A. Massachusetts "Substance" and "Procedure"

Under Massachusetts law, as elsewhere, questions of evidence are deemed procedural,[147] while questions of damages are deemed substantive.[148] As a result, a federal court applying Massachusetts law in a diversity case would, ordinarily, apply the Federal Rules of Evidence on evidentiary questions and Massachusetts law on the damages issue. This would be consistent with general principles of state-federal law, which, pursuant to the *Erie* doctrine,[149] would require a federal court in Massachusetts to apply its own procedural law and to follow whatever substantive law would be applied by a Massachusetts court.

The remarriage issue, as shown by *Papizzo v. O. Robertson Transport, Ltd.*,[150] and *Conway v. Chemical Leaman Tank Lines, Inc.*,[151] necessarily involves both procedural and substantive elements. Consequently, were the federal court in question to fail to properly consider Massachusetts law, it is obvious that a veritable imbroglio may develop. In the *Papizzo* and *Conway* cases, the federal courts held that evidence of remarriage was properly admissible under Rule 402, but, in so doing, fell into an abyss of state-federal relations law problems.

B. Papizzo and Conway on Trial

Papizzo v. O. Robertson Transport, Ltd.[152] involved Michigan decedents and a Michigan plaintiff, an Ontario, Canada corporate defendant, and an Ontario *locus delectus*. The federal district court in Michigan noted, initially, that there was a controversy as to whether

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confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

147. "The local law of the forum determines the admissibility of evidence. . . ." RESTATEMENT (SECOND) OF CONFLICTS OF LAW 138 (1969). *But see* Bresnahan v. Proman, 312 Mass. 97, 43 N.E.2d 336 (1942) (determining whether a question is a matter of law or of fact relates to the method of trial and is to be decided according to the law of the place of trial).

148. *See* Atwood v. Walker, 179 Mass. 514, 61 N.E. 58 (1901); Jackson v. Anthony, 282 Mass. 540, 185 N.E. 389 (1933).

149. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The *Erie* doctrine provides that except in matters governed by the United States Constitution or by federal statutes, the law to be applied by federal courts in diversity of citizenship cases is the law of the state. *Id.* at 64, 78.

150. 401 F. Supp. 540 (E. D. Mich. 1975).

151. 525 F.2d 927 (5th Cir. 1976).

152. 401 F. Supp. 540 (E. D. Mich. 1975).

Michigan law, which favored exclusion, or Ontario law, which favored admission, should control on the issue of the admissibility of evidence of plaintiff's remarriage. The court skirted this issue by stating that, consistent with *Erie,*[153] it could apply federal law as to procedure; accordingly, because evidentiary questions are characterized as procedural, federal law as to admissibility of the evidence was held to apply.[154] The court then went on to hold that this evidence should be admissible under the "broad rules favoring admissibility,"[155] which, presumably, meant that it was "relevant" within the meaning of Rule 401, and not "prejudicial" under Rule 403. Thus, although the court determined that Michigan's own law of damages would have barred admission of such evidence,[156] the evidence of remarriage was revealed to the jury. Interestingly enough, the court then ruled that the jury could consider the remarriage in mitigation of plaintiff's damages[157] — even though, only a moment earlier, the remarriage was considered as an evidentiary issue rather than one of damages.

The decision in *Conway* I and II[158] only added to the confusion. *Conway* I arose when the defendant raised, on appeal, the propriety of the trial court's refusal to permit reference to the plaintiff widow's subsequent remarriage. During the course of trial, plaintiff actually stated, on direct examination, that her marriage to her deceased husband had been her only marriage, even though this was totally false. Under the Texas death statute governing the case, "evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if such is true . . . ,"[159] thereby altering prior Texas common law, which had prohibited the use of such evidence for any purpose.[160] With considerable restraint, the court refused to adopt defendant's suggestion that the plaintiff widow's statement constituted a deliberate misrepresentation, although it did note that the plaintiff's testimony "sails close to the wind indeed and carries a high potential for er-

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153. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

154. 401 F. Supp. 540, 542 (E. D. Mich. 1975).

155. *Id.*

156. *See* Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965). Interestingly, Michigan was one of the very first courts to hold that such evidence was *admissible* to mitigate plaintiff's damages. Stuive v. Pere Marquette Ry., 311 Mich. 143, 18 N.W.2d 404 (1945). The Michigan Supreme Court later overruled *Stuive* in *Bunda v. Hardwick,* stating that the *Stuive* decision had misread some cryptic language on the subject from Jones v. McMillan, 129 Mich. 86, 88 N.W. 206 (1901), and furthermore, that the entire notion of mitigation based upon remarriage was consistent with the principle of the collateral source doctrine. Bunda v. Hardwick, 376 Mich. 640, 652, 138 N.W.2d 305, 311 (1965).

157. 401 F. Supp. 540, 542 (E.D. Mich. 1975).

158. Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927 (5th Cir. 1976); Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837 (5th Cir. 1976).

159. 13A TEX. REV. CIV. STAT. ANN., art. 4675a (Vernon Supp. 1976-77).

160. *See* Gulf, C. & S. F. Ry. v. Younger, 90 Tex. 387, 38 S.W. 1121 (1897).

roneous inference by the jury. . . ."[161] Initially, the Fifth Circuit Court of Appeals held that the Federal Rules of Evidence should control because evidence of remarriage was a matter of background evidence which was relevant; however, because "under *Erie* state law governs the measure of damages,"[162] and because Texas law denied admissibility, the evidence would be limited to use during voir dire.[163] The notion that remarriage was properly categorized as background evidence was unusual enough,[164] but the issue was further muddled upon rehearing.

In *Conway* II,[165] the court affirmed, but concluded that Texas substantive law was "so bound up" in the evidentiary issue that Texas law, and not the Federal Rules, should control the remarriage question.[166] The court flatly rejected the widow's contention that her testimony had not been misleading; indeed, the court found that "she made her marital status a sword, not a shield" and that "[t]he effect . . . can only have been to press upon the jury a condition contrary to fact and to seek to derive benefits from the misleading impression so created. . . ."[167] By implication, therefore, the court in *Conway* II considered this to be a question of relevancy of evidence. However, the court then abruptly announced that because the Texas death statute had been amended to admit evidence of remarriage, the issue transcended one of evidence, which was a procedural matter, and became a substantive question governed by Texas law. Unlike the federal court in the *Papizzo* case,[168] and unlike its own prior decision in *Conway* I,[169] the *Conway* II court held that *Erie* required that state law, rather than federal law control, insofar as the remarriage issue was "more than a mere rule of evidence."[170] The discussion in *Conway* I was not otherwise referred to, thereby leaving *Conway* II open to speculation as to the actual impact of *Conway* I.[171]

It has been suggested in a commentary,[172] that *Papizzo* and *Conway* represent emasculations of the purpose of the Federal Rules and an abuse of the *Erie* doctrine. Although Congress drafted the Rules in such a way that the Rules of Decision Act of 1789[173] and the Rules Enabling

161. 525 F.2d 927, 930 (5th Cir. 1976).
162. *Id.* at 930.
163. *Id.* at 930 n.6.
164. *See* WRIGHT & GRAHAM, *supra* note 55.
165. Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837 (5th Cir. 1976).
166. *Id.* at 838.
167. *Id.*
168. Papizzo v. O. Robertson Transport, Ltd., 401 F. Supp. 540 (E. D. Mich. 1975).
169. Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927 (5th Cir. 1976).
170. 540 F.2d 837, 839 (5th Cir. 1976).
171. *See* note 55 and accompanying text *supra.*
172. Wellborn, *supra* note 55. *See also* WRIGHT & GRAHAM, *supra* note 55.
173. "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

Act of 1934[174] should, technically, have had no effect,[175] the legislative history of the Rules evidences a congressional intent for the Rules to conform to state substantive law.[176] Therefore, according to Professor Wellborn, the holding in *Papizzo*[177] was totally incorrect under a traditional analysis of federal-procedural/state-substantive law issues.[178] The federal court in *Papizzo* correctly held that the damages issue should be governed by Michigan law, and that Michigan law would deny admissibility. However, by subsequently ruling that it could ignore Michigan law and follow federal procedural law, which purportedly favored admissibility, the court in effect turned the analysis "on its head."[179] The remarriage issue was either procedural, in which case, it could not be used in mitigation of the substantive issue of damages, or it was substantive, in which case the proper function of the federal court would have been to have followed Michigan law and denied admissibility.[180]

Similarly, according to Professor Wellborn, *Conway* I[181] created a problem insofar as the Fifth Circuit Court rather baldly held that the Federal Rules, and not state law, governed the remarriage question; this holding in effect would tempt forum-shopping and contravene the mandate of Congress in enacting the Rules.[182] Thus, the danger was that *Conway* I's interpretation of Rule 401[183] might be so determinative of the character or result of the litigation that use of the Rule might unfairly discriminate against the party relying on state law. *Conway* II impliedly realized this shortcoming but did nothing to actually alleviate the melange created by *Conway* I. Again, the Fifth Circuit Court might have simplified its analysis, in view of the puzzling state of Texas' damages law,[184] by applying the Federal Rules consistent with Texas law. That is, had the court considered the matter as procedural, as Texas apparently did, by limiting such evidence to the voir dire, it could either admit the evidence for that limited purpose, or exclude it, without running afoul of Texas' substantive law.[185]

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174. "Such rules [as the Supreme Court shall have the power to prescribe] shall not abridge, enlarge or modify any substantive right. . . ." 28 U.S.C. § 2072.

175. *See* Wellborn, *supra* note 55, at 398.

176. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

177. Papizzo v. O. Robertson Transport, Ltd., 401 F. Supp. 540 (E. D. Mich. 1975).

178. Wellborn, *supra* note 55, at 385.

179. *Id.* at 415-16.

180. WRIGHT & GRAHAM, *supra* note 55, at § 5201.

181. Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927 (5th Cir. 1976).

182. *See* Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965).

183. Rule 401 defines "relevant evidence." *See* note 51 *supra*.

184. *See* note 58 *supra*.

185. *See* Wellborn, *supra* note 55, at 415-17. *See also* text accompanying note 188 *infra*.

IV. A PROPOSAL

Federal courts applying Massachusetts law in diversity cases, would do well to avoid the kind of problem encountered in *Conway* and *Papizzo* and to consider the evidentiary and damages issues inherent in the remarriage problem in such a way as to maintain consistency between federal and state law. This is not a problem easily dealt with, for, as illustrated by the *Papizzo* and *Conway* decisions, the issues frequently rest upon the shifting sands of public policy. However, in grappling with this situation, a federal court applying Massachusetts law must have an understanding of the various considerations weighing in favor of and against admissibility, as well as a knowledge of, or reasonable ability to predict, how Massachusetts courts stand on the admissibility issue. Additionally, the federal court in question must be familiar enough with the Massachusetts death statute to determine whether Massachusetts courts have approached that issue as a matter of substantive or procedural law. Certainly, the most consistent results will follow, and the least harm to state-federal law will arise, if the federal court simply adopts the mandate of the state "substantive" law, which the federal court may determine by noting whether the state law admits or excludes such evidence for all purposes, including mitigation of damages.[186] On the other hand, if the state law is one which may be classified as "procedural," which Professor Wellborn suggests would be state law permitting or requiring admission of this evidence for the limited purpose of ensuring the court of an unbiased jury, or of ensuring the requisite judicial integrity, then a federal court would be free to admit or exclude the evidence as it deemed proper.[187] A third situation, which arose in the context of *Conway* II,[188] would be one in which state law favored limited admissibility as a matter of "substantive" law.[189] In such a case the federal court would be required to follow the state law. The latter case should hopefully not arise too often; indeed, it should arise only in that limited instance in which the state legislature has made the admissibility or exclusion of evidence of remarriage a part of the death statute itself.

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186. *See* Wellborn, *supra* note 55, at 416.

187. *Id.*

188. Conway v. Leaman Chemical Tank Lines, Inc., 540 F.2d 837 (5th Cir. 1976).

189. Professor Wellborn disputes the *Conway* II court's characterization of the Texas rule of limited admissibility as being grounded in "substantive policy." Instead, he argues that the court should have followed the Texas law, even though it was only "procedural," in order to minimize forum-shopping and unequal treatment. This is, of course, precisely the language adopted by the Supreme Court in Hanna v. Plumer, 380 U.S. 460, 468 (1965), in its discussion of the twin aims of the *Erie* doctrine.

CONCLUSION

The issue of the remarriage of a wrongful death plaintiff is one which has not yet been decided by Massachusetts courts. The issue is by no means a new one, and most courts which have sojourned into this troublesome matter have concluded that a jury should not be informed of the plaintiff's remarriage. This conclusion is an unfortunate one, however, borne less from a calculated appraisal of the plaintiff's loss than from a sympathetic desire to maximize her recovery. It is submitted that such evidence should be admissible in Massachusetts, and that plaintiffs should not be permitted to subsidize their present marriages by "cashing in" on the death of their departed spouses. Defendants should not profit from a plaintiff's remarriage. Indeed, in some cases a jury may not even reduce plaintiff's recovery after having learned of her remarriage. But they should, at the very least, be entitled to have the jury made aware of the fact that plaintiff may no longer live under the same burdens she once did. Moreover, barring admissibility on the damages issue, it is hoped that Massachusetts courts will nonetheless see fit to provide defendants with fair trials in which justice, and not simply substantial verdicts for plaintiffs, is the goal. Defendants are rightfully entitled to fair trials; however, such trials will clearly be beyond their grasp should plaintiffs be permitted to conceal evidence, or even more repugnantly, to perjure themselves under oath before a jury.

International Law and Disposal of Radioactive Wastes at Sea

*J. Paul Lomio**

The disposal of radioactive nuclear waste materials is a topic of paramount importance to the United States and the balance of the industrialized world. Many countries, including the United States, are considering the appropriateness of employing the oceans as a permanent repository for these highly toxic materials. The author examines the current national and international, legal and policy issues raised by using the oceans as a permanent disposal site for these wastes.

Of the twenty-one nations using nuclear power only one, West Germany, has an accepted program for the permanent disposal of nuclear waste.[1] In the other nations, including the United States where there are sixty-five operating nuclear power plants, the disposal of spent fuel from fission reactors has caused the most concern. The radioactivity of spent fuel is such that it must be contained from the biosphere for periods of time up to one million years.[2]

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1. Countries with nuclear energy reactors in operation are the following: Argentina, Belgium, Britain, Bulgaria, Canda, Czechoslovakia, Finland, France, East Germany, West Germany, India, Italy, Japan, The Netherlands, Pakistan, South Korea, Spain, Sweden, Switzerland, United States, Soviet Union. *See* Deese, *Seabed Emplacement and Political Reality,* 20 OCEANUS 50 (1977). *See also* D. DEESE, NUCLEAR POWER AND RADIOACTIVE WASTE 18 (1978).

It has been decided by West German officials to use salt deposits as the geological repository of that nation's radioactive wastes. *See* NUCLEAR ENERGY POLICY STUDY GROUP, NUCLEAR POWER ISSUES AND CHOICES 265-66 (1977) [hereinafter cited as POLICY STUDY GROUP].

2. "High-level nuclear wastes are extremely toxic, with some fission product radionuclides having effective lifetimes of more than a million years." Frosch, *Disposing of High-Level Radioactive Waste,* 20 OCEANUS 5 (1977). Dr. Frosch is Associate Director for Applied Oceanography at the Woods Hole Oceanographic Institution, and Chairman of the Committee on Radioactive Waste Management of the National Academy of Sciences/National Research Council.

In an article about the use of the ocean floor for radioactive waste disposal, the author concludes: "The level of radioactivity and rate of decay of the full suite of elements is such that the waste elements must not be allowed to escape from the seabed for a million years." Silva, *Physical Processes in Deep-Sea Clays,* 20 OCEANUS 31, 31 (1977). Dr. Silva is a professor of Ocean and Civil Engineering at the University of Rhode Island.

In the United States, roughly 1,200 tons of spent fuel are being held temporarily at the reactor sites.[3] This figure does not include the far greater quantity of radioactive wastes produced by Department of Defense activities.[4] Originally, commercial power industry wastes were stored in this manner because a decision was yet to be made on whether they would be reprocessed for further use. In 1978, President Carter made this decision and reprocessing projects were cancelled.[5] This decision was based on the fact that plutonium is separated from spent fuel during reprocessing; and the administration was concerned that some of this plutonium, which is used in weapon production, could be diverted to terrorists. Therefore, a decision must be made now regarding the permanent disposal of the spent fuel.

Public concern over the problem of radioactive waste disposal is growing and finding an acceptable solution has now taken on political overtones. Maine and California, for example, have enacted laws that prohibit any further nuclear power plant development within their borders until an acceptable solution has been found for the problem.[6] One alternative being studied by the policy makers is to use the sea for the permanent disposal of radioactive waste. This article will address the legal and policy issues presented by the disposal of radioactive wastes at sea. Part I will examine the problems associated with the dumping of radioactive wastes at sea. Part II will discuss the current legal framework governing such practices. Finally, part III will scrutinize the feasibility of sub-seabed emplacement of radioactive wastes.

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3. POLICY STUDY GROUP, *supra* note 1, at 253.

4. *Id.*

> As a result of the nuclear weapons program beginning in World War II, the Atomic Energy Commission (AEC) generated some 205 million gallons of high-level radioactive liquid waste (as of June 30, 1974), primarily as a by-product of the production of plutonium in special reactors. Weapons work currently generates waste at the rate of about 7.5 million gallons annually. The total amount of waste has been reduced in volume by partial solidification to about 81 million gallons total in liquid and solidified forms.

Id. at 250. *See* Tables I and II depicting present and predicted waste production by both military and commercial sources.

5. *See* Weaver, *The Promise and Peril of Nuclear Energy*, 155 NAT'L GEOGRAPHIC 459, 486 (1979), where the author states:

> [T]he administration opposes reprocessing spent reactor fuel — a necessary step if plutonium is to be extracted and recycled.
>
> President Carter hopes that foreign nations follow the U.S. lead in foregoing reprocessing and breeder construction. By way of example, the President has blocked completion of a large reprocessing plant at Barnwell, South Carolina, that has already cost 250 million dollars.

6. *See generally* NUCLEAR REGULATORY COMMISSION OFFICE OF STATE PROGRAMS, INFORMATION REPORT ON STATE LEGISLATION (1977).

I. THE PROBLEM OF DUMPING RADIOACTIVE WASTES AT SEA

A. Definition of Radioactive Waste

Waste materials emitting ionizing radiation are the byproducts of the nuclear fission process.[7] Oversimplified, the fission process occurs when the nucleus of an atom of a certain isotope of uranium, U-235, is hit by a neutron. The atom will break apart, usually into two pieces, and a number of other neutrons will be emitted. These neutrons will hit nearby U-235 nuclei and cause a "chain reaction." There is more energy in the form of mass stored in the U-235 nucleus than in the sum of the fission product nuclei. Therefore, when the atom is split, extra energy is made available. This extra energy creates heat, and the heat is used to produce electricity.[8]

U-235 is only a minor constituent of natural uranium. Reactor fuel, in the form of "rods," is a mixture of U-235 and other elements, including U-238, another isotope of uranium. When U-238 is struck by a neutron it eventually decays to an isotope of plutonium, P-239. Then, sequential captures of neutrons results in the transmutation of the U-238 into other elements, called "transuranic elements."[9]

There comes a point when the fuel rod's effectiveness is producing energy decreases because there are simply too many non-fissile elements that get in the way of new fission reactions. The fuel rod is then removed from the reactor; it has become "spent fuel."

Fission reactors are used by both the military and the commercial nuclear power industry. These reactors produce other forms of radioactive wastes in addition to the spent fuel. These wastes are divided into two main categories: high-level and low-level radioactive wastes.

High-level wastes consist of materials of very high level radioactivity that have to be stored and monitored for at least hundreds of thousands of years.[10] In the United States, high-level wastes are defined as those wastes that are the products of the nuclear fuel process (*i.e.*, the spent fuel).[11] The International Atomic Energy Agency (IAEA) adopts a dif-

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7. Radioactive waste is defined and described with the nontechnical reader in mind in chapter 1 of M. WILLRICH & R. LESTER, RADIOACTIVE WASTE: MANAGEMENT AND REGULATION (1977).

8. *See* Frosch, *supra* note 2, at 15.

9. *See* note 13 and accompanying text *infra*.

10. M. WILLRICH & R. LESTER, *supra* note 7, at 6.

11. The basis for the United States definition is explained in *Hearings on Nuclear Waste Disposal Before the Subcomm. on Oceanography and the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 191 (1978) [hereinafter cited as *1978 Hearings*].

ferent definition: they classify as high-level wastes "matter with an activity per unit gross mass"[12] exceeding certain limits, in curies.[13]

Low-level wastes are those substances produced or made radioactive at the reactor which have a lower concentration of radioisotopes. Low-level wastes result from certain operations in the processing of irradiated fuel.[14] Examples of other low-level wastes are radioactive contaminated "laboratory equipment, sealed sources of radioisotopes which are no longer useful, scrap from fuel cycle manufacturing plants, contaminated resins from nuclear waste systems, et cetera."[15]

Low-level wastes are further divided into wastes which are transuranic contaminated (TRU waste) and those that are not. TRU waste consists of those radioactive elements that are heavier than uranium. Two important points to remember here are that: (1) TRU waste is potentially more dangerous than is non-TRU waste because of the longer half-lives (*e.g.*, the half-life of Neptunium, a transuranic element, is 2,140,000 years); and, (2) the distinction between the types of radioactive wastes is often a "question of judgment."[16] Once the wastes have been packaged, it may become even more difficult to make the distinction. One reason for this is that the Nuclear Regulatory Commission (NRC) can be ambiguous in their labeling practices;[17] another reason is that at some point the distinctions become arbitrary. An example of this is found in the case of plutonium:

> Plutonium is probably the principal long-lived transuranic contaminant. The question is whether these transuranic contaminated low-level wastes should be reprocessed, solidified and considered as high-level wastes, or should be disposed of in some other safe manner in their present form. This is an example of a case where you might not want to consider plutonium as a high-level waste.[18]

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12. This definition and the concentration in curies figures are presented in International Atomic Energy Agency (IAEA), *The IAEA Revised Definition and Recommendations of 1978 Concerning Radioactive Wastes and Other Radioactive Matter Referred to in Annexes I and II to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, IAEA Doc. INFCIRC/205/Add. 1/Rev. 1 (1978) [hereinafter cited as *1978 IAEA Revised Definition*].

13. For a discussion of the significance of this distinction, *see* notes 87-90 and accompanying text *infra*.

14. *See* INTERNATIONAL ATOMIC ENERGY AGENCY (IAEA), RADIOACTIVE WASTE DISPOSAL INTO THE SEA 17 (1961).

15. *Hearings on Low-Level Radioactive Waste Disposal Before the Subcomm. on Conservation, Energy, and Natural Resources of the House Comm. on Gov't Operations*, 94th Cong., 2d Sess. 203 (1976) (statement of Richard Cunningham) [hereinafter cited as *March Hearings*].

16. M. WILLRICH & R. LESTER, *supra* note 7, at 3.

17. Isotopes for disposal "may be labelled 'mixed fusion products,' 'low specific activity,' 'not specifically identified' " or by another vague designation. *March Hearings, supra* note 15, at 228-29.

18. *Hearings on Radioactive Waste Management Before the Subcomm. on Environment and Safety of the Joint Comm. on Atomic Energy*, 94th Cong., 2d Sess. 316 (1976) (statement of William D. Rowe).

B. Dumping of Radioactive Wastes at Sea: Past and Present Practices

Nations once enjoyed carte blanche privileges regarding what they chose to dump into the ocean. National and international prescriptions now prevent certain practices; however, the ocean is still being used for a disposal ground of radioactive waste materials.

Between 1946 and 1970, the United States dumped 86,758 containers containing low-level radioactive wastes at sea.[19] There has been radioactive leakage from all of the dumpsites in excess of the anticipated levels.[20]

European nations with nuclear energy facilities belong to the Nuclear Energy Agency (NEA). It is this entity that supervises all dumping of radioactive wastes by its member nations.[21] The participating NEA countries are Belgium, France, West Germany, Italy, the Netherlands, Sweden, Switzerland and Great Britain.[22] All of these nations have, at one time or another, dumped radioactive wastes at sea. Since 1971, however, only Belgium, the Netherlands, Switzerland and Great Britain have used the sea for radioactive waste disposal.[23] As of 1976, the NEA nations had dumped 113,870 containers of radioactive waste at sea.[24] Estimates are that between 1967 and 1976, countries other than the United States dumped 45,970 *tons* of radioactive waste into the oceans.[25]

The average nuclear power reactor produces about 30 to 40 tons of high-level waste annually.[26] Estimates on low-level waste production are not available since this type of waste includes such things as slightly contaminated clothing and industrial trash. The magnitude of the problem of what to do with radioactive waste will grow as the number of reactors increases. Currently, there are 198 operating nuclear energy reactors and an additional 314 reactors are either under construction or on order throughout the world.[27]

The NEA nations are expected to continue to use the sea for the disposal of radioactive wastes. Other nations, either those that are soon to acquire nuclear reactors or those that see no better alternative, may

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19. *See 1978 Hearings, supra* note 11, at 211. *See also* D. DEESE, *supra* note 1, at 50.

20. A recent EPA survey of the dumpsites revealed that radioactive contamination around the sites ranged from two to seventy times the expected maximum concentrations. Roosevelt, *Overview: Forever may be at hand,* 11 OCEANS 63 (1978).

21. Some radioactive waste disposal operations done at sea by Great Britain, such as the untreated low-level wastes from the Windscale reactors that flow by pipeline directly into the Irish Sea, are not NEA-supervised. *See generally 1978 Hearings, supra* note 11; D. DEESE, *supra* note 1.

22. *Id.*

23. *See* D. DEESE, *supra* note 1, at 50.

24. *Id.*

25. *See* Roosevelt, *supra* note 20, at 63.

26. *See* POLICY STUDY GROUP, *supra* note 1, at 243-67.

27. D. DEESE, *supra* note 1, at 18. For a list by country of the nuclear energy reactors in operation, under construction, on order, or announced, *see id.*

likewise use the sea for radioactive waste disposal. Thus, the question that needs to be answered is how much, if at all, this increased radioactivity in the oceans will affect man. The primary route by which this radioactivity will reach man is the food chain. Therefore, an answer to how man will be affected begins with an understanding of the effects of radioactivity upon marine resources.

C. The Effect of Radioactivity Upon Marine Living Resources

"The oceans are collectively the site of what is probably the world's largest inventory of unconfined radioactive materials, essentially all of natural origin."[28] There are sixty or so of these natural radionuclides found in the sea. They derive principally from two sources: the earth's rocks and minerals and cosmic-ray activity.

Natural radioactivity in the oceans has reached uniformity over the millennia, so that an ecological equilibrium exists for these long-lived radionuclides. Man-made radioactive materials, however, are only introduced at "point sources." Therefore, the processes that control the diffusion and dispersion of these isotopes are important to understand.

Untreated radioactive wastes from the Windscale reactors in England flowing by pipeline directly into the Irish Sea and reactor coolant water from the Hanford, Washington, reactors flowing into the Pacific ocean via the Columbia river result in two point sources. At each of these locations there is an initial mechanical dilution; the contaminated volume resulting from this mixing is called the "initial cloud."[29] Diffusion of this initial cloud is first controlled by its density, the density of the receiving waters and by the local ocean currents. The local currents control the movement of the cloud horizontally. "The local current pattern will advect the contaminated cloud away from the point of introduction, and the small scale turbulent motion will produce diffusion of the cloud, causing it to grow in volume and the concentrations within it to decrease."[30] This disfussion will continue until, eventually, large-scale ocean-wide circulation patterns cause the long term distribution of the radioisotopes. The cloud will also be dispersed vertically, first in the ocean's upper layer:

> Measurement of the Sr-90 content of ocean water has revealed significant amounts at depths of 1000 m. As the only source of this isotope is presumed to be the residue from atomic bombs, starting

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28. *Oversight Hearings on Radiological Contamination of the Oceans Before the Subcomm. on Energy and the Environment of the House Committee on Interior and Insular Affairs*, 94th Cong., 2d Sess. 547 (1976) (statement of James Liverman).

29. NATIONAL RESEARCH COUNCIL, RADIOACTIVITY IN THE MARINE ENVIRONMENT 91 (1971).

30. *Id.*

> in 1954, this indicates that the rate of vertical mixing in the upper waters may be quite rapid.[31]

For the most part, radioactive waste dumping practices, however, utilize the ocean floor in very deep water.[32] Canisters are designed to either sink to or penetrate the ocean sediments of deep mid-ocean areas, areas which are biological deserts, for permanent isolation. Under current and foreseeable technology, leaching of radioactivity from these containers cannot be prevented. Therefore, the concern is how the radioactivity will move from the bottom up and, because of this concern, the "age" of the water is important. "Age" here means the time it takes for water from the ocean's depths to circulate up to and be in contact with the surface.

There is some debate among oceanographers concerning the length of this period. However, relatively recent studies (1960), concluded that the ages range from 350 years to 900 years, depending upon the region.[33] As even the longest estimated ages are much shorter than the half-lives of most elements found in nuclear reactor wastes, there is a cause for concern. Thus, isotopes dumped at sea will be brought to the surface while still active and picked up by the more abundant fish life found there.

It is not just the ocean currents and mixing processes that spread radioactivity from the point sources. Many species of marine life are highly migratory, travelling thousands and thousands of miles. Two species of special importance to man as a food source — tuna and salmon — make transoceanic migrations. If these migrations pass through areas of high radioactivity the consequences may be felt in other parts of the world. For example,

> [b]etween March and May, 1954, a number of nuclear bombs were exploded at Bikini Island, in the North Equatorial Current at 165°E. During the following six months, radioactive fish were discarded at sea in the Kuroshio current and in the Kuroshio extension as far east as 176°W, . . . a distance of 3000 miles on a straight course but round the gyre it is nearer 7500 miles.[34]

How, then, does radioactivity affect fish? The danger posed by radioactive substances arises when these substances enter the cells of plants or animals. There they continue to emit radiation that, in certain — but still minute — quantities, destroys or alters tissue. When radioactive

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31. G. PICKARD, DESCRIPTIVE PHYSICAL OCEANOGRAPHY 101 (1975).

32. The IAEA has recently issued a requirement that the dumping of packaged waste be restricted to areas having an average water depth greater than 4,000 meters. *1978 IAEA Revised Definition, supra* note 12, at 3.

33. These are the conclusions of the Lamont Geological Observatory. G. PICKARD, *supra* note 31, at 99.

34. D. CUSHING, MARINE ECOLOGY AND FISHERIES 100 (1975).

isotopes enter the food chain they may become increasingly concentrated as they move up the chain into the higher plants and animals, and ultimately into man. This fact is of great significance in the marine food chain where it is estimated that there is a 90 percent loss of food — biomass — with each link as the isotopes found in the prey aggregate within the tissues of the predator. This theory seems to be borne out by research done on radioactivity in Pacific salmon.[35] The study documents the "relatively large amounts" of the man-made radionuclide zinc-65 found in Pacific salmon. The carnivorous chinook had the highest concentrations while the plankton feeding sockeye had low levels of this isotope.[36]

Operating independently of the food chain accumulations is the fact that "[c]ertain organisms have a high affinity for particular elements, *e.g.*, zinc is concentrated to very high levels in oysters, and vanadium reaches a high concentration in the blood of tunicates."[37] To further complicate matters, the "concentration factor" (CF) varies widely from species to species. The CF is defined as "the ratio of the concentration of an element or radionuclide in an organism to that concentration directly available from the organism's environment."[38] Generally speaking, a marine organism concentrates all the different isotopes (*i.e.*, radionuclides) of a given element to the same degree; and grazing marine animals tend to have the highest CF's.[39] Therefore, "if there is a progressively increasing human use of marine grazing animals for food, accompanied by widespread marine disposal of radionuclide wastes, the problems of maintaining human exposure to radiation at low levels would be intensified."[40]

A number of experiments have been conducted to determine how radioactivity, given in less then lethal doses, affects marine life. By administering radioactivity at levels much higher than those levels found anywhere in the oceans, various physiological and behavioral abnormalities were noted. These abnormalities included: reduction in reproductive capability, morphological abnormalities, leukopenia (decrease in the number of leuocytes in the blood), anorexia (reduction in the amount of oxygen in the blood), lethargy, growth depression and hyperactivity.[41]

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35. *See* N. Kujala, Artificial Radionuclides in Pacific Salmon (June 1966) (unpublished thesis in University of Washington Fisheries/Oceanography Library).

36. *Id.*

37. UNITED NATIONS, OVERVIEWS IN THE PRIORITY SUBJECT AREAS: OCEANS AND CONSERVATION OF NATURE, WILDLIFE AND GENETIC RESOURCES (1976), *excerpted in* W. BURKE, INTERNATIONAL LAW OF THE SEA 349 (3d ed. 1977).

38. NATIONAL RESEARCH COUNCIL, RADIOACTIVITY IN THE MARINE ENVIRONMENT 164 (1971).

39. *Id.* at 168-69.

40. *Id.*

41. *See generally id.* at ch. 9.

While the effects of radioactivity upon the marine population level has received most of the attention,[42] the individual abnormalities discovered during experiments with fish should concern man the most since low levels of radioactivity in fish tissue will be accumulated in man as he ingests it. This will be added to the other innocuous levels found in peoples' bodies (from, *e.g.*, x-rays, background radiation, leaks from nuclear power plant accidents) and there may come a point when the levels are no longer innocuous. Cancer from radiation may be "quiescent up to a certain point beyond which it canntake off in rapid growth."[43]

The present rate of radiation contamination does not present seritain point beyond which it can take off in rapid growth."[43]

The present rate of radiation contamination does not present serious dangers to animal or plant populations. However, extreme caution must be exercised by all countries producing radioactive wastes to ensure that this does not change. This caution will take the form of national and international law.

II. "DUMPING" OF RADIOACTIVE WASTES AT SEA: THE CURRENT LEGAL FRAMEWORK

A. Dumping of Radioactive Wastes as a High Seas Freedom

The freedom of the seas doctrine is often traced back to Grotius who stated, in 1609, that "the sea is common to all . . . because it is adapted for the use of all."[44] As a rule of international law, this doctrine means that no nation may have sovereignty over the high seas.[45] Grotius' concern was to "uphold the right of the Dutch to navigation and commerce with the Indies, in spite of the Portuguese claims to monopoly."[46] The International Law Commission attempted to clarify this doctrine in Article 2 of the Convention on the High Seas. Article 2 states:

> Freedom of the high seas . . . comprises, *inter alia,* both for the coastal and non-coastal states:
>
> (1) Freedom of navigation;

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42. "It would seem likely that the genetic response of [marine] populations is relatively unimportant. . . . [G]eneral mortality and infertility would be the limiting factors in the extent to which populations may overcome radiation exposure." *Id.* at 223.

43. *Nuclear Plants and Safety Levels,* SATURDAY REVIEW, May 5, 1979, at 8.

44. H. GROTIUS, MARE LIBERUM 28 (R. Magoffin trans. 1916). Grotius, however, was not the first to think this way. "Although it was Grotius who first placed the freedom of the seas on a legal and unassailable basis, the principle had been advocated, nearly a century before him, by the famous Spanish jurist de Vitoria in 1509, who was supported by Vasquez de Menchaca in 1564." C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 53-54 (1954).

45. *See* L. OPPENHEIM, INTERNATIONAL LAW — A TREATISE 254 (1955).

46. C. COLOMBOS, *supra* note 44, at 52.

(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.[47]

Although this language does not list waste disposal as a high seas freedom, the "*inter alia*" was included for a precise purpose. As the Commission explained in a Comment:

> The list of freedoms of the high seas contained in this article is not restrictive; the Commission has merely specified four of the main freedoms. It is aware that there are other freedoms such as the freedom to explore or exploit the subsoil of the high seas and freedom to engage in scientific research therein.[48]

To date, there has not been an agreement in the international community on whether dumping radioactive wastes at sea is a high seas freedom. States which do use the ocean for this purpose obviously believe that they have the right to do so, but only a few nations are involved. A small number of other nations believe that ocean disposal of these wastes is not permissible. The Soviet Union, for example, "continues to believe that such disposal is unlawful."[49] This latter group base their views upon the contention "that contamination of the oceans by depositing radioactive elements is a violation of freedom of the seas and, therefore, an impermissible use."[50]

McDougal and Burke argue for a "reasonableness test" to determine what is a high seas freedom;[51] perhaps such a test could be used to resolve international differences of opinion. To make an assessment of reasonableness, McDougal and Burke set out the following analysis:

> Factors relevant to an assessment for this purpose would include the scope and intensity of prior investigation of a proposed site, the possibility of harm according to existing information, prior use of the area, effects on such prior use and on potential uses, and available alternatives for the disposing state.[52]

Using three factors of this analysis, one could make an argument that the disposal of radioactive wastes at sea is unreasonable.

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47. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82, T.I.A.S. No. 5200.

48. INTERNATIONAL LAW COMMISSION, 1955 REPORT 3, *cited in* M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 758 (1962).

49. M. MCDOUGAL & W. BURKE, *supra* note 48, at 860. The Soviet Union made a proposal at the 1958 United Nations Conference on the Law of the Sea that all waste disposal in the ocean be prohibited. *Id.* at 860 n.413. However, despite the fact that the Soviet Union

> has accused the United States, United Kingdom, and France of polluting the Atlantic, . . . there is some evidence that they formerly dumped packaged solid wastes into the Pacific Ocean, and in 1960 they participated in a joint international scientific search for a suitable dumping site in the North Atlantic Ocean.

D. DEESE, *supra* note 1, at 30.

50. M. MCDOUGAL & W. BURKE, *supra* note 48, at 852.

51. *Id.* at 757-863.

52. *Id.* at 863.

The first of these three factors concerns "the possibility of harm according to existing information."[53] It is well known that ionizing radiation can damage and destroy living tissue. Without standards to follow, it is impossible to determine at what point radioactive pollution is done without reasonable regard to other states' use of the ocean since the danger is a cumulative one. Radioactive pollution is irreversible,[54] and the unknowns are still many. One commentator has remarked that "[i]t is uncertain whether drums containing liquid waste, or even solid lumps of radioactive materials are rendered totally harmless when dumped to the depths of the ocean, or whether the radioactive elements get back into circulation."[55] It is doubtfull that they are "totally harmless," however, as the Environmental Protection Agency (EPA) has reported that radioactive contamination around the sites where materials have been dumped is two to seventy times the expected maximum concentrations.[56]

Another major uncertainty exists concerning the "residence time" of a water particle in the deep layers of the sea. This measurement has to do with the "age" of the deep water; and there is not a general agreement on the length of this period. One group of scientists believes that the residence time is short, measured in tens of years; the other's position is that it is a very long time, measured by hundreds of years. The correct answer is essential for management of radioactive waste disposal operations:

> Assuming a simple two-layered model of the ocean, and taking a short retention time for the deep water layers of 50 yr, computations indicated that less than 2% of the fission products of 1000 metric t/yr could be placed in the deep sea without having the concentration of Sr-90, arising from such disposal, exceed the suggested value . . . in the upper layers. On the other hand, if the alternative view is taken that the retention time for the deep water is more like 500 yr, computations indicate that about 7% of the fission products from the considered future power production could be placed in the deep sea.[57]

Therefore, under "existing information," it cannot be concluded that there is no possibility of harm from ocean disposal of radioactive wastes.

The second factor used in a reasonableness argument is that waste-filled canisters dumped into the sea will "affect other potential uses of

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53. *Id.*

54. "Once [radioactive] wastes are deposited in the oceans they are likely to be largely beyond control and whatever harmful effects may ensue can therefore no longer be prevented." *Id.* at 854.

55. Ezediaro, *Review of the Legal Aspects of International Water Pollution Control,* 17 HOWARD L. J. 69, 83 (1971).

56. Roosevelt, *supra* note 20, at 63.

57. IAEA, *supra* note 14, at 25.

the seas." [58] Dumping of these canisters would have to be done in areas not now nor in the future "used for bottom trawling or other types of bottom fishing . . . [and], [a]reas crossed by submarine cables are likewise undesirable."[59] One important potential use, not contemplated in 1961 when the IAEA published its recommendations, is the mining of the so-called manganese nodules. This resource has been discovered in all oceans, with the greatest concentration in the deep sea.[60] Radioactive waste filled containers scattered along the ocean floor could seriously interfere with any of the three systems thus far developed for deep sea mining.[61]

It is also possible that one day the deep seabed may be a site for oil or gas mining. It is now assumed that such mining would be too costly; however, "fifty years ago similar assumptions might have been made about the seabeds of the outer continental shelf where oil drilling now occurs."[62] Moreover, other uses which could interfere with any widescale nuclear waste disposal at sea include military uses of the seabed (*e.g.*, submarine listening devices) and scientific research.

The third factor, "available alternatives,"[63] is perhaps the most significant. The following are the possible modes of permanent disposal of nuclear waste:

Ocean and Seabed Disposal
- — Deep ocean dumping
- — Seabed disposal in stable ocean floor
- — Ocean trench disposal

Disposal in Geological Formations on Land
- — Liquid injection into hydrofractured rock
- — Disposal in very deep holes
- — Burial in deep geological formations

Ice Sheet Disposal

Extraterrestrial Disposal[64]

Of these alternatives, disposal in geological formations is the most satisfactory. As a recent Nuclear Energy Policy Study Group has concluded: "[N]uclear wastes can be disposed of permanently in geological formations in such a way that there is very little prospect of material escaping into the environment."[65] Also, disposal in geological formations

58. M. MCDOUGAL & W. BURKE, *supra* note 48, at 863.

59. IAEA, *supra* note 14, at 25.

60. "Although manganese nodules occur at various depths, the more important accumulations, from an economic point of view, are those of the deep sea, at depths between 3000 and 6000 M." Xavier, *The Exploitation of the Deep-Sea Manganese Nodules: Progress and Prospects*, 1976 MARITIME POL. MGMT. 33, 34 (1976).

61. They are: a hydraulic system, an airlift system and a continuous-line bucket system. *Id.*

62. J. BERGER, NUCLEAR POWER: THE UNVIABLE OPTION 106 (1977).

63. M. MCDOUGAL & W. BURKE, *supra* note 48, at 863.

64. POLICY STUDY GROUP, *supra* note 1, at 255.

65. *Id.* at 245.

enables the wastes to be easily monitored and, if need be, retrieved.

Unfortunately, some states do not have the alternative of disposal in geological formations available to them. But even without this factor, an argument can be advanced, based upon the other two factors, that the disposal of radioactive wastes at sea should not be considered as a high seas freedom.

B. 1958 Convention on the High Seas

In 1956, the United Nations Scientific Committee on the Effects of Atomic Radiation first considered, superficially, the question of radioactive contamination of the oceans. This was their conclusion:

> The Committee has not given any detailed consideration to the technical aspects of these problems, but for the information available it is clear that there is no general population hazard from this cause at the present time. The Committee realizes that these problems may become of importance in the future and considers that the release of radioactive wastes should be a matter of international co-ordination and agreement.
>
> The discharge of radioactive waste in countries with nuclear reactors has not led to appreciable radiation exposure of populations, . . . however, . . . this subject [should] be kept under review. It is important that work should be actively continued on methods of minimizing environmental contamination from these causes.[66]

This report, and a 1957 recommendation that the IAEA deal with sea disposal, may have had a catalytic effect in producing the first international agreement attempting to deal with radioactive waste pollution. In 1958, the first United Nations Conference on the Law of the Sea (UNCLOS), was held in Geneva. The pollution concern of this conference "which had originated in connection with [the] release of oil, was extended to include pollution by radioactive materials."[67] The result was Article 25 of the 1958 Convention on the High Seas, which stated:

> 1. Every state shall take measures to prevent pollution of the seas by the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organization.
>
> 2. All states shall co-operate with the competent international organization in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents.[68]

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66. IAEA, *supra* note 14, at 9.
67. *Id.*
68. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82, 96, T.I.A.S. No. 5200.

Further, the Law of the Sea Conference, at its Tenth Plenary Meeting, adopted a Resolution stating:

> [T]he International Atomic Energy Agency, in consultation with existing groups and established organs having acknowledged competence in the field of radiological protection, should pursue whatever studies and take whatever action is necessary to assist States in controlling the discharge or release of radioactive materials to the sea, in promulgating standards, and in drawing up internationally acceptable regulations to prevent pollution of the sea by radioactive materials in amounts which would adversely affect man and his marine resources.[69]

As may be deduced from the quantity of radioactive wastes dumped at sea between 1946 and 1976,[70] this treaty and Resolution did not change United States or international policy on the issue. One reason for this is the weak drafting of the treaty: it does not prohibit anything; it does not distinguish between high-level and low-level radioactive wastes; and it sets no standards, leaving that responsibility to "competent international organizations." These organizations had, at that time, no interest in setting such standards.[71]

Another weakness with this treaty reflects the fact that there were no established principles of international law on the issue of radioactive waste disposal. This particular treaty is one of four adopted in Geneva in 1958. Collectively they sought to "codify existing international law and establish new rules governing the law of the sea."[72] The inability to achieve this goal with respect to radioactive waste disposal results from the fact that:

> The law of the sea is based primarily on conventions or other agreements which were concluded prior to current understanding of the actual and potential impacts of dumping on the marine environment. Consequently, present international law appears inadequate to deal with possible long-term environmental effects of various actions.[73]

Notwithstanding its limitations, the 1958 Convention was important in a number of respects. First, it was the initial formal pronouncement on the question of radioactive waste disposal at sea. Second, its

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69. Final Act of the United Nations Conference on the Law of the Sea, 450 U.N.T.S. at 58.

70. *See* notes 19-25 and accompanying text *supra*.

71. Three years later the IAEA recommended that "[t]he most recent Recommendations of the International Commission on Radiological Protection should be used as a guide for the assessment of the safety of proposed radioactive-waste disposal into the sea." IAEA, *supra* note 14, at 77.

72. Kuersteiner & Herbach, *In Pursuit of Clean Oceans — A Review of the Marine Protection, Research and Sanctuaries Act*, 18 SANTA CLARA L. REV. 157, 160 (1978).

73. COUNCIL ON ENVIRONMENTAL QUALITY, OCEAN DUMPING — A NATIONAL POLICY 36 (1970).

reference to competent international organizations, coupled the call for regulations in the Resolution, created a framework for actions by agencies such as the IAEA, Organization for Economic Cooperation and Development (OECD), United Nations Environment Program (UNEP), Food and Agricultural Organization (FAO), World Health Organization (WHO), and the International Commission on Radiological Protection (ICRP).

Finally, and most importantly, after the Convention, "states responded actively, through IAEA, to calls from other international forums for standards and guidelines to cover the disposal of radioactive materials into the sea."[74] The IAEA established its Brynielsson Panel which, among other things, made the important distinction between the types of radioactive wastes.[75] The Panel made 13 recommendations, the most important being: (1) that the release of "highly radioactive wastes from irradiated fuel cannot be recommended as an operational practice"; (2) that low and intermediate activity wastes "may safely be disposed of . . . under controlled and specific conditions"; and, (3) provisions for licensing, registering and monitoring disposal activities.[76]

C. The 1972 London Convention on Ocean Dumping

The next treaty to deal with radioactive pollution was produced by the 1972 London Convention.[77] However, a discussion of the 1972 London Convention begins in Oslo, as it was there that the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft was signed in September, 1971.[78] This Convention "provided a model for the London Convention,"[79] and first embodied the so-called "grey list" and "black list" concept. The "black list" is an inventory of substances which simply cannot be dumped into the ocean from any ship or aircraft; the "grey list" catalogues substances the dumping of which will be permitted, but only under certain circumstances. The Oslo Convention does not expressly list radioactive materials on either of its

74. D. DEESE, *supra* note 1, at 90.

75. IAEA, *supra* note 14.

76. *Id.* at 77-79.

77. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165 [hereinafter cited as *London Convention*].

In the interim, the 1967 *Torrey Canyon* accident had focused attention on the shores of Normandy and led to two 1969 conventions dealing with oil pollution. *See* International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, *reprinted in* 9 INT'L LEGAL MATERIALS 25 (1970); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, *reprinted in* 9 INT'L LEGAL MATERIALS 45 (1970). These conventions led to the 1971 convention in Oslo, the predecessor of the London Convention.

78. Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Feb. 15, 1972, *reprinted in* 11 INT'L LEGAL MATERIALS 262 (1972).

79. D. DEESE, *supra* note 1, at 81.

lists, and what it does list is not made very clear. Annex I prohibits, among other things, compounds and substances likely to be carcinogenic.[80] This prohibition would seem to include radioactive wastes. Annex II lists substances "requiring special care."[81] Radioactive wastes could easily be interpreted to fall within Annex II as well. Annex II also lists "containers . . . liable to sink to the sea bottom . . . which may present a serious obstacle to fishing or navigation."[82] In a few instances, containers of radioactive wastes dumped off the Atlantic and Pacific coasts have interfered with fishing.[83]

The impetus for the Oslo and later London Conventions can be traced back to the efforts of the United States. In 1971, the United Nations' Intergovernmental Working Group on Marine Pollution (IWGMP) met in London to prepare for the U.N.'s upcoming Stockholm Conference.[84] It was at this London meeting that the United States introduced its draft convention, The Regulation of Transportation for Ocean Dumping (First U.S. Draft).[85] Originally, the First U.S. Draft did not contemplate the *ad hoc* "grey and black list" approach. Its inclusion occurred when the IWGMP had its second meeting in November, 1971, in Ottawa.[86] Here, the First U.S. Draft was revised to include the "grey and black" lists.

The next step towards a treaty was taken in Iceland when the government convened an "Intergovernmental Meeting on Ocean Dumping" in Reykjavik in April, 1972,[87] using the Oslo Convention, a Second U.S. Draft Convention, and the articles drafted in Ottawa to produce a set of

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80. Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Feb. 15, 1972, *reprinted in* 11 INT'L LEGAL MATERIALS 262, 265 (1972).

81. *Id.* at 266.

82. *Id.*

83. *See generally 1978 Hearings, supra* note 11.

84. *See* United Nations, *Report of the United Nations Conference on the Human Environment*, 11 INT'L LEGAL MATERIALS 1416 (1972).

85. The First U.S. Draft is *reprinted in* 11 INT'L LEGAL MATERIALS 1021-28 (1971). It provides:

> *Article I*
>
> Each Party shall by law prohibit the transportation by any person from land under the jurisdiction of the Party of all material for the purpose of dumping such material in the oceans unless a general or specific permit for the transportation and dumping of such material is granted under laws of the Party meeting the requirements of Article III of this Agreement. Laws prohibiting such transportation shall contain penalties sufficient to deter their violation.
>
> However, nothing in this Convention shall be construed as abridging the sovereign immunity to which certain vessels and aircraft are entitled under international law.

Id. at 1022. All of the historical material pertaining to the London Convention comes from AMERICAN SOCIETY OF INTERNATIONAL LAW, THE QUESTION OF OCEAN DUMPING (1972) [hereinafter cited as A.S.I.L. REPORT].

86. Report of the Second Session of the IWGMP, U.N. Doc. A/Conf. 48/IWGMP 11/5 (1971).

87. A.S.I.L. REPORT, *supra* note 85, at 8.

draft articles.[88] Shortly thereafter, the United Kingdom called for The Intergovernmental Conference on the Convention on the Dumping of Wastes at Sea.[89] At this conference, the Oslo Convention, the Second U.S. Draft, and the Reykjavik articles coalesced into the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention).[90]

The London Convention expresses what is now regarded as international law on the subject of ocean disposal of radioactive wastes. There are over 90 signatory states, including the United States, the United Kingdom, Canada, Norway, Sweden, Panama, Mexico, and three nations which are rapidly expanding their nuclear energy capabilities — the U.S.S.R., Japan and France. However, Japan and the Republic of China, both signatories to the Convention, have not ratified it, although Japan has indicated its intention to ratify it in the near future.[91] Japan is significant here as "the only nation which has given greater weight to seabed disposal [of radioactive wastes] than [the U.S.]."[92] This is an important concern as Japan does not have suitable geological formations on land for the disposal of wastes and, therefore, "Japan is . . . a real potential additional dumper of low-level radioactive wastes" into the sea.[93]

The London Convention defines dumping as "any deliberate disposal of substances and materials into the sea by or from ships."[94] The approach this treaty then takes is to divide pollutant materials into three categories. First, black listed, prohibited materials are listed in Annex I. Paragraph six of this Annex prohibits the dumping of "[h]igh-level radioactive wastes or other high-level radioactive matter, defined on public health, biological or other grounds, by the competent international body in this field, at present the International Atomic Energy Agency, as unsuitable for dumping at sea."[95] Second, Annex II lists the materials requiring a prior special permit. This requirement applies to

88. Draft Articles of a Convention for the Prevention of Marine Pollution by Dumping, U.N. Doc. A/Conf. 48/8/Add. 1 (1972).

89. Kuersteiner & Herbach, *supra* note 72, at 159.

90. *London Convention, supra* note 77.

91. *1978 Hearings, supra* note 11, at 246.

92. *Id.* at 204.

93. *Id.* at 256.

Two other countries which might, in the reasonable future, give consideration to dumping low-level wastes in the ocean would be the Republic of Korea and Italy. We have no evidence that either is seriously considering the possibility, however, and their "potential" for ocean dumping is considered significantly less than Japan's at this point. Korea has not signed the London Convention, while Italy has signed but not ratified.

Id.

94. *London Convention, supra* note 77, Art. III, 26 U.S.T., at 2465, T.I.A.S. No. 8165, at 63.

95. *Id.* at 2407, T.I.A.S. No. 8165, at 63.

"[r]adioactive wastes or other radioactive matter not included in Annex I. In the issue of permits for the dumping of this matter, the Contracting Parties should take full account of the recommendations of the competent international body in this field."[96] Finally, there is a category for a residual group of materials requiring only a general permit.

The London Convention "finally limits the long-standing freedom of high seas waste disposal."[97] Its effect is to make what had been a beginning trend in international practice now the substance of treaty: high-level wastes cannot be disposed of into the oceans while low-level wastes can.

Perhaps the most serious weakness of the London Convention is a definitional one: What are high-level wastes? For example, the Environmental Protection Agency's (EPA) definition of high-level wastes is not the same as the IAEA's. Under EPA regulations, high-level wastes are defined as the products of the nuclear fuel process. The IAEA, however, "employs the curie, which is a measurement of radioactivity."[98] This distinction is not merely a matter of semantics:

> One of the most critical requirements is to gain agreement on the definition of high-level wastes. If a definition based solely on the quantitative level of radioactive emissions is agreed to, then any type of waste could theoretically be dumped by countries which argue that their containment technology will keep radiation levels below the permissible limits.[99]

The Annex to the IAEA's definition of high-level wastes was revised to indicate that spent fuel may be included within the definition, regardless of the level of radioactivity. The revision provides:

> The Definition also covers those wastes which *have relatively high concentrations of radioactivity* and have been generally recognized by the appropriate national authorities as being unsuitable for dumping, for example, the "first cycle wastes" from nuclear reprocessing, irradiated fuel and irradiated fuel cladding.[100]

Under the London Convention the dumping of low-level wastes requires a special permit. The need for a special permit, however, loses its significance by the provisions of Article VI which states in language similar to that of high-level wastes, that each nation "shall designate an appropriate authority . . . to (a) issue special permits which shall be required prior to, and for, the dumping of matter listed in Annex II."[101]

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96. *Id.* at 2466, T.I.A.S. No. 8165, at 64.
97. D. DEESE, *supra* note 1, at 82.
98. *1978 IAEA Revised Definition, supra* note 12.
99. *1978 Hearings, supra* note 11, at 220.
100. *1978 IAEA Revised Definition, supra* note 12 (emphasis in original).
101. *London Convention, supra* note 77, 26 U.S.T. at 2466, T.I.A.S. No. 8165, at 64.

Thus, for substances on the "grey list" it is only required that the states "should take full account of the recommendations of the competent international body."[102] This language gives to the signatory state total discretion in deciding whether or not to issue a dumping permit. Not only does this allow any state wanting to dump low-level wastes into the sea to do so, but it also raises the possibility that "pollution havens" may be created "in the same way that some states have become tax shelters or 'flags of convenience.' "[103]

A second limitation of the London Convention is its unrealistic stand on enforcement. Even if the Convention required an international authority to issue all permits, there is still the problem of apprehending and prosecuting those who do not obtain the permits. The Convention authorizes enforcement action by the flag state only when the dumping is beyond the territorial sea.[104]

Another weakness is the provision permitting a nation to unilaterally allow the dumping of high-level wastes if it determines that exigent circumstances exist. This authority is found in Article V: "A contracting Party may issue a special permit as an exception to [the prohibitions of Annex I, the "black list"] in emergencies, posing unacceptable risk relating to human health and admitting no other feasible solution."[105] Furthermore, none of the provisions of this Convention apply to "those vessels and aircraft entitled to sovereign immunity under international law" meaning that, absent national legislation, there is nothing to prevent the discharge of high-level wastes by public vessels.[106] Although it would seem unlikely that any nation would ever exercise its authority under these articles, the ban on the sea disposal of high-level wastes should be complete, as it is under United States law.[107]

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102. *Id.* As to substances for which only a general permit is required — which does not include any radioactive materials — the authorities need only "consider" certain factors listed in Annex III.

103. Schenker, *Saving a Dying Sea? The London Convention on Ocean Dumping*, 7 CORNELL INT'L L. J. 32, 44 (1973).

104. 1. Each contracting party shall apply the measures required to implement the present convention to all:
(a) vessels and aircraft registered in its territory or flying its flag;
(b) vessels and aircraft loading in its territory or territorial seas matter which is to be dumped;
(c) vessels and aircraft and fixed or floating platforms under its jurisdiction believed to be engaged in dumping.
2. Each party shall take in its territory appropriate measures to prevent and punish acts in contravention of the principles of this Convention.

London Convention, supra note 77, 26 U.S.T. at 2409, T.I.A.S. No. 8165, at 7-8.

105. *Id.* Art. V, 26 U.S.T. at 2408, T.I.A.S. No. 8165, at 6.

106. *Id.* Art. VII(4), 26 U.S.T. at 2410, T.I.A.S. No. 8165, at 8. This concept, first expressed in the First U.S. Draft, *supra* note 74, has been carried through all of the subsequent texts.

107. "The United States ban on high-level radioactive waste dumping leaves no room for definitional flexibility or unilaterally determined 'emergencies.' " D. DEESE, *supra* note 1, at 82.

D. United States Law and Policy

It has become a tenet of international law that no nation shall dump high-level wastes into the oceans. What, then, are the international rules on the dumping of other than high-level wastes into the sea? Under the 1972 London Convention each state is free to prescribe its own regulatory scheme. A look at the policies of the state with the greatest number of atomic power generating plants may be illustrative of how world opinion may be expected to develop.

Under United States legislation,[108] as under current treaty law,[109] the disposal of high-level wastes into the ocean environment is prohibited. No enactment, however, prevents the dumping of other than high-level radioactive wastes. Sea disposal of radioactive materials by any person within the United States must be done under the authority of two permits from two different agencies. One permit, from the EPA, is required for the transportation of radioactive material for sea dumping or the dumping of such materials in waters subject to United States jurisdiction.[110] Another permit, from the NRC, would be necessary to give authority to "whoever brings it up to that point to possess the material and transport it to the point of actually dumping it."[111]

The NRC's authority over the disposition of radioactive wastes comes from three laws: The Atomic Energy Act of 1954, as amended;[112] the Energy Reorganization Act of 1974, as amended;[113] and the National Environmental Policy Act of 1969.[114] The Atomic Energy Act of 1954 gave the AEC "broad regulatory authority over source, byproduct, and special nuclear materials."[115] Special nuclear materials were defined as those radioactive wastes which could be dispersed as low-level wastes.[116] The government's primary concern in 1954 was to ensure national security and defense since fission at that time was used mostly for weapons production.

The far reaching National Environmental Policy Act (NEPA) was enacted in 1969, and it provides that all federal agencies have to consider environmental factors and values in their decision making process. Prior to this time, it was the AEC's contention that its obligations were "limited to radiation hazards . . . [and, therefore,] it would not con-

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108. *See* notes 160-61 and accompanying text *infra*.
109. *See* note 84 and accompanying text *supra*.
110. 40 C.F.R. § 221 (1979).
111. 10 C.F.R. § 20.302(c) (1979).
112. 42 U.S.C. §§ 2011 *et seq.* (1976).
113. 42 U.S.C. §§ 4801 *et seq.* (1976).
114. 42 U.S.C. §§ 4321 *et seq.* (1976).
115. Poulin, *Who Controls Low-Level Radioactive Wastes*, 6 ENVIRONMENTAL AFFAIRS 201, 203 (1977).
116. *Id.* at 203 n.16.

sider the broader environmental impact."[117] Any doubt as to the importance of NEPA in regards to the AEC's decision making functions has been removed by subsequent judicial interpretations of NEPA. In *Calvert Cliffs' Coordinating Comm. v. AEC,*[118] a seminal NEPA decision, the court held that the AEC's duty was to guard against environmental harm to "the fullest extent possible"[119] at all stages of the decision making process.

The Atomic Energy Act gave the AEC licensing power over source, byproduct and special nuclear materials, but it did not deal specifically with the ocean dumping of these materials. Further, the Act "did not specifically characterize the kind of regulatory control the AEC would have over these materials which may be dispersed into the waters as pollutants."[120] However, AEC regulations did address this issue by stating that: "The Commission will not approve any application for a license for disposal of licensed material at sea unless the applicant shows that sea disposal offers less harm to man or the environment than other practical alternative methods of disposal."[121] Between 1946 and 1970, the AEC licensed the dumping of more than 86,000 containers of low-level radioactive wastes into the Atlantic and Pacific oceans.[122] In 1960, the AEC discontinued issuance of new licenses for sea disposal but existing licenses were permitted to remain in effect and licensees were permitted to continue waste disposal at sea.[123] Subsequent to the enactment of the above quoted 1971 regulation, the AEC issued no permits for ocean disposal.

The AEC was abolished under Title II of the Energy Reorganization Act of 1974,[124] and its regulatory authority was transferred to the NRC. Current NRC policy has followed that of the AEC: sea disposal of radioactive waste is not considered an unsafe practice; however, anyone wishing to dispose of wastes in this manner must comply with the 1971 regulation. Although not legislatively prevented from doing so, the NRC has not issued any permits for sea disposal for three reasons:

> The shift in disposal methods was driven by (1) international objection to sea disposal on environmental grounds, (2) a change in AEC disposal philosophy to contain wastes (as in land burial) rather tnan disperse wastes (as in sea dumping), and (3) because land burial was more economically attractive to the commercial industry.[125]

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117. *Id.* at 202.
118. 449 F.2d 1109 (D.C. Cir. 1971).
119. *Id.* at 1113-19.
120. Poulin, *supra* note 115, at 202 n.6.
121. NRC Standards for Protection Against Radiation, 10 C.F.R. § 20.302(c) (1979) (promulgated 1971).
122. *See* note 19 and accompanying text *supra.*
123. *1978 Hearings, supra* note 11, at 211.
124. 42 U.S.C. §§ 4801 *et seq.* (1976).
125. *1978 Hearings, supra* note 11, at 211 (statement of Sheldon Meyers).

In 1970, the United States Council on Environmental Quality (CEQ) suggested that national policy be formulated to stay abreast with international conventions.[126] Congress followed this suggestion through the enactment and subsequent amendment of the Marine Protection, Research and Sanctuaries Act, also known as the Ocean Dumping Act.[127] This Act was amended in 1974 to prohibit the disposal of "chemical and biological warfare agents and high level radioactive wastes."[128] There are no similar prohibitions against the dumping of low-level wastes, but such dumping is subject to an involved permit process by the EPA.[129]

By a permit process, the Ocean Dumping Act regulates:

> (1) the transportation by any person of materials from the United States and, in the case of United States vessels, aircraft or agencies, the Transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and
>
> (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States.[130]

Materials were broadly defined as "matter of any kind" including radiological materials, warfare agents and radioactive materials.[131]

Since the Act regulates dumping in the territorial sea, there appears to be conflict of laws with the provisions of the Federal Water Pollution Control Act (FWPCA).[132] The FWPCA permits the states to issue dumping permits for dumping off their coasts.[133] It is clear, however, that states have no authority to issue permits for the disposal of radioactive wastes at sea for three reasons. First, there are the NRC requirements explained above. Second, the Ocean Dumping Act is later in time than the FWPCA, although only by a few days,[134] and therefore supercedes it. Finally, there is the need for national control over any radioactive waste disposal. The Ocean Dumping Act recognizes this

126. COUNCIL ON ENVIRONMENTAL QUALITY, OCEAN DUMPING — A NATIONAL POLICY 37 (1970).

127. 33 U.S.C. §§ 1401 *et seq.* (1976).

128. 33 U.S.C. § 1412(a) (1976).

129. Nuclear power plants, in their routine operation, emit various forms of radioactivity. For example, the cooling waters contain low-level radioactivity of low concentrations. These are generally believed to be harmless and are not controlled or regulated by the EPA. Instead, the NRC licenses this activity under its licensing authority over all nuclear energy plants. This is because the Ocean Dumping Act does not cover "a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under . . . the provisions of the Atomic Energy Act. . . ." 33 U.S.C. § 1401(c) (1976).

130. *Id.*

131. 33 U.S.C. § 1402(c) (1976).

132. 33 U.S.C. §§ 1251-1376 (1976).

133. *Id.* at §§ 1343, 1370.

134. The Ocean Dumping Act was enacted on October 23, 1972, and the FWPCA was passed over Presidential veto on October 18, 1972.

need and provides that: "no State shall adopt or enforce any rule or regulation relating to any activity regulated by the Ocean Dumping Act."[135]

The primary focus of the Ocean Dumping Act has been upon the disposal of nuclear wastes from the commercial nuclear power industry. Just as controversial, though often overlooked is the large quantity of radioactive wastes originating from Department of Defense activities. In 1977, the volume of low-level wastes from military sources was about twice that from the commercial power industry. Estimates by the United States Department of Energy (DOE) are that low-level wastes from commercial sources will not exceed those by the military until the year 2000. Many antinuclear energy advocates urge that a moratorium be imposed upon fission nuclear power plant development. Such a moratorium, however, would not solve the waste disposal problem. There are still the Department of Defense wastes to contend with; and global commitments towards nuclear power are such that "the levels of radioactivity in radioactive wastes that may be generated in any future year are expected to be orders of magnitude higher than the total amount dumped in the ocean during the past 10 or 15 years."[136]

TABLE I
U.S. Commercial Waste[137]
(Cumulative millions of cubic feet)

Year	LLW	TRU	HLW
1977	19.1	0.01	0.08
1980	30.1	.04	.08
1985	60.2	.09	unk.
1990	109.4	.14	
1995	180.0	.10	
2000	275.8	.24	

TABLE II
U.S. Defense Waste[138]
(Cumulative millions of cubic feet)

Year	LLW	TRU	HLW
1977	39.1	15.0	9.4
1980	42.8	15.7	9.3
1985	89.1	47.2	9.1
1990	135.3	78.7	unk.
1995	181.6	103.7	
2000	227.8	128.7	

135. 33 U.S.C. § 1416(d) (1976).
136. *1978 Hearings, supra* note 11, at 241.
137. *Id.* at 196.
138. *Id.*

One of the first military uses of nuclear fission was by the United States Navy for vessel propulsion. Any solid wastes are retained on board the vessel until they can be transported to a land storage point. The main source of radioactive waste from atomic submarines is the reactor coolant water which contains "small quantities of activated impurities"[139] of low radioactivity. This water is discharged directly into the sea during vessel operations. The greatest quantity is discharged when the cooling waters expand as the reactor is brought to its operating temperature. This occurs a few times each month and "the quantity of coolant water discharged on each heat-up averages about 500 gallons."[140] It is the opinion of the Navy that the radioactivity contained in the coolant waters "is consistently low and has had no detectable effect on the radioactivity of [the ocean] environment."[141] This conclusion, however, is questionable because "[i]n addition to activated impurities, the reactor cooling water may contain trace amounts of fission products. These come from minute quantities of uranium impurity in the reactor structural materials."[142]

The London Convention does not apply to public vessels,[143] and under United States law such military wastes are managed only by the Department of Defense. An EPA permit under the Ocean Dumping Act is not required. In its definition of dumping, the Act states, "nor does it mean a routine discharge of effluent incidental to the propulsion of, or operation of, motor-driven equipment on vessels."[144]

There are two ways of utilizing the ocean as a depository of nuclear wastes. The ocean can be used as a dilution medium or as a place for the storage of wastes packaged to prevent any leakage into the marine environment. The EPA's standards are based upon the latter. Its regulations "require that radioactive materials [other than high-level] must be packaged or containerized to prevent their dispersion or dilution in ocean waters."[145] One EPA official stated: "We view the ocean not as a waste dilution medium but as a disposal location which will assure undisturbed isolation and containment."[146]

The EPA has never issued a permit for any ocean disposal of radioactive wastes. This fact should not be viewed as a manifestation of an

139. Doyle, *Radioactive Waste Disposal, Mobility and Freedom for Nuclear Seapower,* 1959 JAG J. 12, 13 (1959).

140. *Id.* at 13 n.8.

141. *Id.* at 26.

142. *Id.* at 13.

143. *London Convention, supra* note 77, Art. VII(4), 26 U.S.T. at 2403, 2410, T.I.A.S. No. 8165, at 8.

144. 33 U.S.C. § 1402(f) (1976).

145. Criteria for the Evaluation of Permit Applications for Ocean Dumping of Materials, Final Revision of Regulations and Criteria, issued January 11, 1977.

146. *1978 Hearings, supra* note 11, at 222 (statement of William D. Rowe).

EPA policy of strong opposition to the practice. The reason is more of an economic one. To date, the nuclear power industry has found it more economical to retain the wastes on land and only a handful of permit applications have been received by the EPA.[147]

EPA officials believe that more scientific knowledge is required before ocean dumping practices should be resumed. The EPA has identified three main problems in the 1946-1970 disposal programs.[148] With the resolution of these difficulties, it is the EPA's opinion that

> low-level waste emplacement on the bottom of the sea probably will be a useful technique which is economically feasible . . . such disposal can be done economically for certain low-level short-lived wastes, and . . . we should make the option available. We think we can make it available in the 1980-85 period.[149]

For the time being, at least in the United States, the issue of dumping low-level wastes in the ocean is resolved. Absent a showing that it is the better environmental alternative, such a practice will be prohibited. However, the question of what to do with high-level wastes is far from resolved. A possible solution now being considered by the United States and other nations is to bury these wastes in ocean sediments deep below the surface. There are many obstacles to overcome before this could become an accepted practice, among them the international legal issues may be the thorniest.

III. EMPLACEMENT OF RADIOACTIVE WASTES IN THE SUB-SEABED

High-level wastes must be safely isolated from the biosphere for very long periods of time. For example, it will take 250,000 years for waste containing plutonium 239 to become innocuous.[150] Unfortunately, at the present time there are no permanent disposal facilities for these wastes in the United States or most other countries.[151]

There are three places where high-level wastes may be permanently secured: on land, in or under the sea, or in outer space. Launching radioactive wastes into space cannot be done economically or with the margin of safety demanded.[152] Permanent disposal in stable geological

147. *See generally* Weaver, *supra* note 5, at 488.

148. First, we think that the sites are too shallow. We think new sites must be below 4,000 meters where the currents would be less and no food fish would be found.
Second, we think that the packaging has to be changed to prevent the implosion of packages when they are sent to the sea bottom.
Third, we think that proper sites have to be found and investigated and determined prior to disposal, and that we need monitoring requirements so we can assure that the disposal took place properly and continues to operate properly.
1978 Hearings, supra note 11, at 240-41 (statement of William D. Rowe).

149. *Id.* at 243.

150. Weaver, *supra* note 5, at 483.

151. *Id.*

152. Extraterrestrial disposal of solidified high-level waste or spent fuel would be very

formations on land, although now considered the best alternative,[153] is meeting growing local opposition.[154] Maine and California have enacted laws that prohibit any further nuclear power plants "until an acceptable solution has been found for waste disposal"; and eight states are attempting to ban altogether any waste storage within their borders.[155] Further, many nations (*e.g.*, Japan) do not have suitable geological sites available for the storage of radioactive waste.[156]

As a result of these considerations, attention is focusing on the seas. The focus is no longer upon the dumping of canisters of waste into the sea to settle to the bottom, but rather to bury wastes deep under the ocean floor. The "basic concept for emplacement is that radioactive wastes will be put within a blanket of deep ocean sediments which are stable and have accumulated over millions of years and are in the process of becoming sedimentary rock."[157] The radioactive elements will be absorbed by the ocean sediments as "[i]t is now clear that these deep-sea sediments provide a high rate of absorption of the dissolved radioactive waste components."[158]

Two principal emplacement techniques are now being studied.[159] The first technique calls for the use of a "penetrometer — a streamlined, ballistic-shaped container — which could be lowered from a winch and released just far enough above the seabed to reach the velocity needed to penetrate to the required depth."[160] The second method requires the drilling of holes through the unconsolidated sediment (clay) into either the lithified sediment or basalt and place canisters of waste in them from a drilling ship.[161]

In the United States, sub-seabed emplacement has been called an "intriguing concept"[162] and research has been receiving increasing amounts of money and congressional attention. In 1979, $3,100,000 was spent to assess ocean bed emplacement.[163] While this amount represents only 2.3 percent of the DOE budget for high-level waste alternative research, the

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> expensive, something in excess of $2,000/kg of payload. . . . An additional and important source of risk is that of malfunction of the space vehicles carrying waste, with reentry of waste packages into the atmosphere.

NUCLEAR ENERGY POLICY GROUP, NUCLEAR POWER ISSUES AND CHOICES 256 (1977).

153. *Id.*

154. For example, tear gas was used against 20,000 demonstrators at the site of the Super-Phenix, the world's first commercial fast breeder reactor, in France. Weaver, *supra* note 5, at 482.

155. *Id.* at 482. *See generally* NRC OFFICE OF STATE PROGRAMS, INFORMATION REPORT ON STATE LEGISLATION (1977).

156. *Id.*

157. *1978 Hearings, supra* note 11, at 198 (statement of James L. Liverman).

158. D. DEESE, *supra* note 1, at 12.

159. Silva, *supra* note 1, at 37.

160. D. DEESE, *supra* note 1, at 13-14.

161. *See* Silva, *supra* note 1, at 37.

162. *1978 Hearings, supra* note 11, at 203.

163. *Id.* at 200.

amount allocated for this alternative has been increasing since 1974.[164] Moreover, this interest in emplacement is not limited to the United States. Canada, the United Kingdom, Japan, and France are also participating in emplacement reasearch.[165]

Thus, the emplacement issue is complex and multifaceted because:

> unlike the land-based programs, the sub-seabed program presents legal, political, and scientific obstacles and opportunities on an international scale. Since implanting high-level radioactive waste in the seabed effectively withdraws from common use an area hitherto available to all countries on equal terms, the seabed is not likely to be available for unilateral use by any country, or at least not without serious international, legal and political consequences.[166]

A. The 1972 London Convention

Although both treaty and national "dumping" rules are subject to differing interpretations when applied to sub-seabed emplacement, it should be noted that when the London Convention was written the nations involved were not contemplating sub-seabed emplacement of radioactive wastes.[167] The London Convention defines dumping as "any deliberate disposal *at sea* of wastes or other matter from vessels, aircraft, platforms or other man-made structures."[168]

The language "deliberate disposal *at sea*" has been given two constructions. Under the first, "at sea" refers to the location of the vessels, aircraft or platforms. In other words, "any disposal from vessels that are at sea constitutes dumping, regardless of whether there is any possibility of the wastes eventually reaching the water."[169] Under this construction, sub-seabed disposal would be "dumping." Therefore, because Annex I to the Convention provides that, "High-level radioactive wastes . . . [are] unsuitable for dumping at sea,"[170] there could be no deep sea emplacement of high-level wastes. This interpretation is

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164. *Id.*

165. A seabed working group has been established as an informal subgroup of the OECD/NEA [Organization for Economic Cooperation and Development/Nuclear Energy Agency] Radioactive Waste Management Committee — Canada, Japan, France, United Kingdom, and the United States are currently participating. The purposes of this group are to: provide a forum for discussions, assessment of progress, and planning of future R & D efforts; encourage and coordinate research vessel cruises and experiments; share facilities and test equipment, and maintain cognizance of international policy issues. . . .

Id. at 200.

166. *Id.* at 294.

167. It was recognized, however, by the IAEA, in 1973 that this was a possible method of disposal. *See* IAEA Doc. GOV/1622, Appendix at 7, Sept. 3, 1973, *in* IAEA Doc. P1-540, 81 (1976).

168. *London Convention, supra* note 77, Art. III(1)(a)(i), 26 U.S.T. at 2403, 2407, T.I.A.S. No. 8165, at 5.

169. *1978 Hearings, supra* note 11, at 283 (statement of David A. Deese).

170. *London Convention, supra* note 77, 26 U.S.T. at 2465, T.I.A.S. No. 8165, at 63.

buttressed by the fact that the London Convention also defines dumping to *not* include "placement . . . for a purpose other than disposal."[171] If "placement" is construed to mean "seabed emplacement," then the Convention applies to sub-seabed emplacement as such as practice would be for "disposal."

The second construction of "at sea" refers not to the location of the disposing party, but rather to the final location of the wastes. Under this interpretation, "any disposal from vessels resulting in the discharge of wastes, whether containerized or not, into the water and/or onto the seabed constitutes dumping."[172] If this interpretation is used, seabed emplacement would not be dumping and such a method would not be specifically restricted by treaty law.

While the first interpretation is more inclusive, "[t]he second interpretation . . . is evident in almost all international work in this area since 1956, and most existing dumping legislation and in the Oslo Convention of 1972."[173]

It is the opinion of a spokesman for the United States Department of State that "the London Convention would, at a minimum, ban the disposal of [high-level wastes] under the seabed unless it could be demonstrated that they would not pose a threat to the marine environment."[174] This conclusion, that seabed emplacement would be banned by the London Convention if it poses a threat to the marine environment, is not based upon either of the interpretations of "at sea." Instead, it may be based upon the guidelines for issuing dumping permits found in Annex 3. These guidelines take into account:

1. Possible effects on amenities. . . .
2. Possible effects on marine life. . . .
3. Possible effects on other uses of the sea. . . .
4. The practical availability of alternative landbased methods of treatment to render the matter less harmful for dumping at sea.[175]

Since the London Convention prohibits the "dumping" of high-level wastes, the characterization of what constitutes "dumping" is crucial. The Convention assigns this function to the IAEA. The IAEA also has authority, under the Convention, to issue recommendations as possible guidelines for individual nations to follow in issuing permits. The first IAEA definition of high-level wastes, made in 1973, contained the following Comment with respect to "dumping":

Certain methods of radioactive waste disposal, although not fea-

171. *Id.* at 2407, T.I.A.S. No. 8165, at 5.
172. *1978 Hearings, supra* note 11, at 283.
173. *Id.* at 289.
174. *Id.* at 249.
175. *London Convention, supra* note 77, 26 U.S.T. at 2468, T.I.A.S. No. 8165, at 66.

> sible at this time, may eventually be developed technically to the point of proposing the long-term isolation of wastes by emplacement beneath the seabed. Such methods should be evaluated as variations of deep geological burial on land and are excluded from the scope of this document because they will not contribute to the radioactivity of the seabed.[176]

However, the definition which accompanied this Comment has been superseded. In 1977, a series of advisory group meetings developed a revised basis for high-level waste definition which classified high-level wastes as substances that release specified levels of radioactivity, measured in curies.[177] The Annex to this definition indicates that spent fuel may always be treated as high-level waste, as well as other wastes which "have relatively high concentrations of radioactivity and have been generally recognized by the appropriate national authorities as being unsuitable for dumping."[178] Thus, the present IAEA position with respect to sub-seabed emplacement is unclear.

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176. IAEA Doc. GOV/1622, Appendix at 7 (1973) *in* IAEA Doc. P1-540, 81 (1976).

177. The definition is as follows:

> For the purposes of Annex I to the Convention, high-level radioactive wastes or other high-level radioactive matter unsuitable for dumping at sea means any waste or other matter with *an activity* per unit gross mass (in tonnes) exceeding:
> (a) 1 Ci/t for a-emitters but limited to 10^{-1} Ci/t for 226 Ra and supported 210 Po;
> (b) 10^{2} Ci/t for B/y -emitters with half-lives of at least 0.5 years (excluding tritium) and B/y -emitters of unknown half-lives; and
> (c) 10^{6} Ci/t for tritium and B/y -emitters with half-lives of less than 0.5 years.
> The above activity concentrations shall be averaged over a gross mass not exceeding *1000 tonnes.*

1978 IAEA Revised Definition, supra note 12, at 3.

178. The Annex to the IAEA definition states:

> The Definition identifies material, the radioactive content of which is at such a level that the Parties to the Convention would wish to prevent any participating State from issuing a special permit even after a detailed appraisal of the safety of the proposed operation, and even for the sector of the *marine environment furthest removed from man, i.e.,* the deep sea with depth greater than *4000 meters.* The Definition also covers those wastes which *have relatively high concentrations of radioactivity* and have been generally recognized by the appropriate national authorities as being unsuitable for dumping, for example the "first cycle wastes" from nuclear reprocessing, irradiated fuel and irradiated fuel cladding. The Definition must not be so permissive that regular and repeated operations somewhat below the defined levels would endanger man or his environment, even though each individual operation had been conducted with appropriate care. The Definition has, therefore, been based on the concept of the limiting capacity of the deep oceans to receive ocean wastes, which capacity is based on the annual input of radioactivity which will result in individual dose commitments via the critical pathways equal to the dose limits for individual members of the public recommended by the ICRP [International Commission on Radiological Protection].

Id. at 15.

The purpose of the Annex is to aid in the interpretation of the IAEA's definition:

> This Annex provides background material pertinent to the specific responsibilities entrusted to the IAEA under the Convention, namely to define "high-level radioactive wastes or other high-level radioactive matter . . . unsuitable for dumping at sea. . . ." It provides information on the way the IAEA arrived at the *revised* Definition and outlines the thinking behind the Recommendations which are set out rather formally and without elaboration in the Definition and Recommendations.

Id. at 13.

B. *The Ocean Dumping Act*

The Ocean Dumping Act provides that "dumping . . . does not mean the intentional placement of any device . . . in the submerged land beneath [ocean] waters, for a purpose other than disposal."[179] Therefore, since the purpose of sub-seabed emplacement is disposal, it is "dumping" within the meaning of the Act.

As to the emplacement of other than high-level wastes in the seabed, "the EPA has claimed that it has licensing jurisdiction over such action by U.S. nationals."[180] EPA lawyers believe that the EPA's authority under the Ocean Dumping Act "would include not only simply dumping a barrel . . . into the ocean . . . but also any attempt to place it under the floor."[181] However, upon a close reading of the Ocean Dumping Act, one sees that there is no support for the EPA's contention. The Ocean Dumping Act was carefully drafted to ensure that the United States would not be exercising its sovereignty over any high seas area. The Act does not regulate the dumping of radioactive wastes from the United States outside United States jurisdiction.[182]

While the Ocean Dumping Act is arguably inapplicable to anyone in the United States wishing to use the sub-seabed for the disposal of high-level wastes, there are nevertheless two insurmountable hurdles in the form of NRC regulations to overcome. The first regulation provides that all high-level wastes must be disposed of on federal lands.[183] The second puts the burden on the applicant to show that disposal at sea "offers less harm than other methods."[184] It is unlikely that an applicant today could meet this burden.

C. *The Informal Composite Negotiating Text*

It is probably safe to conclude that it is now recognized as customary law that high-level wastes cannot be dumped into the ocean.[185] Regarding the emplacement of such wastes in the sediments under the sea, however, the legality is unclear. Some states say that sub-seabed disposal could be implemented unilaterally by any technically capable

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179. Ocean Dumping Act, 33 U.S.C. § 1402(f) (1976).

180. M. WILLRICH & R. LESTER, *supra* note 7, at 75.

181. *Hearings on Radioactive Waste Management Before the Subcomm. on Environment and Safety of the Joint Comm. on Atomic Energy*, 94th Cong., 2d Sess. 315 (1976) (statement of Roger Strelow).

182. 33 U.S.C. § 1401(c) (1976). *See* note 130 and accompanying text *supra*.

183. NRC Licensing of Production and Utilization Facilities Regulations, 10 C.F.R. § 50, Appendix G (1979) provides: "Disposal of high-level radioactive fission product waste material will not be permitted on any land other than that owned and controlled by the Federal Government."

184. NRC Standards for Protection Against Radiation, 10 C.F.R. § 20.302(c) (1979).

185. *Id. See also* note 95 and accompanying text *supra*.

country. Other states assert that the practice is banned under international law.

There is no convention or statute which could be used with authority to prevent a state from burying its high-level wastes in ocean sediments. An effort is being made by the United Nations Conference on the Law of the Sea (UNCLOS) to produce one comprehensive law of the sea treaty. The question raised is this: Could this comprehensive treaty be used as a basis for the regulation of sub-seabed emplacement of radioactive wastes? Unfortunately, at this stage of the negotiations, the answer is not at all clear.

The Informal Composite Negotiating Text (ICNT)[186] is the most recent product of the UNCLOS. It is not yet a treaty and may never become one, but to some extent it has the effect of law because it reflects customary law, or what is emerging as customary law. It can be used as existing evidence of what people believe the law to be; and nowhere in the ICNT are the terms "radioactive" or "nuclear" used in regards to waste disposal operations. There are, however, two sets of provisions in the ICNT which may affect a sub-seabed disposal program.

The first of these is the "common heritage doctrine."[187] Any sub-seabed disposal would be in what the ICNT calls "the Area." Concerning the seabed, the ICNT reaffirms the premise that "[t]he Area and its resources are the common heritage of mankind."[188] Article 137 provides:

> 1. No state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or person, natural or juridical, appropriate any part thereof.
> 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act.[189]

These provisions could, perhaps, be interpreted to mean that there can be no national appropriation of "the Area." This is relevant as it appears that any sub-seabed emplacement program would probably require such appropriation. This belief, that sub-seabed emplacement would require the appropriation of regions of the seabed, is the opinion, at least, of Dr. Robert Stein of the International Institute for Environment and Development.[190]

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186. United Nations Third Conference on the Law of the Sea, Composite Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Corr. 1 (1977) [hereinafter cited as ICNT].

187. *Id.* at Art. 136.

188. *Id.*

189. *Id.* at Art. 137.

190. *See Hearings on Radiological Contamination of the Oceans Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs,* 94th Cong., 2d Sess. 30-31 (1976) (statement of Robert E. Stein).

The second set of provisions which may be used to govern sub-seabed emplacement are those concerning the powers of the Seabed Authority. The Seabed Authority is "the organization through which States' Parties shall organize and control activities in the Area."[191] "Activities in the Area" are defined as "all activities of exploration for, and exploitation of the resources of the Area."[192] Article 145 provides: "With respect to the activities in the Area, necessary measures shall be taken in order to ensure effective protection for the marine environment from harmful effects which may arise from such activities."[193]

How these two sets of provisions might relate to sub-seabed disposal of radioactive waste is very speculative. One of the most difficult political questions in the UNCLOS negotiations is the make-up of a regime for ocean areas beyond national jurisdiction. The contested issue is not waste disposal, but seabed mining.[194] Unless "resources of the Area" are defined to include waste disposal as a "resource," it would appear that the Seabed Authority's mandated concern is limited to the harmful effects from mineral exploitation.

CONCLUSION

In regard to low-level waste disposal at sea, the legal framework controlling current practices is inadequate. The London Convention permits each state to decide for itself what its practices will be. The only limit on state discretion is the requirement that they "take full account of the recommendations of the competent international body. . . ."[195] The IAEA is the "competent international body," but it leaves certain disposal practices, such as the unpackaged and untreated flow of radioactive wastes from Britain's Windscale reactors into the Irish sea, completely unaddressed. Moreover, its recommendations are "limited to deep sea dumping."[196]

International and national laws only preclude the disposal of high-level wastes at sea. Yet, in some instances, the threat of radiation contamination posed by low-level wastes may also be grave. The EPA now recognizes this fact and is shifting its priorities:

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191. ICNT, *supra* note 186, at Art. 155(1).

192. ICNT, *supra* note 186, at Art. 133(a).

193. *Id.* at Art. 145.

194. "The problem . . . is with seabed mining. Third world countries want decisions on deep seabed resources to be controllable by numerical majorities. Developed nations prefer an international organization that would license mining. . . ." Brown & Fabian, *Diplomats at Sea,* 52 FOREIGN AFFAIRS 301 (1974).

195. *London Convention, supra* note 77, 26 U.S.T. at 2466, T.I.A.S. No. 8165, at 64.

196. IAEA, Provisional Definition and Recommendations Concerning Radioactive Wastes and Other Radioactive Matter Referred to in Annexes I and II to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, IAEA Doc. INFCIRC/205/Add. 1 (1975).

> While there is a great deal of interest in the problem of high-level waste disposal, there exists yet another waste problem which must be addressed, *i.e.*, the disposal of low-level waste. . . .
> EPA believes it is necessary to place a high priority on establishment of regulations controlling the burial of transuranium waste. EPA strongly supported the AEC proposed rulemaking published in 1974 which would prohibit the burial of long-lived transuranium waste by shallow land fill methods.[197]

In regard to high-level wastes, the important legal issue concerns the practice of sub-seabed emplacement. According to some authorities, "most of the technology is available"[198] to deal with these concerns. There are no laws or international agreements on the books, however, which speak to this practice. Some nations are adamantly opposed to the practice; others call it an "intriguing concept."[199] There is still the question whether such a program would interfere with other uses of the sea floor, now and for hundreds of thousands of years into the future. While the ICNT calls for international regulation of the seabed, "in its present form there is little regulatory authority for any International Seabed Authority."[200]

Assuming these legal and policy problems could be resolved, there are yet many other considerations. Monitoring of the sites will be accomplished only at great expense and, under present technology, with great difficulty. Furthermore, under present and foreseeable technology there can be no retrievability. Moreover, there are still many unknowns. For example,

> a major problem that remains is heat produced by the nuclear wastes. [Dr. Anderson, of the Sandia Laboratory] said [that] the heat could bring chemical changes to the canisters and destroy them or create pressure on the canisters and surrounding sediment to push the canisters out of the sediment to the ocean bottom and thus become a possible threat.[201]

Finally, anything having to do with nuclear energy has become emotionally charged. In considering the prospect of burying high-level wastes in deep ocean sediments, Elizabeth Mann Borgese warns that although "[i]t may well be the safest place on earth . . . [s]urely some-

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197. *Hearings on Radioactive Waste Management Before the Subcomm. on Environment and Safety of the Joint Comm. of Atomic Energy*, 94th Cong., 2d Sess. 311 (1976).

198. This is the opinion of Dr. Daniel R. Anderson of the Sandia Laboratory, Albuquerque as reported by Weathersby, *At Sea, Nuke Waste Destiny?*, Yakima Herald-Republic, Apr. 19, 1979, at 3, col. 2.

199. The most strident voices come from Canada, Sweden, the U.S.S.R., Portugal and Denmark. *See generally* D. DEESE, *supra* note 1.

200. *1978 Hearings, supra* note 11, at 285 (statement of David A. Deese).

201. Weathersby, *supra* note 198, at col. 2.

thing will go wrong sometime, somewhere — while the radioactive waste is shipborne, or during its burial — and the consequences will be apocalyptic."[202]

202. E. BORGESE, THE DRAMA OF THE OCEANS 213 (1975).

NOTES

When Stress Becomes Distress: Mental Disabilities Under Workers' Compensation In Massachusetts

People who suffer from mental or emotional problems occupy more hospital beds in the United States than those who have a physical illness or injury.[1] It is estimated that at any given time between fifteen and thirty percent of the general population has diminished efficiency as a result of some type of mental or emotional dysfunction.[2] In an attempt to trace the causes of such widespread deficiencies in mental health, psychiatric research has determined that significant relationships exist between the kind of work a person does and the nature of the psychological disorder which that person develops.[3] Additionally, it is known that an individual's ability to cope with sundry future life crises in a more or less healthy fashion is largely defined before he assumes his role in the workplace.[4] If that is so, and if workers' compensation is to continue to compensate employees for injuries arising from employment, it is especially important that the real cause of an employee's mental disability can be isolated. An accurate determination of cause and effect would relieve industry of the burden of compensating workers for mental disorders that have roots outside the workplace. Likewise, industry would be required to pay for injuries caused by the business enterprise.

Workers' compensation cases which involve mental, nervous, or emotional elements have been generally arranged into three categories:[5] a mental stimulus causing physical injury; a physical stimulas or trauma resulting in mental injury; and a mental stimulus causing a purely mental disorder.[6] The latter category, which is also referred to as the

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1. *See* P. CARONE, S. KIEFFER, L. KRINSKY & S. YOLLES, THE EMOTIONALLY TROUBLED EMPLOYEE: A CHALLENGE TO INDUSTRY 57 (1976).

2. *Id.*

3. *Id.* at 3.

4. *Id.* at 4.

5. *See* 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 42.20-42.24 (1979), where a fourth group, labelled "compensation neurosis," is also discussed.

6. This analysis will not attempt to chart the complex medical problems of diagnosing the causes of mental disabilities. It would require an extensive work just to particularize the various phenomena which comprise mental disorders. In keeping with the approach taken by the courts, this note will use the term "mental or emotional disorder" in a generic sense, without attempting to identify the medical components which would form the core of expert psychiatric testimony on

"mental-mental" group of disabilities, is the subject of the following note.

The long-accepted view of the Massachusetts Supreme Judicial Court has been to grant compensation for injuries of the first[7] and second[8] types. Recently, disabilities of the mental-mental sort have been deemed compensable under the Massachusetts Workers' Compensation Act,[9] but only in a restrictive construct.[10] As part of a sub-group within that category, the Massachusetts Supreme Judicial Court has distinguished between mental injuries induced by sudden stress and those caused by gradual stress, limiting compensability to the former.[11]

This note analyzes the judicial distinction between sudden and gradual stress, and the wisdom of retaining the distinction. Beginning with the origin of workers' compensation and its comparison to tort law, Part I continues with an examination of the relevant Massachusetts statute. The claimant's burden of proving a causal connection between the disability and the external stimulus (the stressful event), as well as establishing the existence of a personal injury, are discussed in Part II. The development of the current body of workers' compensation law on the subject of mental injuries is delineated in Part III. There, the utility of the sudden-gradual distinction is scrutinized, with special emphasis upon its effect on workers whose disability is the product of general employment-related stress. It is suggested that the foregoing distinction functions to contort the very purpose of workers' compensation[12] by excluding a class of claimants from beneath its protective umbrella — claimants who were, nonetheless, injured by their employment activity.

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the subject. *See* Albanese's Case, 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83 (1979); Deziel v. Difco Laboratories, Inc., 403 Mich. 1, 268 N.W.2d 1 (1978).

For a technical treatment of stress, which is defined as the nonspecific response of the body to any demand, *see* H. SELYE, THE STRESS OF LIFE (1976).

For a discussion of the types of psychoneuroses which are generally encountered in cases of mental stress *see* note 49 and accompanying text *infra.*

7. McMurray's Case, 331 Mass. 29, 116 N.E.2d 847 (1954); Egan's Case, 331 Mass. 11, 116 N.E.2d 844 (1954); Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947).

8. McEwen's Case, 369 Mass. 851, 343 N.E.2d 869 (1976); Lambert's Case, 364 Mass. 832, 304 N.E.2d 428 (1973); Hogan's Case, 348 Mass. 795, 205 N.E.2d 244 (1965); Silbovitz's Case, 343 Mass. 372, 178 N.E.2d 867 (1961); McIsaac's Case, 266 Mass. 67, 164 N.E. 653 (1929); Sinclair's Case, 248 Mass. 414, 143 N.E. 330 (1924); Sponatski's Case, 220 Mass. 526, 108 N.E. 466 (1915); Hunnewell's Case, 220 Mass. 351, 107 N.E. 934 (1915).

9. MASS. GEN. LAWS ANN. ch. 152 (West 1958 & Supp. 1979).

10. For a discussion of the breadth of the current Massachusetts view *see* notes 77-127 and accompanying text *infra.*

11. For purposes of this note, sudden stress refers to a specific and identifiable traumatic event, as when a claimant witnesses the death of a co-worker and immediately responds to that stress. Gradual stress includes general stress of a daily job routine, or stress that does not have a single event as its cause, but accumulated incidents all contributing to a disability.

12. For a discussion of the purpose of workers' compensation *see* notes 13-24 and accompanying text *infra.*

In Part IV the note concludes with a proposal to abandon the present judicial approach in favor of a scheme which predicates compensability on the cause of the disability rather than the form of the stimulus.

I. THE GERMINATION OF WORKERS' COMPENSATION

A. Comparison With Tort Law

A thorough understanding of the problems associated with mental disabilities is best achieved by examining the legislative goals of workers' compensation acts. Prior to the Industrial Revolution there existed a system dominated by small shops and craftsmen.[13] Employees (servants) could receive compensation for work-related injuries by proving the negligence of their employer (master) in a tort action.[14] Once the Industrial Revolution had taken hold, however, small shops were replaced by large factories, dangerous machinery, lack of training, and generally hazardous conditions, but injured employees were still required to prove negligence in order to recover for injuries. Typically, this proof requirement led to inadequate compensation, forcing injured workers to seek handouts or to rely on an informal welfare system.[15] In response, legislatures enacted workers' compensation laws to alleviate the monetary burden created by the injury.[16]

Essentially, the underlying social philosophy which gave rise to initial legislation for injured workers was spurred by an awareness of the available alternatives.[17] The choice that seemed most equitable was based on the notion that industrial hazards constituted an insurable risk inherent in production.[18] Consequently, workers' compensation laws functioned to preserve the employee's "dignity and self-respect as an injured veteran of industry,"[19] and properly placed the cost on the manufacturer and, ultimately, on the consumer of the product.

Whereas tort law had previously controlled the compensability of personal injuries with concepts of proximate cause, foreseeability, scope of employment and contributory negligence, the typical modern workers' compensation law does not look to the fault of the employee

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13. 2 W. HANNA, THE LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION 3 (1954).
14. *Id.*
15. *See* A. LARSON, *supra* note 5, at § 2.20.
16. *Id.*
17. One alternative was to do nothing and force the employee to test his entrepreneurial skills, such as selling pencils or something of the sort. Another solution involved county relief or some form of direct handout. Unfortunately, that type of aid was stigmatic and placed the cost of the injury on those who had no connection with the industry from which the disability arose. *See* A. LARSON, *supra* note 5, at § 2.20.
18. R. ALLEN, E. FERSTER & J. RUBIN, READINGS IN LAW AND PSYCHIATRY 472 (1975).
19. *See* A. LARSON, *supra* note 5, at § 2.20.

in assessing the liability of an employer.[20] Instead, the overriding purpose of workers' compensation is to eliminate common law remedies of tort[21] and to substitute a cohesive system of employee protection;[22] it is akin to no-fault insurance,[23] except that compensation is awarded for loss of earning capacity.[24]

B. The Massachusetts Statute

First made effective on July 1, 1912,[25] the Massachusetts workers' compensation law requires that the personal injury for which compensation is sought must be one "arising out of and in the course of . . . employment."[26] This is different from the problematic[27] requirement in many states[28] that the personal injury also occur "by acci-

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20. L. LOCKE, 29 MASS. PRACTICE: WORKMEN'S COMPENSATION § 9 (1968).

21. Small describes workers' compensation in the following manner: "Workmen's Compensation is an enterprise liability, a liability of occasionment, embracing all risks *occasioned* by the employment and its incidentia . . . . It, like the cost of replacing equipment, is a cost occasioned by the employment." Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEX. L. REV. 630, 656 (1953).

22. *See* A. LARSON, *supra* note 5, at § 2.20.

23. A leading commentator on the subject describes the theoretical foundation of workers' compensation in the following way:

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude: if the accident arises out of and in the course of the employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee: the same award issues.
>
> Thus, the test is not the relation of an individual's personal quality [fault] to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

A. LARSON, *supra* note 5, at § 2.10.

24. *Id.* at § 2.20; *see also* R. ALLEN, E. FERSTER & J. RUBIN, READINGS IN LAW AND PSYCHIATRY 464 (1975).

25. Brooke, *Reforming Workmen's Compensation: Recommendations For Massachusetts,* 9 HARV. J. LEGIS. 1 (1971).

26. MASS. GEN. LAWS ANN. ch. 152, § 26 (West 1958).

27. For a discussion of the problems which have arisen as a result of the "by accident" requirement, *see* Horovitz, *Workmen's Compensation: Half Century of Judicial Developments,* 41 NEB. L. REV. 1, 12-15 (1961).

28. The following state workers' compensation statutes employ the term "by accident": ALA. CODE tit. 25, § 3-31 (1975); ARIZ. REV. STAT. § 23-801 (1971); COLO. REV. STAT. § 52-102 (1) (c) (1974); DEL. CODE ANN. tit. 19, § 2304 (1979); FLA. STAT. ANN. §§ 440.03 & 440.02 (6) (West 1966); GA. CODE ANN. § 114-102 (1973); HAW. REV. STAT. § 386-3 (1976); IDAHO CODE § 72-102 (14) (a) (1973 & Supp. 1979); IND. CODE ANN. § 22-3-2-2 (Burns 1974 & Supp. 1979); KAN. STAT. ANN. § 44-501 (1973); LA. REV. STAT. ANN. § 23:1031 (West 1964); MO. ANN. STAT. § 287.120 (1) (Vernon 1965 & Supp. 1980); NEB. REV. STAT. § 48-101 (1978); NEV. REV. STAT. § 616.270 (1) (1975); N. J. STAT. ANN. § 15-7 (West 1959); N.M. STAT. ANN. § 52-1-28 (A) (1) (1978); N.C. GEN. STAT. § 97-3 (1979); N.D. CENT. CODE § 65-01-02.8 (Supp. 1979); S.C. CODE § 42-1-160 (1977); TENN. CODE

dent."[29] However, the former phrase is not free from its own difficulties of interpretation, for as the United States Supreme Court has declared, that "statutory phrase . . . is deceptively simple and litigiously prolific."[30]

While the phrases "arising out of" and "in the course of" can be separately dissected to determine the elements necessary to satisfy each part of the test, they are generally taken together to form a single standard of compensability known as "work-connection."[31] The first part of the test, that the personal injury arise out of the employment, is satisfied when "[a]n injury . . . arises out of the nature, conditions, obligations or incidents of the employment."[32] In other words, did the injury occur as a result of a risk to which the employee was exposed because of his or her status as an employee? An affirmative answer indicates that the injury arose out of the employment.[33]

The second part of the test, requiring that the injury occur in the course of employment, can be simply stated to mean that it occur during the employment,[34] within its spatial and temporal boundaries. The phrase requires consideration of the time, place, and circumstances of the injury: "A injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidential thereto."[35]

Just as the two phrases are joined together in the statute, so are they judicially joined into a dual requirement of work-connection.[36] The

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ANN. § 50-902 (d) (Supp. 1979); UTAH CODE ANN. § 35-1-45 (1974); VT. STAT. ANN. tit. 21, § 618 (1978); VA. CODE § 65.1-7 (1973); WIS. STAT. ANN. § 102-01 (2) (c) (West Supp. 1979-80).

The requirement of an "accidental injury" is found in these state statutory provisions: ALASKA STAT. §§ 23.30.010 & 23.30.265 (13) (1972); ARK. STAT. ANN. § 81-1302 (d) (1976); CONN. GEN. STAT. ANN. § 31-275 (West Supp. 1979); ILL. ANN. STAT. ch. 48, § 138.2 (Smith-Hurd 1969); MD. ANN. CODE art. 101, § 15 (1979); MISS. CODE ANN. §§ 3-7 & 3-3 (b) (1973); N.Y. WORK. COMP. LAW § 2.7 (McKinney 1965); OKLA. STAT. ANN. tit. 85, § 3 (7) (West Supp. 1979-80); OR. REV. STAT. § 656.005 (8) (a) (1977).

The term "accidental injury" is also used in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 902 (2) (West 1978).

29. The National Commission on State Workmen's Compensation Laws recommended that the "accident" requirement be eliminated as a test for compensability. Lavorci, *A Summary of the Report of the National Commission on State Workmen's Compensation Laws,* 1972 INS. L. J. 573 (1972).

30. Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 479 (1947).

31. L. LOCKE, *supra* note 20, at § 211.

32. *Id. See also* Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940); Bator's Case, 338 Mass. 104, 153 N.E.2d 765 (1958).

33. *See* L. LOCKE, *supra* note 20, at § 211.

34. *See* Horovitz, *supra* note 27, at 49.

35. A. LARSON, *supra* note 5, at § 14.00.

36. Malone, *The Limits of Coverage In Workmen's Compensation — The Dual Requirement Reappraised,* 51 N.C.L. REV. 705 (1973).

process of determinating whether the injury is sufficiently connected to the claimant's employment thus involved balancing the factors of time, place and employee activity against each other and then against the fact-finder's estimate of the proximity of the relationship of employment risk to the nature of the work.[37]

II. The Burden Of Proof

A. Causal Connection

Allied with an employment-related mental injury is the difficulty of "connecting-up" the stimulus to the disability so that the burden of proving work-connection can be satisfied.[38] The burden is upon the claimant to prove that the injury arose out of and in the course of employment;[39] however, because some employees encounter more mental stress outside the employment milieu than others, it is often unclear whether the injury is sufficiently associated with the work to merit compensation.[40] For instance, in jurisdictions where the injury must arise "by accident" to conform to the statutory requirement,[41] the emotional strain may not be adequately "unusual" to warrant compensation.[42] While the Massachusetts statute[43] does not have such a requirement, the prerequisite of connecting-up the mental stimulus to the mental disability (establishing causation) necessarily involves the use of expert medical testimony since causation in mental injury cases is beyond the experience of laymen and not a matter of common knowledge.[44] Fac-

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37. *Id.* at 728.

38. Of course, this problem is one of evidence: "An applicant frequently must rely on circumstantial evidence . . . to prove work-related causation. Workmen's compensation case book writers have indicated that the clarity with which the evidence shows a causal connection between the disease and work is often a determinative factor." Comment, *Workmen's Compensation — Diseases Arising Out of Employment — A Problem of Proof,* 2 Pac. L.J. 678, 685 (1971).

39. *See* Sponatski's Case, 220 Mass. 526, 108 N.E. 466 (1915); *Compare* Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966), where the court ruled that the burden is on the employer to go forward with evidence to meet the presumption that injury or illness occurring during employment was caused by that employment. The case involved a parking lot attendant who claimed that twenty years of such work had caused him a mental breakdown, diagnosed as a schizophrenic reaction.

40. Dugan v. State Accident Insurance Fund, 31 Or. App. 1059, 572 P.2d 329 (1977).

41. *See* notes 27-29 and accompanying text *supra.*

42. *See, e.g.,* T&T Loveland Chinchilla Ranch v. Bourn, 173 Colo. 267, 477 P.2d 457 (1970); Douglas v. Warner Gear Div. of Borg-Warner Corp., 131 Ind. App. 664, 174 N.E.2d 584 (1961); Simpson v. Logan-Moore Lumber Co., 212 Kan. 404, 510 P.2d 1234 (1973); Whiting-Turner Contracting Co. v. McLaughlin, 11 Md. App. 360, 274 A.2d 390 (1971); *In re* Taylor, 69 Wash.2d 19, 416 P.2d 455 (1966).

43. Mass. Gen. Laws Ann. ch. 152, § 26 (West 1958).

44. *See, e.g.,* Fitzgibbons' Case, 1978 Mass. Adv. Sh. 675, 373 N.E.2d 1174 (1978); Buck's Case, 342 Mass. 766, 175 N.E.2d 369 (1961); Sevigny's Case, 337 Mass. 747, 151 N.E.2d 258 (1958); Josi's Case, 324 Mass. 415, 86 N.E.2d 641 (1949).

tual findings are made by a reviewing board[45] after weighing the value of the medical testimony,[46] and the courts must accept these findings.[47]

Psychiatrists discuss the etiology[48] of a psychoneurosis[49] in terms of precipitating or exciting causes, because very often the psychiatrist cannot estimate the probability of such a disorder occurring in the absence of employment.[50] Nevertheless, to meet the test of work-connection, the medical evidence must establish that it is more likely that the disability suffered by the claimant was caused by the employment, rather than by other causes.[51] Evidence that the plaintiff worked effectively and enjoyed good mental health before the trauma will help to negate a claim that the neurosis was already apparent or inevitable.[52] Certainty is unnecessary, for the causal relation can be sufficiently established if the expert states that it is more likely that the employment, not other stimuli, caused the condition.[53] Consequently, the employee must show that causal connection is a probability, not merely a possibility.[54] This requirement forces the employee to prove that there

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45. For a discussion of procedure in Massachusetts workers' compensation cases *see* note 84 and accompanying text *infra.*

46. Murphy's Case, 328 Mass. 301, 103 N.E. 2d 267 (1952).

47. *See, e.g.,* Albanese's Case, 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83, n.2 (1979); McEwen's Case, 369 Mass. 851, 343 N.E.2d 869 (1976).

48. "Etiology" refers to the causation of diseases in medical parlance. Levine, *Legal Questions Regarding the Causation of Occupational Disease,* 26 LAB. L.J. 88, 89 (1975).

49. A psychoneurosis has been described as a mental disorder which is dependent on unconscious mental causes. The personality problems which develop in an individual lie somewhere between the reactions of the "average" and the psychotic individual. The main characteristic of a psychoneurotic reaction is the development of "anxiety," and that anxiety gives rise to six principal types of psychoneurotic reactions: anxiety reaction; phobic reaction; obsessive-compulsive reaction; conversion reaction; dissociative reaction; and a depressive reaction. *See* Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions,* 70 YALE L.J. 1129, 1131-32 (1961).

It should be remembered that the Massachusetts Supreme Judicial Court has described mental disorders only in general terms. *See* note 6 *supra; see also* Albanese's Case, 1979 Mass. Adv. Sh. 1171, n.1, 389 N.E.2d 83 (1979). For the psychiatric viewpoint *see generally* O. FENICHEL, THE PSYCHOANALYTIC THEORY OF THE NEUROSES (1945); H. DEUTSCH, PSYCHOANALYSIS OF THE NEUROSES (1933); D. HENDERSON & R. GILLESPIE, A TEXTBOOK OF PSYCHIATRY 146-226 (7th ed. 1955); NOYES & KOLB, MODERN CLINICAL PSYCHIATRY 490-94 (5th ed. 1958).

50. *See* Comment, *supra* note 49, at 1142-43. Due to the difficulty in applying an objective causal nexus standard, the Michigan Supreme Court recently adopted a subjective standard for establishing a causal nexus. The court found that almost all psychoneurotic injuries are somewhat latent in origin, usually traceable back to childhood. The causal significance of any one of the many factors that produced the injury is indistinguishable, the court reasoned, and the result is felt in ad hoc decisions. *See* Deziel v. Difco Laboratories, Inc., 403 Mich. 1, 268 N.W.2d 1 (1978).

51. Duggan's Case, 315 Mass. 355, 53 N.E.2d 90 (1944); Blosck's Case, 277 Mass. 451, 179 N.E. 223 (1931).

52. LAWYERS' MEDICAL CYCLOPEDIA § 20.54, at 273 (1970).

53. *See* L. LOCKE, *supra* note 20, at § 521.

54. *See* Oberlander's Case, 348 Mass. 1, 200 N.E.2d 268 (1964); Hachadourian's Case, 340 Mass. 81, 162 N.E.2d 663 (1959). *See also* Nass v. Duxbury, 327 Mass. 396, 99 N.E.2d 54 (1951). *See generally* L. LOCKE, *supra* note 20, at § 521.

existed a better than fifty percent chance that the work caused the harm.[55]

When an employee suffers a tangible, physical (organic) injury under circumstances where the causal connection is within the common knowledge and experience of the ordinary layman,[56] concrete medical evidence of causal connection is unnecessary.[57] Even if a casual connection need be shown in the case of a physical injury, it is easier to prove than in cases of a purely mental disability since organic changes can be demonstrated to the fact-finder.[58] This distinction is less apparent where the mental disability results from a sudden and identifiable event, because the claimant can point to a specific incident as evidence of cause and effect.[59] However, in cases where the mental disability is induced gradually, perhaps in response to daily job pressure, medical evidence is unavoidably of an intangible nature.[60] The absence of a single disabling event makes it more difficult to isolate the mental cause of the injury. Although Massachusetts case law makes it clear that "[a]n injury may develop gradually from the cumulative effect of stresses and aggravations,"[61] the claimant's burden of proof is exacerbated by consideration of other factors such as stress outside the workplace.[62]

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55. *See* Dahl, *The Inter-Relationship Between Law and Medicine in Workmen's Compensation: A Comparative Guide for Practitioners,* 12 CALIF. W. L. REV. 25, 37 (1975).

56. For example, where the employee is injured while operating a machine, causal connection is fairly straightforward.

57. *See* Buck's Case, 342 Mass. 766, 175 N.E.2d 369 (1961).

58. *See* LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 52, at 191.

59. *See* notes 93-115 and accompanying text *infra.*

60. The Michigan Supreme Court recognized this evidentiary dilemma: "Perhaps some direct causal nexus with an employment event can be established in a few cases. But in most cases a constellation of psychodynamic factors is involved; therefore, it is almost impossible to weigh the causal significance of any one factor . . . . Psychoneuroses and psychoses take on so many shades and forms as to show no logical pattern vis-a-vis any notion of objective legal causation." Deziel v. Difco Laboratories, Inc., 403 Mich. 1, 28, 268 N.W.2d 1, 12 (1978).

61. Trombetta's Case, 1 Mass. App. 102, 105, 294 N.E.2d 484, 485 (1973), *citing*, Pell v. New Bedford Gas & Edison Light Co., 325 Mass. 239, 90 N.E.2d 555 (1950); Franklin's Case, 333 Mass. 236, 129 N.E.2d 906 (1955); Brzozowski's Case, 328 Mass. 113, 102 N.E.2d 399 (1951); Mill's Case, 258 Mass. 475, 155 N.E. 423 (1927).

62. In stark contrast, Michigan has eliminated the necessity of establishing the factual medical link between injury and occupation because of the problems of using objective legal causation to analyze complex psychological disorders. Instead, the standard adopted by the Supreme Court of Michigan focuses on the claimant's own perception of reality, rather than on the objective interpretation afforded by expert medical testimony. The court held:

> [I]n cases involving mental . . . injuries, once a plaintiff is found disabled and a personal injury is established, it is sufficient that a strictly *subjective* causal nexus be utilized by referees and the WCAB to determine compensability. Under a "strictly *subjective* causal nexus" standard, a claimant is entitled to compensation if it is factually established that claimant *honestly perceives* some personal injury incurred during the ordinary work of his employment "caused" his disability. (emphasis in original).

Deziel v. Difco Laboritories, Inc., 403 Mich. 1, 26, 268 N.W.2d 1, 11 (1978). *See also* the dissenting opinion of Justice Coleman, at n.13.

Irrespective of the Massachusetts statutory form of workers' compensation which omits a "by accident" provision,[63] a gradually-incurred mental disability may go uncompensated even if the claimant has met the burden of proof and established a causal nexus between the occupation and the injury.[64] This peculiar outcome is achieved by resort to the ancient doctrine of "wear and tear."[65]

B. Wear and Tear vs. Personal Injury

The concept of "wear and tear" is a judicially-created doctrine which recognizes that some disabilities are not the result of employment, but actually are produced by "years of imperceptible changes common to ordinary human activity. . . ."[66] Such a characterization is analogous to the marketing concept of durable goods, except that it is applied to the durability of human beings. Just as an appliance is expected to wear out from normal use over a period of time, a person who is exposed to a great deal of physical labor is expected to gradually become debilitated. Applied in a judicial context, this notion is known as the doctrine of wear and tear. The doctrine acts effectively as a bulwark against compensation in cases where a single disabling event has not occurred, but where a physical disability is found.[67] Recovery is denied on the basis of the human body's finite capacity for physical exertion.

In 1917, the Massachusetts Supreme Judicial Court heard *Maggelet's Case,*[68] which involved a cigarmaker who had been pursuing his trade for twenty-five years. He claimed compensation for a neurosis which was causing him pain in his arms. In denying the claim, the court defined the wear and tear doctrine as "the gradual breaking down or degeneration of tissues caused by long and laborious work. . . ."[69] This decision substantially narrowed the scope of the workers' compensation statute as the court did not overly concern itself with causation, even

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63. *See* notes 27-29 and accompanying text *supra.*

64. *See* Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968), and discussion at Part III *infra.*

65. For a discussion of the wear and tear doctrine *see* notes 66-67 and accompanying text *infra.*

66. S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS (1944).

67. *See, e.g.,* Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968); Spalla's Case, 320 Mass. 416, 69 N.E.2d 665 (1946); Maggelet's Case, 228 Mass. 57, 116 N.E. 972 (1917).

68. 228 Mass. 57, 116 N.E. 972 (1917).

69. *Id.* at 61, 116 N.E. at 974. The court elaborated on the doctrine as follows:

> The act affords no relief against general disease. It is not a scheme for health insurance. It deals only with personal injuries following as an immediate result from the employment as its direct cause . . . . A disease of mind or body which arises in the course of employment, with nothing more, is not within the act . . . . A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not because of this entitled to compensation, for the reason that this condition cannot fairly be described as a personal injury.

Id.

though the claimant's employment "was the continuing ever-present cause of the degeneration."[70] Since the elements of tort liability are discarded in cases of workers' compensation,[71] the court was utilizing the wear and tear doctrine to develop a rigid standard of causation.

Subsequent to *Maggelet's Case,* the same court held in *Spalla's Case*[72] that a foundry laborer was not entitled to partial compensation for weak abdominal walls following a hernia operation which had been compensated as an industrial injury. In the court's view, Spalla's physical condition was not shown to be causally related to an injury but to bodily wear and tear. *Spalla's Case* marked the zenith of the wear and tear doctrine in Massachusetts. Following that decision, the doctrine was viewed somewhat as an aberration, a solution to old problems and certainly of little modern vitality.[73]

The decline of the wear and tear doctrine became apparent after the ruling in *Pell v. New Bedford & Edison Light Co.*,[74] which granted compensation to a clerk for an eye injury caused by many years of inadequate lighting. Such an organic injury, involving gradual deterioration over a period of years, seemed to be an opportune factual setting for application of the wear and tear doctrine,[75] but the court awarded recovery. Nevertheless, the wear and tear doctrine remains viable within the narrow constraints of gradually-inflicted mental disabilities.[76] Its effect on the complex evidentiary considerations of medical causation will be felt only in cases where evidence of specific stressful incidents to establish work-connection is absent.

III. When Is A Mental Disability Compensable?

For mentally disabled claimants in Massachusetts who are able to show that their injury is causally connected to mental trauma arising "out of the employment looked at in any of its aspects,"[77] compensa-

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70. Bear, *The Injured Employee's Nightmare, Or the Case of "Wear and Tear" vs. "Personal Injury,"* 14:8 B. B. J. 17, 18 (1970).

71. *See* notes 13-24 and accompanying text *supra.*

72. 320 Mass. 416, 69 N.E.2d 665 (1946).

73. Attorney Locke asserts:

> The modern trend of decisions in Massachusetts has all but eclipsed the doctrine of wear and tear, by undermining the foundation upon which it was erected. Looking back on the development of the Massachusetts act, it can be seen that in its origin, the rule was a strange solution to three separate difficulties that were simultaneously present: (1) inadequate proof of medical causal connection with the employment, (2) a narrow interpretation of "arising out of and in the course of the employment," and (3) the difficulty of construing "personal injury" in an act which makes no mention of disease.

L. Locke, *supra* note 20, at § 175.

74. 325 Mass. 239, 90 N.E.2d 555 (1950).

75. *See* L. Locke, *supra* note 20, at § 175.

76. For a discussion of Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968), *see* Part III *infra.*

77. Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940).

tion may well be forthcoming. Under present law, recovery will depend upon the type of stimulus which led to the disorder. If the claimant's disorder is the result of gradually-inflicted trauma, as in a situation where the employee encounters numerous stressful incidents in the course of his employment, it will be quite difficult for him to recover an award in Massachusetts.[78] Conversely, if the claimant's injury can be traced to a single traumatic event, the current law in Massachusetts clearly favors compensation.[79]

A. Gradually-Sustained Mental Injury

Begin's Case[80] involved a corrections officer who worked at Bridgewater, a facility housing criminally insane individuals and those who had committed sex violations. Joseph Begin recounted "unpleasant and repelling" experiences[81] that took place over a three and one-half year period at the institution, and he claimed to have become emotionally disturbed as a result of that employment.[82] A psychiatrist diagnosed his condition as an acute anxiety state and gave evidence that the etiology of his illness commenced during his service at the institution. He described Begin as highly sensitive and one "who never should have sought employment in such a position . . . where acts of violence were not uncommon."[83]

Given the foregoing facts, the Massachusetts Supreme Judicial Court[84] *assumed the existence of a causal relationship* between the employment and the disorder[85] and considered whether the illness con-

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78. *See* notes 80-92 and accompanying text *infra*.

79. Albanese's Case, 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83 (1979); Fitzgibbons' Case, 1978 Mass. Adv. Sh. 675, 373 N.E.2d 1174 (1978).

80. 354 Mass. 594, 238 N.E.2d 864 (1968).

81. The experiences of Begin that educed the disorder for which he sought compensation were not specified or discussed in the opinion of the court.

82. 354 Mass. 594, 595, 238 N.E.2d 864, 865 (1968). Among a variety of ailments, Begin had begun drinking heavily and being truculent toward his family. He had experienced no emotional problems prior to working at Bridgewater. *Id.*

83. 354 Mass. 594, 595, 238 N.E.2d 864, 865 (1968).

84. The single member had awarded compensation to the employee and that decision was adopted and affirmed by the reviewing board. The Superior Court upheld the ruling of the reviewing board; 354 Mass. 594-95, 238 N.E.2d 864, 865 (1968).

Procedurally in Massachusetts, workers' compensation is administered by the Division of Industrial Accidents under the supervision and control of the Chairman of the Industrial Accident Board. The board consists of twelve members who individually conduct hearings on disputed claims. Appeals are taken from the decision of the single member to a reviewing board selected by the chairman. Further appeals are taken to the Superior Court, Appeals Court, and Supreme Judicial Court, respectively. However, a procedure exists for direct appeal to the Supreme Judicial Court from the Superior Court if the parties believe the matter should be heard by the highest court without prior hearing before the Appeals Court. *See* Brooke, *supra* note 25, at 13; Locke, *Years of Change: Recent Developments in Massachusetts Workmen's Compensation Law*, 60 MASS. L. Q. 55, 66-69 (1975).

85. Begin's Case, 354 Mass. 594, 596, 238 N.E.2d 864, 866 (1968).

stituted a personal injury under the act. Citing *Maggelet's Case,*[86] concerning the cigarmaker, the court concluded that the illness was not a personal injury:

> The act affords no relief against general disease. It is not a scheme for health insurance. It deals only with personal injuries following as an immediate result from the employment as its direct cause. . . . A disease of mind or body which arises in the course of employment, with nothing more, is not within the act.[87]

Since the court assumed that a causal nexus existed between the injury and the employment, it seemed illogical to deny compensation on the basis of the type of stimulus which induced the disorder[88] unless the workers' compensation statute was written in those terms. But, as we have seen,[89] while some legislatures have concerned themselves with the type of stimulus that produced the injury by requiring that the injury occur "by accident," the Massachusetts legislature has not opted for such a qualifying ingredient.[90] Regardless, the flawed logic of *Begin's Case* is not readily apparent in a vacuum.[91] To comprehend all its im-

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86. 228 Mass. 57, 116 N.E. 972 (1917).

87. Begin's Case, 354 Mass. 594, 596-97, 238 N.E.2d 864, 866 (1968), *quoting* Maggelet's Case, 228 Mass. 57, 61-62, 116 N.E. 972, 974 (1917).

88. *See* note 127 and accompanying text *infra.*

89. *See* notes 27-29 and accompanying text *supra.*

90. *See* discussion of the Massachusetts statute at notes 25-37 and accompanying text *supra.*

91. The majority of courts in other jurisdictions that have considered the question have concluded that the type of stimulus is of little relevance in the decision to grant or withhold compensation. *See* Levine v. WCAB, 70 Cal. 3d 66, 137 Cal. Rptr. 129 (1977) (depressive neurosis and anxiety resulted from claimant's husband, who worked in the same office, being harassed and eventually dismissed by supervisor); Baker v. WCAB, 18 Cal. App.3d 852, 96 Cal. Rptr. 279 (1971) (cardiac neurosis caused by stresses of 26 years as a fireman); Yocom v. Pierce, 534 S.W.2d 796 (Ky. 1976) (nervous breakdown suffered while working on a production job for a clothing manufacturer); Deziel v. Difco Laboratories, Inc., 403 Mich. 1, 268 N.W.2d 1 (1978) (plaintiff suffered a mental injury and subsequent disability from pressures of his job); Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960) (psychosis caused by claimant's inability to keep up with automotive assembly line); Gamble v. N.Y. State Narcotics Addict Control Comm'n, 60 App. Div.2d 703, 400 N.Y.S.2d 599 (1977) (change of job and resulting psychotic behavior, which led to sucide, found to be causally related); Swiss Colony v. Dept. of ILHR, 72 Wis.2d 46, 240 N.W.2d 128 (1976) (schizophrenic mental breakdown caused by nerve-racking seasonal business and supervisor's harassment). *See also* Murray v. T.W. Dick Co., Inc., 398 A.2d 390, 392 (Me. 1979) ("We preceive no reason why in appropriate circumstances such an injury is not fully compensable if in fact it is shown that the injury arose out of and in the course of the employment.") *Contra* Verdugo v. Industrial Comm'n, 114 Ariz. 477, 561 P.2d 1249 (1977); Muse v. Industrial Comm'n, 27 Ariz. App. 312, 554 P.2d 908 (1976); Ayer v. Industrial Comm'n, 23 Ariz. App. 163, 531 P.2d 208 (1975); Shope v. Industrial Comm'n, 17 Ariz. App. 23, 495 P.2d 148 (1972); Erhart v. Great Western Sugar Co., 169 Mont. 375, 546 P.2d 1055 (1976); Daugherty v. ITT Continental Baking Co., 558 P.2d 393 (Okla. 1976); Vernon v. Seven Eleven Stores, 547 P.2d 1300 (Okla. 1976); *See generally* A. LARSON, *supra* note 5, at § 42.23(b).

plications, *Begin's Case* must be compared to two cases in which a sudden stimulus led to the injury.[92]

B. Suddenly-Sustained Mental Injury

Fitzgibbons' Case[93] was the first Massachusetts workers' compensation ruling that recognized the compensability of mental disorders caused by mental trauma. The employee, Vincent Fitzgibbons, was a supervisory corrections officer at the Billerica House of Correction. He ordered several officers to segregate an inmate in response to a disturbance at the institution. During the removal of the inmate a scuffle ensued. One of the officers became ill and later was pronounced dead at a hospital. When Fitzgibbons learned of the death he began to cry and became very shaky and upset. His condition was diagnosed as an acute anxiety reaction, a reaction from which he never recovered. As a result of the incident, Fitzgibbons did not return to work. A few weeks later his wife found him bleeding at the head from a self-inflicted gunshot wound that proved fatal.[94]

The Industrial Accident Board adopted the findings of the single member and concluded that:

> the employee sustained a personal injury on August 24, 1973, as evidenced by his immediate emotional reaction following the dramatic incident at work. . . . [A]s [a] result of said injury, *i.e.*, psychotic depression, the employee committed suicide and . . . said suicide was the result of the employee being of "such unsoundness of mind as to make him irresponsible for his act of suicide". . . .[95]

The Massachusetts Supreme Judicial Court affirmed the board's ruling and declared that:

> the term "personal injury" also permits compensation in cases involving mental disorders or disabilities causally connected to mental trauma or shock arising "out of the employment looked at in any of its aspects." There is no valid distinction which would preclude mental or emotional disorders caused by mental or emotional trauma from being compensable.[96]

With that pronouncement, the court incipiently recognized the compensability of such disorders, but did not go as far as overruling *Begin's*

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92. Albanese's Case, 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83 (1979); Fitzgibbons' Case, 1978 Mass. Adv. Sh. 675, 373 N.E.2d 1174 (1978).

93. 1978 Mass. Adv. Sh. 675, 373 N.E.2d 1174 (1978).

94. *Id.* at 676-77, 373 N.E.2d at 1175-76.

95. *Id.* at 677, 373 N.E.2d at 1176.

96. *Id.* at 681, 373 N.E.2d at 1177.

Case. Instead, the court distinguished *Begin's Case* by emphasizing that Fitzgibbons' mental injury resulted from a stress greater than the ordinary stresses of everyday work.[97] Since the implication remained that Begin had undergone routine stress, it is anomalous that the court did not discuss how it (or expert witnesses) measured the stress borne by Begin and Fitzgibbons. Consequently, how much stress is necessary to evoke a favorable disposition of a similar claim is unclear. Moreover, a particularly troubling aspect of the court's willingness to quantify the stress is that it is common knowledge that some individuals can withstand emotional stress far better than others.[98] Overwhelming stress for one person might be slight stress, or no stress, to another.[99] Assuming, arguendo, that Begin had undergone only routine stress, the inference remains that such a recovery will be foreclosed unless the claimant produces evidence of extraordinary stress.

The actual distinguishing factor between *Begin's Case* and *Fitzgibbons' Case* is not that the latter suffered extraordinary stress. It is that the court erred in denying compensation to Begin once the assumption had been made that a causal connection existed between the injury and the employment. In attempting to distinguish the two cases so that it could compensate Fitzgibbons on other grounds, the court did not wholly rely on a quantitative analysis of the *stress.* In dictum, the court observed that the relevant criterion in determining compensability is the *event* that triggers subjective guilt feelings.[100] By emphasizing the event as the relevant criterion, the court impliedly rejected the rationale for denial of benefits to Begin. This distinction is more clearly seen when it is recalled that both Begin's and Fitzgibbons' disorders arose as subjective reactions to objective events,[101] but only the latter was compensated. Since a causal nexus was assumed to exist in both cases, the particular distinguishing factor between them is really the *duration of the event* that induced the disorders, not the *magnitude of the stress.* It is submitted that once a causal connection is established between the in-

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97. *Id.* at 682, 373 N.E.2d at 1177.

98. M. MAYERS, OCCUPATIONAL HEALTH HAZARDS OF THE WORK ENVIRONMENT 218, 435 (1969).

99. *Id.*

100. Fitzgibbons' Case, 1978 Mass. Adv. Sh. 675, 683, 373 N.E.2d 1174, 1178 (1978). The court held that the subjective guilt feelings of Fitzgibbons were not enough to bring the case within the rule of Korsun's Case, 354 Mass. 124, 235 N.E.2d 814 (1968). *Korsun's Case* denied recovery for the death of an employee who was apprehensive over the prospect of losing his job after finding an empty whiskey bottle in his desk. The court said such apprehension does not arise from the employment, but is a state of mind.

101. *See* notes 80-82, 93-94, and accompanying text *supra.*

jury and the stress,[102] the policy considerations underlying workers' compensation[103] should trigger recovery.

One year after *Fitzgibbons' Case,* the Massachusetts Supreme Judicial Court found for the claimant in *Albanese's Case.*[104] Joseph Albanese was employed as a "working foreman" for approximately twenty years prior to 1970. His duties encompassed the supervision of shipping as well as certain activities of the plant's employees. When the business was sold to a new owner in 1967, an attempt to unionize the employees was soon commenced. In 1969, the employees voted to unionize, and thereafter friction developed between Albanese and the workers. This friction was partially caused by management's decision to eliminate overtime, which frequently required Albanese "to prod the men to expedite the work."[105] Additional friction also resulted from actions of Albanese's direct supervisor, the plant manager, who seemed to intentionally undermine Albanese's relationship with the workers.[106]

In April, 1970, Albanese became embroiled in a "heated argument" with one of the workers over the question of overtime pay. Albanese had been told by the plant manager that the company did not intend to pay any overtime wages to the worker. Five days later, the plant manager, the worker, the union agent, and Albanese met to discuss the subject. Following another "heated discussion," the manager ordered Albanese to grant the overtime pay to the worker. After the confrontation Albanese became distressed, developed chest pains, nausea, and went into the conference room to lay down for ten minutes. He went home to bed when the chest pains got sharper and did not return to work again.[107]

When Albanese's claim for workers' compensation reached the

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102. It should be borne in mind that this is not a standard which can be easily met. As we saw in Part II, the problems associated with medical causation in mental disability cases are so complex that proving probable cause and effect, as opposed to possible cause and effect, poses a formidable task to the claimant. *See* notes 38-65 and accompanying text *supra.*

103. *See* discussion of the history of workers' compensation at notes 13-24 and accompanying text *supra.*

104. 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83 (1979).

105. *Id.* at 1173, 389 N.E.2d at 85.

106. *Id.* at 1173, 389 N.E.2d at 85. On one occasion in 1968, the manager informed Albanese that the company practice of distributing Thanksgiving turkeys was to be discontinued. On a second occasion, the manager told Albanese that the company did not intend to give the workers a Christmas bonus in 1969. Each time, after Albanese relayed this information to the workers, the plant manager reversed his own decision. *Id.*

107. 1979 Mass. Adv. Sh. 1171, 1173-74, 389 N.E.2d 83, 85 (1979). Albanese continued to experience pains, sweatiness, shortness of breath, headaches, and depression. His condition was diagnosed as a chronic anxiety state mixed with depression, somatized reaction, and neurocirculatory asthenia. *Id.*

Massachusetts Supreme Judicial Court,[108] the issue had been narrowed to "whether a mental or emotional disorder[109] causally related to stressful incidents at work is a 'personal injury arising out of and in the course of . . . employment' under the Workmen's Compensation Act. . . ."[110] The question was answered affirmatively: "We hold that if an employee is incapacitated by a mental or emotional disorder causally related to a series of specific stressful work-related incidents, the employee is entitled to compensation."[111]

The court observed that the reviewing board did not find the injury to have resulted from general stress or the wear and tear of working.[112] Rather, the board found as fact "both the existence of a series of specific stressful episodes and a causal nexus between Albanese's working conditions and his emotional disorder. Thus, his injury [was] not '[a] disease of mind or body which arises in the course of employment, with nothing more, [and which] is not within the act.'. . ."[113] One of the more significant observations in the opinion, however, was set forth in a footnote: "There is no issue before us as to whether an employee's mental disorder caused by the general stress of his working conditions is a compensable personal injury without proof of specific, stressful work-related incidents."[114]

It is important to understand how the court distinguished *Begin's Case*[115] in order to compensate Albanese. As noted earlier,[116] Begin's emotional disturbance was not deemed a personal injury even though a causal relationship between the employment and the illness was assumed to exist. In *Albanese* the court briefly compared *Begin's Case* and concluded that there the employee had been unsuited to his work from the very beginning.[117] Hence, the court was convinced of Albanese's good mental health (probably because he had worked successfully for twenty years) prior to the specific stress he underwent. This finding was critical to the court's conclusion that his injury was not the result of wear and tear. At this junction it should be recalled that Begin

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108. The claim had been favorably decided by the single member, reversed by the reviewing board, and then reversed by the Superior Court. *Id.* at 1174, 389 N.E.2d at 85. *See* discussion of procedure at note 84 *supra*.

109. In a footnote the court made it clear that the term "mental or emotional disorder" is used in a general sense, not a precise medical sense, and is not intended to limit or extend the type of injury for which compensation is awarded. *See* 1979 Mass. Adv. Sh. 1171, n.1, 389 N.E.2d 83, n.1. (1979). *See also* notes 6 and 49 *supra*.

110. 1979 Mass. Adv. Sh. 1171-72, 389 N.E.2d 83, 84 (1979).

111. *Id.* at 1171-72, 389 N.E.2d at 84.

112. *Id.* at 1176, 389 N.E.2d at 86.

113. *Id.*

114. *Id.* at 1176, n.4, 389 N.E.2d at 86, n.4.

115. 354 Mass. 594, 238 N.E.2d 864 (1968).

116. *See* notes 80-92 and accompanying text *supra*.

117. 1979 Mass. Adv. Sh. 1171, 1176-77, 389 N.E.2d 83, 86 (1979).

had not experienced emotional problems prior to assuming his duties at the institution.[118]

If the relevant criterion for determining compensability is the event[119] (the external stimuli), it should not matter that the employee is unsuited to his job. Otherwise, if an employee suffered a severe disabling injury while operating a machine and the evidence established that the worker was wholly suited to a desk job, logic would lead the court to deny compensation based on this supposed unsuitability. Although job unsuitability may be a clever way to distinguish *Albanese's Case* from *Begin's Case,* the workers' compensation statute was not drafted to protect only those workers who are compatible with their employment.[120] In practice, those workers who do not readily adapt to the operation of machinery (or to the violence inside an institution for the insane) are probably in greater need of workers' compensation than those who are well-suited, since the former may be more prone to mishaps.

For Massachusetts claimants who sustain a legitimate mental disability but lack evidence of specific, identifiable incidents to connect the injury to their employment, the operation of the sudden-gradual distinction will foreclose compensation unless the Massachusetts Supreme Judicial Court is willing to rely on a causation analysis rather than one which scrutinizes the type of stimulus involved.[121] As the law presently exists, such claimants are faced with an amorphous burden of proof, replete with a disheartening irony:

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118. *See* note 82 *supra.*

119. Fitzgibbons' Case, 1978 Mass. Adv. Sh. 675, 683, 373 N.E.2d 1174, 1178 (1978).

120. *See* discussion of the origin of workers' compensation at notes 13-24 and accompanying text *supra.*

121. For the treatment of sudden stimulus injuries in other jurisdictions, *see* Brock v. Industrial Comm'n, 15 Ariz. App. 95, 486 P.2d 207 (1971) (claimant killed a woman while driving truck; condition on preexisting depressive anxiety was aggravated); Lyng v. Rao, 72 So.2d 53 (Fla. 1954) (building in which claimant was working was struck by a bolt of lightning; no visible injury); Pathfinder v. Industrial Comm'n, 62 Ill.2d 556, 343 N.E.2d 913 (1976) (headaches, numbness of extremities, and nervousness caused when co-worker lost hand in a machine and claimant tried to extricate it); Todd v. Goostree, 493 S.W.2d 411 (Mo. Ct. App. 1973) (truck driver killed a fellow worker: the resulting emotional shock created a severe neurotic disability); Simon v. R.H.H. Steel Laundry, 25 N.J. Super. 50, 95 A.2d 446, *aff'd,* 26 N.J. Super. 598, 98 A.2d 604 (1953) (psychoneurotic disability following explosion of steel pipe); Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603 (1975) (secretary became severely depressed after discovering her boss dead from a self-inflicted gunshot wound); Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955) (claimant witnessed his co-worker fall to his death while working on the same scaffold narrowly escaping serious physical injury; the traumatic incident produced a neurosis which made it impossible for him to continue as an iron worker); Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941) (neurosis caused by the short circuit of an electric motor which produced a flash). *See also* Kinney v. State Industrial Acc. Comm'n, 245 Ore. 543, 423 P.2d 186 (1967). *Contra* City Ice & Fuel Div. v. Smith, 56 So.2d 329 (Fla. 1952); Bekeleski v. O.F. Neal Co., 141 Neb. 657, 4 N.W.2d 741 (1942); Voss v. Prudential Ins. Co. of Am., 14 N.J. Misc. 792, 187 A. 334 (N.J.D.L. 1936); Liscio v. Makransky & Sons, 147 Pa. Super. 483, 24 A.2d 136 (1942).

> [I]f a guard is sturdy enough to withstand stress for 3½ years before breaking down, he cannot collect, but if his emotional balance is so precarious that he succumbs to a single episode or a short period of stress, he will be compensated. The net result is a law for the weak, but not for the strong. . . .[122]

It is suggested that such a result was not intended by the Massachusetts Supreme Judicial Court because workers' compensation was created to by-pass litigation of employee-employer culpability and the concomitant fastidious legal subtleties that resulted.[123] Should it become necessary to prove job suitability, specific stress, or extraordinary stress, the effectiveness of workers' compensation will diminish and the efficacy of a tort claim will be rejuvenated. When presented with another case involving gradually-inflicted mental stress, the court should rely upon evidence of work connection rather than on the type of external stimuli for the linchpin of the claim. *Once a causal nexus is established* between the injury and the trauma, ancient notions of personal injury should be abandoned and replaced by the modern doctrine which merely requires industry to pay for the ills it causes.[124] If a causal connection is shown, there is no logical basis to deny compensation to a claimant who would be otherwise mentally sound, *but for* his employment, especially in Massachusetts, where there is no statutory requirement that the injury arise "by accident."[125] By varying the facts of *Albanese's Case* the thrust of this thesis can be illustrated.

1. A Hypothetical Case

Assume that the "heated discussion" which immediately preceded Albanese's depression, chest pains, nausea, and rest in the conference

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122. Locke, *Workmen's Compensation, 1968 Ann. Survey of Mass. Law* § 16.5.

123. *See* discussion of origin of workers' compensation at notes 13-24 and accompanying text *supra*.

124. *Id.* The Supreme Court of Hawaii observed:

> In today's highly competitive world it cannot be doubted that people often succumb to mental pressures resulting from their employment. These disabilities are as much a cost of the production process as physical injuries. The humanitarian purposes of the Workmen's Compensation Law require that indemnification be predicated not upon the label assigned to the injury received, but upon the employee's inability to work because of impairments flowing from the conditions of his employment.

Royal State National Ins. Co. v. Labor and Industrial Relations Appeal Board, 53 Hawaii 32, 38, 487 P.2d 278, 282 (1971).

125. In his treatise on workers' compensation, Larson argues that:

> The real distinction here should be, not between sudden and gradual stimuli, but between gradual stimuli that are sufficiently more damaging than those of everyday employment life to satisfy the normal "arising-out-of" test, and those that are not. Of course, by ruling out all gradual stimuli, Arizona and Massachusetts make this task much easier for themselves, but they do it at the price of denying deserved compensation to a class of claimants whose injury is just as clearly work-connected as if the stimulus had been brief.

A. LARSON, *supra* note 5, at § 42.23(b).

room had been followed only by depression. Further assume that later in the evening, as Albanese considered the behavior of the plant manager in the past and the way in which the entire episode had been handled, he became more depressed and began to suffer from chest pains, nausea, and the like. In the ensuing weeks the daily stress of his employment could lead to the very same disability for which Albanese was actually compensated, except that the disabling event would be of an imprecise character. If this hypothetical is extended to its logical limit, to the point at which Albanese continued to work and continued to become more emotionally disabled because of the mental trauma triggered by the single episode and exacerbated by daily stress, the integrity of the sudden-gradual distinction begins to crumble. The hypothetical case ends with an individual whose mental disability, the identical disability for which Albanese was compensated, results in loss of earnings. The end is the same; the means are different.

Under present case law in Massachusetts,[126] even though a causal nexus is established between general stress and loss of earning capacity, the injury may not be compensable because a "disease of mind or body which arises in the course of employment, with nothing more, is not within the act."[127] However, compensation would be forthcoming if, instead of bearing up under the stress, claimants immediately succumbed following specific stressful incidents.[128] As the court observed in *Fitzgibbons' Case,*[129] the relevant criterion for workers' compensation is the objective event that triggers the subjective emotional disorder. Thus, the court will determine future claims individually based on their perception of the magnitude of the stressful event. This ad hoc approach clashes with the reality, albeit subjective, of the claimant's emotional disorder; but for *that* employment, the claimant would not have suffered the stress-related injury. Clearly, the sudden-gradual

126. Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968).

127. Maggelet's Case, 228 Mass. 57, 61, 116 N.E. 972, 974 (1917), *quoted* in Begin's Case, 354 Mass. 594, 597, 238 N.E.2d 864, 866, and Albanese's Case, 1979 Mass. Adv. Sh. 1171, 1176, 389 N.E.2d 83, 86 (1979).

128. *See* note 124 and accompanying text *supra.* If, in the hypothetical, the employee did not succumb immediately after a particularly stressful incident, but only after a period of general stress, it is difficult to imagine how the court would find the stress to be greater than everyday-type stress even though the illustration depicts a very stressful employee environment. In other words, what yardstick will the court use in the future to measure general stress so that a fair determination can be made, taking into consideration the type of industry involved, the employee's level of responsibility, and the cumulative effect of that employment, if the court is unwilling to rely on causality?

The Supreme Court of Hawaii has rightfully observed that "[o]ne can succumb to the pressures of work even though he is not under any unusual exertion or strain." Royal State National Ins. Co. v. Labor and Industrial Relations App. Bd., 53 Hawaii 32, 39, 487 P.2d 278, 282 (1971).

129. 1978 Mass. Adv. Sh. 675, 683, 373 N.E.2d 1174, 1178 (1978).

distinction is ill-suited to a causative analysis in mental disability cases.[130]

IV. Conclusion And Proposals

As our society becomes increasingly dynamic and complex, and as the pace of living continues to quicken, so too the external pressures that are placed upon each individual begin to exact a "toll" in the form of physical or mental well-being. Often, so many of these external forces are at work that it is an arduous undertaking to try to isolate the causes of sundry mental disorders which are the by-product of working for a living.[131] Although it is difficult to establish a causal nexus between the employment and the mental disorder, an employee who has been injured by stress which is rooted in the workplace *must* chart the probable cause of his disability in order to recover under workers' compensation in Massachusetts.[132]

Even if an employee has demonstrated the existence of a causal nexus between the occupation and the disability, compensation may not be forthcoming if the injury resulted from general stress. This dilemma is the practical effect of the "wear and tear" doctrine in Massachusetts. Although still part of the law, the doctrine is poorly suited to a causative analysis in workers' compensation cases because it fails to attain the goal for which workers' compensation was originally created, that is, to alleviate the monetary burden occasioned by a disability.[133] Hence, if the Massachusetts Supreme Judicial Court intends to implement the legislative mandate reflected in the workers' compensation law, it should refrain from analogizing mental disorders to explosions. Certainly a mental disability can occur in response to a single stressful event. But it can occur just as surely in response to protracted stress.[134]

One commentator has argued that since compensation is paid for the disability (the loss of earning power) and not for the injury *per se*[135] (a small cut on the finger is fixed with a bandage instead of workers' com-

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130. An eminent specialist in coronary heart disease, whose testimony concerned the relationship of stress to heart attacks, put it aptly: "I say what precipitated the myocardial infarction . . . doesn't require any immediate causality of the day before or the moment before. And Jurisprudence better move away from that point of looking at it as though it was an automobile accident. It's not an automobile accident." N.H. Supply Co. v. Steinberg, __ N.H. __, 400 A.2d 1163, 1167 (1979) (Testimony of Dr. Bernard Lown).

131. *See* discussion of the medical burden of proof at notes 38-65 and accompanying text *supra*.

132. *Id.*

133. *See* notes 21-24 and accompanying text *supra*.

134. *See* note 62 and accompanying text *supra*.

135. In other words, workers' compensation is not paid for the injury *qua* injury, but for the inability to perform or obtain work because of the injury. *See generally* Comment, *supra* note 49, at 1132.

pensation), the term "personal injury" ought to be abandoned in favor of "disability" so that the fine legal distinctions resulting from the doctrine of wear and tear can be discarded.[136] Although this view is attractive because it simplifies the criteria for recovery, it unfairly casts the economic burden of all disabilities upon industry, including those which bear a slim causal connection to the nature of the employment.

Clearly, the *status quo* of workers' compensation law in Massachusetts is not sufficiently malleable to adapt to the myriad forms of work-related mental injuries.[137] The solution which is most consonant with both the wear and tear cases of gradual stress and those involving specific stress seems to rest within the thorny realm of causation. The Massachusetts Supreme Judicial Court must move away from the ad hoc approach foreshadowed by *Fitzgibbons' Case*[138] and *Albanese's Case*[139] and adopt a standard based on a uniform methodology. For if the court is willing to compensate victims of specific stress, it must also be willing to allow recovery where the evidence is less than specific, but where substantial evidence has been introduced to prove that stress from work pressures caused the mental disability. Such a view is consistent with the policy of requiring industry to pay for the ills it causes.[140] Similarly, industry would not be held responsible for injuries which cannot fairly be attributed to its activity.

Since there is no compelling need to retain the wear and tear doctrine, compensation should be forthcoming regardless of the duration of the stimulus. Just as an injury can develop gradually from exposure to cigarette smoking, radioactivity or carcinogenic substances, so can a disability result from any type of mental stress.[141] The Massachusetts Supreme Judicial Court must recognize this fact while remaining alert to the real problem — isolating the *source* of the stress. Anything less will mire the court in subtle arguments in an attempt to distinguish prior cases. In turn, those subtle arguments will be no compensation or consolation to those workers whose employment caused them to be mentally disabled.

ROBERT J. FILTEAU

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136. *See* Bear, *supra* note 70, at 21-23.
137. *See* note 60 *supra*.
138. 1978 Mass. Adv. Sh. 675, 373 N.E.2d 1174 (1978).
139. 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83 (1979).
140. *See* notes 13-24 and accompanying text *supra*.
141. *See generally* M. MAYERS, *supra* note 98.

Proposition 2½ in Massachusetts: Another Proposition 13 or a Tax Reform Measure with Potential Constitutional Problems?

In 1979, a number of tax initiatives dealing with limitations on property and other state and local taxes were submitted to the Massachusetts Attorney General for certification in accordance with the Massachusetts Constitution.[1] One such initiative, entitled "Initiative Petition for a Law Limiting State and Local Taxation and Expenditures" (Proposition 2½) was initiated by a Massachusetts taxpayers association called the Citizens for Limited Taxation. In the fall of 1979, the Citizens for Limited Taxation gathered over sixty thousand voter signatures and qualified Proposition 2½ for submission to the state legislature. Failing enactment by the legislature, Proposition 2½ will become a referendum issue to be decided by the electorate in the 1980 state election.[2]

Because of the varied impact of Proposition 2½, not only on taxpayers but also upon public employees and government leaders, the aim of this article is to scrutinize the provisions of Proposition 2½ for potential constitutional violations. In doing so, the experience of California with Article XIII A of the California Constitution (Proposition 13) will be examined to identify the similarities and differences between the two states in their treatment of property tax reform. Specifically, Section I will document historically what has transpired in Massachusetts and California with respect to valuation and classification of property. From that discussion will follow an explanation of Proposition 13 and an outline of the relevant legal challenges discussed by the California Supreme Court in *Amador Valley Joint Union High School District v. State Board of Equalization.*[3] Within the framework of legislative history and limited case law covered in Section I, Section II will analyze the provisions and scope of Proposition 2½ in view of the more limited range of Proposition 13. Lastly, Section III will examine and reconcile the constitutional challenge of impairment of contracts[4] which may arise from the passage of Proposition 2½. The lack

1. MASS. CONST. art. XLVIII. *See* notes 56-60 and accompanying text *infra.*
2. *Id.*
3. 22 Cal.3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).
4. U.S. CONST., art. I, § 10, cl. 1 states that "No state shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the obligations of Contracts ...."

of debt payment protection in Proposition 2½ is fundamental to the impairment of contracts issue. This apparent defect will receive close scrutiny due to the possible impact on public employee collective bargaining agreements, the derivative effect upon jobs and fringe benefits to public employees and the availability of services from municipal and county government.

I. HISTORICAL DEVELOPMENT

A. Property Valuation and Classification Experiences of California and Massachusetts

Long before Proposition 13 reached the voters for consideration, the California legislature had mandated the uniformity of property tax assessments.[5] A 1933 state constitutional amendment[6] required that all taxable property be assessed at its full cash value.[7] The California legislature sought to comply with this amendment by requiring that all property be taxed in proportion to its value: property was to be assessed at between twenty to twenty-five percent of full cash value until the 1971-72 fiscal year, whereupon the property tax rate was equalized at twenty-five percent of full cash value.[8]

The Commonwealth of Massachusetts has likewise struggled with the valuation question since the Massachusetts Constitution enabled the General Court to impose assessments and taxes upon property within the State.[9] Pursuant to this power, the legislature passed a statute which required the assessors of each city or town to "make a fair cash valuation of all estate, real and personal, subject to taxation."[10] In *Bettigole v. Assessors of Springfield,*[11] the fair cash valuation requirement was interpreted by the Massachusetts Supreme Judicial Court as prohibiting

5. CAL. REV. & TAX CODE § 401 (West) (amended by 1966 Cal. Stats. ch. 147).

6. CAL. CONST. art. XI, § 12, repealed 1970; *Id.* at art. XIII, § 1.

7. *Id.* Historical Note; CAL. REV. & TAX CODE § 110 (West) (amended by 1971 Cal. Stats. ch. 1542) provides:

> "full cash value" or "fair market value" means the amount of cash or its equivalent which property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other and both with knowledge of all of the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions upon those uses and purposes.

See De Luz Homes, Inc. v. San Diego County, 45 Cal.2d 546, 550, 290 P.2d 544, 554 (1955).

8. CAL. REV. & TAX CODE § 401 (1966). It should be noted that effective January 1, 1981, California property will be assessed at its full cash value. 1978 Cal. Stat. ch. 1207, § 15.

9. MASS. CONST. art. 4. The Massachusetts legislature has had general assessment and taxing powers since the original state constitution in 1780.

10. MASS. GEN. LAWS ANN. ch. 59, § 38 (West Supp. 1979). *See also* Assessors of Quincy v. Boston Consol. Gas Co., 309 Mass. 60, 63, 34 N.E.2d 623, 626 (1941), where it is stated that fair cash value means fair market value or "the price that an owner willing but not compelled to sell ought to receive from one willing but not compelled to buy."

11. 343 Mass. 223, 178 N.E.2d 10 (1961).

any favored treatment for any one classification of property over another.[12] To reinforce the court's ruling in *Bettigole,* the legislature in 1966 required the Commission of Corporations and Taxation to "determine and establish for each city and town a proposed equalized valuation which shall be the fair cash value of all property in such city or town subject to local taxation. . . ."[13]

Despite the legislative action to equalize valuation for all property in 1966, not all city and town assessors were valuating their property equally.[14] Some practiced fractional valuation which, in general, continued a higher taxation on business property in comparison with residential property. This inconsistency prompted the Massachusetts Supreme Judicial Court to reiterate that the Commission of Corporations and Taxation has the power and duty "to direct local assessors to take such action as will tend to produce uniformity throughout the Commonwealth in valuation and assessments."[15] Since uniform valuation and assessments meant a drastic shift in the tax burden from businesses to homeowners, a classification amendment drive was initiated among a number of lobbying groups, including Massachusetts Fair Share and the AFL-CIO, for the purpose of authorizing separate assessments for different uses of property.[16] The classification amendment was subsequently approved by the voters in 1978 and permitted different assessments to apply to different types of property.[17]

Confusion then arose over the question of whether fair cash valuation was necessary before instituting varied assessments according to use. The Massachusetts Supreme Judicial Court answered this question in *Tregor v. Board of Assessors of the City of Boston*[18] by holding that 100% fair cash valuation of all property must be realized *before* the institution of a classification system. Further, the court held that if 100% fair cash valuation had not been met, a property tax abatement was possible.[19] In *Tregor,* commercial property in Boston was valued at a

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12. *Id.* at 231-32, 178 N.E.2d at 15, where the court struck down a proposed assessment of taxes providing for differing valuations of property ranging from 50% for single family residences to 85% for commercial and industrial property.

13. MASS. GEN. LAWS ANN., ch. 58, § 9 (West Supp. 1979).

14. Town of Sudbury v. Commissioner of Corporations and Taxation, 366 Mass. 558, 566, 321 N.E.2d 641, 647 (1974).

15. *Id.* at 569, 321 N.E.2d at 649.

16. MASS. CONST. art. 112 authorized the legislature to assess property differently by classification. The amendment becomes a ballot question only after approval of at least one-fourth of the legislature in two consecutive sessions. In this case, the Massachusetts legislature had passed a law on classification to take effect only if ratified by the voters. 1978 Mass. Acts ch. 580, § 38.

17. MASS. GEN. LAWS ANN. ch. 59A, §§ 5, 18 (West Supp. 1979).

18. 79 Mass. Adv. Sh. 770, 387 N.E.2d 538 (1979).

19. *Id.* at 774-77, 387 N.E.2d at 540-41. The abatement process is outlined in MASS. GEN. LAWS ANN. ch. 59, § 59 (West Supp. 1979) and allows anyone who is taxed to apply and receive an

higher rate than residential property and the court held that the commercial property owner should receive an abatement down to the level of the class of property which had the lowest percentage of fair cash value.[20]

Since *Tregor* expressly denied application of the classification amendment before fair cash valuation was accomplished,[21] community delay in calculating fair cash valuation provided potential opportunity for business abatements and a corresponding increase in the tax burden upon homeowners. In response to this prospect, the legislature enacted a statute in November, 1979, allowing classification of property according to use, even in the absence of revaluation at 100% of market value.[22] This most recent action seems to have resolved at least tentatively the valuation and classification questions in Massachusetts. However, as in California, interest has now shifted to limiting the property tax rate.[23]

B. Property Tax Reform in California

On June 6, 1978, California voters amended the state constitution by approving Proposition 13. This amendment changed the system of real property taxation by imposing limitations upon tax rates, assessments and the taxing power of state and local government.[24] Nevertheless, the voter mandate did not go unchallenged. Various governmental agencies

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abatement if they are taxed at more than their just proportion or upon an assessment of any or their property in excess of its fair cash value.

20. Tregor v. Board of Assessors of the City of Boston, 79 Mass. Adv. Sh. 770, 783, 387 N.E.2d 538, 544 (1979).

21. *Id.* at 773, 387 N.E.2d at 540. *But see id.* at 786, 387 N.E.2d at 545, where the dissent argued that such a ruling "results in successful taxpayers paying less than it would have paid if the city had assessed all property at 100% of cash value or at the same proportion of fair cash value."

22. 1979 Mass. Acts ch. 797.

23. The following initiatives were filed in September, 1979: An Act to Provide State and Local Property Tax Relief for the Citizens of the Commonwealth by Imposing State and Local Tax Limits and by Establishing a Policy to Increase the Commonwealth's Share of Local Education Costs (submitted by the Massachusetts Teacher's Association); An Act to Reduce Local Property Taxes and Limit the Total Burden of State and Local Taxation (submitted by Fair Share); An Act Limiting State and Local Taxation and Expenditures (submitted by Citizens for Limited Taxation); A Constitutional Amendment Limiting State and Local Taxation and Expenditures (submitted by Citizens for Limited Taxation); An Act to lessen the Burden of State and Local Taxes by Limiting Their Increase and by Granting Added Powers to Cities and Towns to Control Expenditures (submitted by the Massachusetts Taxpayers Foundation); A Constitutional Amendment to the Constitution Reducing and Limiting the Burden of State and Local Taxes on the Citizens of the Commonwealth (submitted by the Massachusetts Taxpayers Foundation); An Act Limiting State and Local Taxation (submitted by the Associated Industries of Massachusetts); and A Constitutional Amendment to the Constitution Limiting State and Local Taxation (submitted by the Associated Industries of Massachusetts).

24. CAL. CONST. art. XIIIA. Proposition 13 was properly processed in accordance with the amendment and initiative powers reserved to the people by the California State Constitution. *See* CAL. CONST. art. XVIII, §§ 3, 4; art. II, § 8.

questioned the constitutionality of the tax initiative by seeking a declaratory judgment from the Supreme Court of California in *Amador Valley Joint Union High School District v. State Board of Equalization.*[25] The court in *Amador,* invoking original jurisdiction, upheld the validity of the initiative and ruled that the measure did not deny the constitutional guarantee of equal protection.[26] This issue was raised by the petitioners in *Amador* because a provision of Proposition 13 rolled back the assessed valuation of all real property to the 1975-76 fiscal year, but allowed the valuation base to change to "the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment."[27] Therefore, petitioners argued, the corresponding effect was a "rollback" for some property owners and not for others, depending upon the date on which property was sold.[28] The effect of the amendment was to permit properties of equal market value to be given unequal assessments. The petitioners in *Amador* argued that this violated the equal protection guarantee in the Federal Constitution by virtue of its "invidious discrimination between owners of similarly situated property."[29]

Relying on a series of United States Supreme Court decisions,[30] the California court rejected the claim of discrimination and held that the Proposition 13 taxation system was rationally based and not wholly arbitrary.[31] The *Amador* court reasoned that the date of acquisition provision of the article rested on the premise that the property owner's taxes "should bear some rational relationship to the original cost of the property, rather than relate to an unforeseen, perhaps unduly inflated, current value."[32] In support of a less than equal taxation system, *Amador* noted that the United States Supreme Court had upheld state

25. 22 Cal.3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

26. *Id.* at 237, 583 P.2d at 1294, 149 Cal. Rptr. at 252.

27. CAL. CONST. art. XIIIA, § 2.

28. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal. 3d 208, 233, 583 P.2d 1281, 1292, 149 Cal. Rptr. 239, 250 (1978).

29. *Id.* at 232, 583 P.2d at 1292, 149 Cal. Rptr. at 250. The petitioners relied on the protection of the fourteenth amendment which provides that no state shall, "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

30. The *Amador* court primarily relied on: Kahn v. Shevin, 416 U.S. 351 (1974); Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); Tax Commissioner v. Jackson, 283 U.S. 527 (1931); Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); and Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 232-37, 583 P.2d 1281, 1292-94, 149 Cal. Rptr. 239, 250-52 (1978).

31. *Id.* at 237, 583 P.2d at 1294, 149 Cal. Rptr. at 252.

32. *Id.* at 235, 583 P.2d at 1293, 149 Cal. Rptr. at 251, The court compared two similar pieces of property for illustration, one of $40,000 acquired in 1975 and one of $80,000 bought in 1977. Under Proposition 13, the 1975 property was assessed and taxed on the basis of the $40,000 cost — reasonably reflecting the price he was originally willing and able to pay for his property; whereas, the 1977 property was assessed at $80,000 — similarly reflecting what the taxpayer was willing to pay and justifying the higher assessment and tax rate. Thus, this dual set-up was ruled to be an"arguably reasonable basis for assessment." *Id.* It should be noted, however, that the court's

flexibility in giving partial or total exemptions within their taxation schemes;[33] and California had such an exemption power in its constitution.[34] The California court concluded that even an equalized full valuation system would result in differences due to the exemptions.[35] In levying taxes, "the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value."[36] Consequently, the *Amador* decision upheld as rationally based Proposition 13's taxation system, provided "a property owner's tax liability bears a reasonable relation to his costs of acquisition."[37]

Although the equal protection challenge was a major focus of petitioners' claims in *Amador,* two other contentions bear inspection: Proposition 13's possible violation of the single-subject requirement of the California Constitution;[38] and a claimed violation of the Federal Constitution due to an impairment of contracts.[39] In support of their claim that Proposition 13 violated the single-subject requirement, the petitioners in *Amador* noted its variety of provisions. In addition to the rollback provision,[40] Proposition 13 contained three other sections. First, it placed a limit on tax rates and assessments other than those property taxes or special assessments needed to pay prior indebtedness approved by the voters.[41] Second, it restricted changes in state taxes by requiring a two-thirds vote of approval from the legislature.[42] Third, the proposition allows cities, counties and special districts to impose special taxes, but only upon approval by a two-thirds vote of qualified electors residing within these governmental units.[43]

The court in *Amador* held that Proposition 13 did not violate the

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example related solely to voluntary acquisition of property. In the case of involuntary changes in ownership or new construction, the court specifically left open the question of proper application of Proposition 13.

33. *Id.* at 234, 583 P.2d at 1292-93, 149 Cal. Rptr. 250-51, *citing* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

34. CAL. CONST. art. XIII, § 4.

35. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 236, 583 P.2d 1281, 1294, 149 Cal. Rptr. 252 (1978).

36. *Id.* at 237, 583 P.2d at 1294, 149 Cal. Rptr. at 252, *quoting* Ohio Oil Co. v. Conway, 281 U.S. 146, 159 (1930).

37. *Id.*

38. CAL. CONST. art. II, § 8(d) provides that an initiative embracing more than one subject may not be submitted to the electors or have any effect.

39. U.S. CONST. art. I, § 10, cl. 1. For the pertinent constitutional language, *see* note 4 *supra.*

40. *See* notes 27-29 and accompanying text *supra.*

41. CAL. CONST. art. XIIIA, § 1.

42. *Id.* at § 3. However, Proposition 13 also provided that "no new ad valorem taxes on real property, or sales or transaction taxes or the sales of real property may be imposed." *Id.*

43. *Id.* at § 4. Proposition 13 provided that "ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district" could not be imposed. *Id.*

single-subject requirement of the state constitution.[44] Unlike the Massachusetts constitutional provisions relative to initiative, California's Constitution provides that, "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[45] The *Amador* decision cited as an underlying purpose of the single-subject requirement the need to "avoid 'exploiting' the initiative process by combining in a single measure several provisions which might not have commanded majority support if considered separately;" but found that the elements of Proposition 13, "not only pertain to the general subject of taxation, but also are reasonably interdependent and functionally related to one another."[46]

The final constitutional issue in *Amador* meriting discussion concerned an alleged violation of the Federal Constitution due to an impairment of contracts.[47] As previously mentioned, the tax rate limitation of Proposition 13 did not apply to taxes or assessments needed to pay for any indebtedness approved by the voters prior to the effective date of the amendment.[48] Petitioners in *Amador* argued that there existed other municipal debts which were not required to be approved by the voters, including labor agreements, pension and health benefits and certain redevelopment bonds.[49] However, the court in *Amador* held that this issue was not ripe for consideration.[50] The court noted that Proposition 13 did not require that local agencies default on their contracts and bonds nor was there evidence of any direct impairment of a contract or bond.[51] Although the Supreme Court has interpreted the impairment section of the Constitution as prohibiting a state from authorizing, "a municipality to borrow money and then restrict its taxing power so that the debt cannot be repaid,"[52] such was not the case in

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44. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 232, 583 P.2d 1281, 1292, 149 Cal. Rptr. 239, 250 (1978). The decision also rejected a challenge that Proposition 13 was more of a revision of the state constitution than an amendment. *Id.* at 221-29, 583 P.2d at 1284-89, 149 Cal. Rptr. at 242-47.

45. CAL. CONST. art. II, § 8(d). In contrast, the Massachusetts Constitution embodied in Amendment XLVIII provides that the initiative contain only subjects that are related and mutually dependent. *See* note 57 and accompanying text *infra*.

46. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 231, 583 P.2d 1281, 1291, 149 Cal. Rptr. 239, 249 (1978). Under this interpretation of the single subject limitation, it appears that the California court has adopted a standard of review similar to that found in Amendment XLVIII to the Massachusetts Constitution. *See* note 45 *supra*.

47. The issue centered upon U.S. CONST. art. I, § 10, cl. 1. For the language of the clause, *see* note 4 *supra*.

48. *See* note 41 and accompanying text *supra*.

49. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 238, 583 P.2d 1281, 1295, 1296, 149 Cal. Rptr. 239, 253 (1978).

50. *Id.* at 239-41, 583 P.2d at 1296-97, 149 Cal. Rptr. at 254-55.

51. *Id.* at 239, 583 P.2d at 1296, 149 Cal. Rptr. at 254.

52. *Id.* at 241, 583 P.2d at 1297, 149 Cal. Rptr. at 255, *quoting* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 24 n.22 (1977).

Amador. The mere existence of a tax limitation and corresponding revenue reduction does not immediately trigger an unlawful impairment.[53] The Supreme Court has required as a prerequisite for establishing contract impairment that there be a change in the express terms of an agreement[54] or a substantial impairment of an existing contractual relationship.[55] In *Amador,* the court held that the claim of contract impairment failed to show "any present, specific and substantial impairment of contract" attributable to Proposition 13.[56]

II. INITIATIVE FOR PROPERTY TAX REFORM IN MASSACHUSETTS

A. Initiative Procedure

The initiative procedure in Massachusetts begins when any ten registered voters who desire a law or constitutional amendment submit such a proposal to the Attorney General for certification in accordance with Article 48 of the Massachusetts Constitution.[57] Once the proposal is certified, the Secretary of the Commonwealth provides the petitioners with printed petition forms for use in obtaining support from registered voters.[58] If the requisite number of certified signatures is gathered by the initiative petitioners,[59] the proposed law or amendment is introduced into the General Court during the next legislative session.[60]

Once the measure is before the legislature for consideration, a number of alternatives for implementation are possible. The easiest route is enactment by the legislature, thus dispensing with any need for

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53. *Id.*

54. *See* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 32 (1977) (legislative repeal of express covenant to bondholders that their monies would not be used for another purpose found to be an unconstitutional impairment of contract).

55. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250-51 (1978) (legislative modification of pension rights set by contract held to be an unconstitutional impairment of contract).

56. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 241, 583 P.2d 1281, 1297, 149 Cal. Rptr. 239, 255 (1978). After concluding that the issue of impairment of contract was not ripe, the *Amador* court cited standing as a related obstacle since none of the petitioners were, "municipal obligees, bondholders or creditors alleging an actual or potential impairment of their rights." *Id.* at 242, 583 P.2d at 1297-98, 149 Cal. Rptr. at 255. Thus, since petitioners' contracts were not impaired, there was no injury to establish the necessary standing. However, the possibility of injury, standing and ripeness in future cases was not eliminated by the *Amador* court. *Id.* at 242, 583 P.2d at 1298, 149 Cal. Rptr. at 256.

57. MASS. CONST. art. XLVIII [hereinafter referred to as Amendment 48 Initiative]. Certification means that the proposed law or amendment: 1) is in the proper form; 2) is not substantially the same as any proposal submitted to the people in either of the two preceding state elections; 3) does not contain excluded subjects (outlined in The Initiative, pt. II, § 2 but not relevant here); and 4) contains only subjects which are related and mutually dependent. Amendment 48 Initiative, *supra,* pt. II, § 3.

58. Amendment 48 Initiative, *supra* note 57, pt. II, § 3.

59. *Id.* at pt. IV, § 5, Gen. Prov. pt. I. The requisite number of registered voter signatures needed is at least three percent of the entire vote cast for Governor at the preceding state election. Amendment 48 Initiative, *supra* note 57, pt. V.

60. Amendment 48 Initiative, *supra* note 57, pt. V, § 1.

voter approval. In the event that the initiative is not passed, the petitioners may procure additional registered voter signatures to place it on the ballot at the next state election.[61] The petitioners also have an option to amend the initiative in such a manner so as to perfect but not materially change the substance of the measure.[62] Although the legislature cannot technically amend the initiative, it may take one of two affirmative steps. First, it can propose a substitute which would be placed on the ballot with the initiative as an alternative measure.[63] Secondly, the legislature has the power to group initiative petitions on the ballot which are conflicting and alternative measures.[64] In either case, the electorate would be allowed to vote for each of the measures or for only one of the measures.[65] This creates the possibility that more than one proposal could receive the necessary votes for approval.[66] In such a situation, only the measure with the largest affirmative vote would be approved.[67] If the legislature decides not to group initiatives as alternatives on the ballot because only parts of them conflict with each other, then the constitution provides that the Supreme Judicial Court will determine whether the provisions conflict.[68] If so, only the provisions contained in the measure receiving the largest number of affirmative votes would win.[69] Finally, the legislature has the power to amend or repeal an initiative law, subject to gubernatorial veto and the right to referendum.[70]

B. Proposition 2½

Proposition 2½ seeks to limit property taxes assessed by municipalities and other governmental entities to a rate of two and a half

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61. *Id.* (the number of registered voters' signatures needed is equal to one-half of one percent of the entire vote cast for Governor at the last state election).

62. Amendment 48 Initiative, *supra* note 57, pt. V, § 2. *See* Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 233, 69 N.E.2d 115, 120 (1946) (an erroneous reference made in the initial proposal and later stricken by an amendment was ruled to be perfecting and not materially changing the substance of the measure).

63. Amendment 48 Initiative, *supra* note 57, pt. III, § 2. If the legislature chooses to propose a substitute, it must be basically the same as that originally filed by petitioners. Buckley v. Secretary of the Commonwealth, 371 Mass. 195, 201, 355 N.E.2d 806, 811 (1976).

64. Amendment 48 Initiative, *supra* note 57, pt. VI. The Massachusetts Teachers Association has a tax initiative before the legislature which would limit the growth in state and local taxes to proportionate growth in personal income and increase state funding for local education costs. It is possible that the legislature could determine that this is an alternative to Proposition 2½.

65. *Id.*

66. Amendment 48 Initiative, *supra* note 57, pt. V, § 1. An initiative or substitute must be approved by voters equal in number to at least thirty percent of the ballots cast and also by a majority of voters voting on the law.

67. Amendment 48 Initiative, *supra* note 57, pt. VI.

68. *Id.*

69. *Id.*

70. Amendment 48 Initiative, *supra* note 57, Gen. Prov. pts. V, VI, Referendum pt. III, § 2.

percent of fair market value.[71] To reach this limitation, the proposed law would require the gradual reduction of property taxes by fifteen percent each year until the two and one half percent limit is reached.[72] That percentage limit could then be raised or lowered only by a two-thirds vote of the municipal electorate.[73] In the case of a city or town with a tax rate lower than the two and one half percent limit, the locality would not be allowed to increase the rate except by the same two-thirds vote by the locality at a general election.[74]

In addition to property tax reform, Proposition 2½ contains various supplementary tax proposals that merit attention in view of the chances for legislative enactment. The measure proposes that no direct services or cost obligation imposed by the state would be effective against a city or town unless the city or town accepted the law and the state paid for the added cost.[75] The same state funding requirement would apply to any state laws granting or increasing exemptions from local taxation or any administrative rules or regulations which would result in the imposition of additional costs to any city or town.[76] Proposition 2½ would also accomplish the following tax changes: (1) reduce the maximum excise tax rate on motor vehicles from sixty-six dollars per thousand to twenty-five dollars per thousand;[77] (2) limit the right of counties, districts, authorities and other governmental entities authorized to assess costs, charges or fees on cities or towns to a four percent increase over the assessment for the preceding fiscal year;[78] (3) limit user fees of goods and services to the actual cost of furnishing such goods or providing such services;[79] and (4) allow individuals who rent their principal place of residence in the Commonwealth a state income tax deduction equal to fifty percent of their annual rent.[80] Finally, Proposition 2½ seeks to limit expenditures, and indirectly, taxes, by abolishing the

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It should also be noted that parts of Proposition 2½ exist as a proposed constitutional amendment which could be on the state ballot in 1982.

71. CITIZENS FOR LIMITED TAXATION, INITIATIVE PETITION FOR A LAW LIMITING STATE AND LOCAL TAXATION; AND EXPENDITURES 1 (1979) [hereinafter referred to as Proposition 2½]. For comparison with the 1979 tax rates, *see* Massachusetts Taxpayers Foundation, *Municipal Financial Data* (1979), wherein the 1979 state average full-value tax rate was $44.84 per $1000 equalized valuation or 4.484%.

72. Proposition 2½, *supra* note 71, at § 1.

73. *Id.*

74. *Id.*

75. *Id.* at § 2. The proposal also gives cities and towns power to revoke certain current mandates in accordance with an enacted procedure.

76. *Id.*

77. *Id.* at § 9.

78. *Id.* at § 12.

79. *Id.* This attempts to prevent what happened in California after Proposition 13 when fees increased due to the prospect of reduced revenues.

80. *Id.* at § 11.

fiscal autonomy of school committees[81] and repealing compulsory binding arbitration for impasses in fire and police labor negotiations.[82]

From the preceding outline it is apparent that there are vast differences between Proposition 2½ and its supposed prototype in California.[83] On the breadth and scope of the provision, there is much more than a single subject involved in Proposition 2½. However, just as *Amador* reconciled the elements of Proposition 13 as concerning the general subject of taxation,[84] the Attorney General of Massachusetts was similarly able to certify Proposition 2½ as an initiative petition which satisfied the related and mutually dependent subject requirement.[85] Therefore, while the scope of Proposition 2½ is greatly different from Proposition 13, both initiatives overcame similar procedural obstacles.

Proposition 13, while more limited in scope, contained two major provisions not present in Proposition 2½: roll-back of tax rates and debt payment protection.[86] In the case of the former, Proposition 2½ accomplishes a tax rate roll-back, without the potential constitutional problem of equal protection,[87] by a gradual annual reduction until the two and one half percent limit is reached for all communities.[88] Since the tax rates for all municipalities vary now, such a proposal seems more in line with the equal protection mandate. As to debt security, the California amendment contained limited protection but enough to refute an impairment of contracts constitutional challenge.[89] Proposition 2½, on the other hand, is silent on debt protection and contract impairment even though it is likely that much less revenue will be available to pay off debts and fulfill contracts.

III. CONSTITUTIONALITY OF PROPOSITION 2½

A. Absence of Debt Protection

The major constitutional question facing Proposition 2½ arises from the absence of language regarding debt payment protection. In other words, if a Massachusetts town cannot pay its debts as a result of the

81. *Id.* at § 7. Section 7 provides that no city or town would be required to fund more money for the support of the public schools than is appropriated by vote of the local appropriating authority.

82. *Id.* at § 10.

83. *See* § I(B) *supra.*

84. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 231, 583 P.2d 1281, 1291, 149 Cal. Rptr. 239, 249 (1978). *See* note 46 and accompanying text *supra.*

85. *See* note 57 and accompanying text *supra.*

86. *See* § I(B) *supra.*

87. *See* notes 26-37 and accompanying text *supra.*

88. *See* note 69 and accompanying text *supra.*

89. *See* notes 47-56 and accompanying text *supra.*

passage of Proposition 2½ and those debts are a product of contractual agreements, then the state will have passed a law impairing the obligations of contracts in violation of the federal Constitution.[90] Upon review of Proposition 13 in *Amador,* the clause rolling back the tax rate to one percent was coupled with an exception authorizing payment of any indebtedness approved by the voters prior to the section becoming effective.[91] It was alleged that Proposition 13 constituted an unlawful impairment of contracts under the federal Constitution since the exception did not cover certain municipal obligations which were not required to be approved by the voters.[92] The parallel question in Massachusetts is whether the absence of any reference to debt payment guarantee renders Proposition 2½ unconstitutional.

As previously noted, the constitutional challenge of impairment of contracts was dismissed in *Amador*[93] and the rationale used by the California court is helpful in resolving a possible challenge to Proposition 2½. The *Amador* court found that the petitioners there lacked standing[94] and that the issue of impairment of contracts was premature.[95] Just as the court in *Amador* found nothing in Proposition 13 directly requiring local agencies to default either in meeting their preexisting contracts or in liquidating their debts,[96] a future Massachusetts court testing the validity of Proposition 2½ would also find the absence of any prima facie default requirement.

The California court also rejected the application of cases exemplified by *United States Trust Co. of New York v. New Jersey*[97] holding that "a State may not authorize a municipality to borrow money and then restrict its taxing power *so that the debt cannot be repaid.*"[98] The Court in *Amador* interpreted those cases as not suggesting that a tax restriction immediately impairs contracts without

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90. U.S. CONST. art. I, § 10, cl. 1. For text of the constitutional provision, *see* note 4. Note that if Proposition 2½ becomes a ballot question, the electorate and not the legislature will have passed a law potentially impairing contracts.

91. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 220, 583 P.2d 1281, 1284, 149 Cal. Rptr. 239, 242 (1978). *See* note 41 and accompanying text *supra.*

92. *Id.* at 238-39, 583 P.2d at 1295-96, 149 Cal. Rptr. at 253-54.

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

94. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 242, 583 P.2d 1281, 1297-98, 149 Cal. Rptr. 239, 255 (1978).

95. *Id.* at 242, 583 P.2d at 1298, 149 Cal. Rptr. at 256.

96. *Id.* at 239, 583 P.2d at 1296, 149 Cal. Rptr. at 254. *See* note 51 and accompanying text *supra.*

97. 431 U.S. 1 (1977).

98. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 241, 583 P.2d 1281, 1297, 149 Cal. Rptr. 239, 255 (1978), *quoting* United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 24 n.22 (1977).

looking at the effect upon the repayment of debts.[99] In fact, the California legislature took steps after the passage of Proposition 13 to insure that no defaults would occur by creating a Local Agency Indebtedness Fund to be used for a limited period of time while revenue sources were being reorganized.[100] Where there is a change in the express terms of a bondholder's covenant, this could be viewed as an impairment of the bondholder's expectations.[101] Even where there is no repeal of any express covenant with municipal obligees, a constitutional violation may attach if there has been a substantial impairment of a contractual relationship.[102]

While the *Amador* court found no substantial impairment of contract rights by the passage of Proposition 13[103] the measure did provide contractual protection for preexisting debts approved by the voters.[104] This provision certainly reduced the impact of the measure on contracts and consequently limited the litigants who might sue for an unconstitutional impairment of contracts. In contrast, Proposition 2½ contains no such language protecting any debts, thereby enhancing the chance of impairment of contracts. In order for that risk to become an unconstitutional impairment, however, the prerequisites of standing and ripeness must be met.

In light of the standing and ripeness impediments raised in *Amador,* a challenge to Proposition 2½ on the ground of impairment of contracts could also be unsuccessful unless it was brought by municipal obligees, bondholders or creditors alleging actual or potential impairment of their rights,[105] and an actual impairment of a contract or bond occurred.[106] While this standing requirement would appear to be easily met, the ripeness requirement may be more difficult to establish since the default of a contractual obligation is not the inevitable result of the passage of Proposition 2½. If an indebtedness issue later appears to be a problem, a municipality can shift priorities within its budget. Further, the Massachusetts legislature could establish a reserve fund to pay bonds and fulfill contractual obligations for those municipalities which have an added financial burden as a result of Proposition 2½.

99. *Id.*

100. CAL. GOV'T. CODE §§ 16496, 16496.5 (West Supp. 1979). *See also* Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 240, 583 P.2d 1281, 1296, 149 Cal. Rptr. 239, 254 (1978).

101. United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 20-21 n. 17 (1977).

102. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

103. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 241, 583 P.2d 1281, 1297, 149 Cal. Rptr. 239, 255 (1978). *See* note 56 and accompanying text *supra.*

104. CAL. CONST. art. XIIIA, § 1. *See* note 41 and accompanying text *supra.*

105. Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 241-42, 583 P.2d 1281, 1297-98, 149 Cal. Rptr. 239, 255 (1978).

106. *Id.* at 241, 583 P.2d at 1297, 149 Cal. Rptr. at 255.

B. Proposition 2½'s Possible Impact on Collective Bargaining

Proposition 2½ will have obvious impact on fire and police employee negotiations due to the elimination of binding compulsory arbitration, and on school employee negotiations because of the elimination of school committee fiscal autonomy. More importantly, the pressure of property tax rate reductions on public sector collective bargaining will be greatly increased. Cases in California[107] and New York[108] are illustrative of the possible effects of such a change in the available tax revenue.

In *Sonoma County Organization of Public Employees v. County of Sonoma,*[109] the Supreme Court of California was asked to consider a statute passed by the state legislature which declared null and void any agreements by local agencies to pay cost-of-living increases in excess of that granted to state employees.[110] The legislature felt such a law would counter any wholesale reduction in services that might have resulted from the passage of Proposition 13 and, in turn, promote full employment and eliminate layoffs.[111] Petitioners in *Sonoma* were employee organizations which had binding collective bargaining contracts with local governmental entities. Citing *United States Trust Co. of New York v. New Jersey,*[112] the *Sonoma* court found there was a significant impairment of contracts even though the wage increases were invalidated for only one year and the law did not speak to fringe benefits and other matters.[113] Therefore, the loss of a wage increase was determined to be a "severe, permanent, and immediate change" in petitioners' rights under the contract.[114]

While petitioners overcame the standing and ripeness problems raised in *Amador,* the *Sonoma* court looked to see if there was a legitimate state purpose[115] to permit the impairment.[116] The respondents alleged

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107. Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal.3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

108. Subway-Surface Supervisors Association v. New York City Transit Authority, 44 N.Y.2d 101, 375 N.E.2d 384, 404 N.Y.S.2d 323 (1978).

109. 23 Cal.3d 269, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

110. *Id.* at 302, 591 P.2d at 3, 152 Cal. Rptr. at 905.

111. CAL. GOV'T. CODE § 16281 (West Supp. 1979). *See* Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal.3d 296, 303-04, 591 P.2d 1, 4, 152 Cal. Rptr. 903, 906 (1979).

112. 431 U.S. 1, 29, 30-31 (1977) where the court stated:

> [A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors .... [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.

113. Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal.3d 296, 308-09, 591 P.2d 1, 7, 152 Cal. Rptr. 903, 909 (1979) (an increase in wages is frequently the very heart of an employment contract).

114. *Id., quoting* Allied Structural Steel Company v. Spannaus, 438 U.S. 234, 250 (1978).

115. *Id.*

116. *Id.* at 305, 591 P.2d at 5, 152 Cal. Rptr. at 907, where the court refers to Home Building

that the fiscal emergency created by the passage of Proposition 13 was a legitimate state purpose, sufficient to justify the invalidation of salary increases.[117] The *Sonoma* court noted the potential crises resulting if the tax revenues lost due to Proposition 13 were not replaced.[118] However, the court found that at the same time the legislature passed the law to restrict wage increases, it approved legislation to refund five billion dollars in state surplus to the localities to help cushion the effect of Proposition 13.[119] As the court then stated: "the 'fiscal emergency' relied upon by respondents as justification for the salary limitation was largely alleviated by the very same bill which contains the limitation."[120] Consequently, there remained no legitimate state purpose for the statute invalidating agreements granting wage increases to public employees, and the law was held invalid as an impairment of contracts.[121]

An impairment of contracts situation where there existed an actual fiscal emergency arose in the New York case of *Subway-Surface Supervisors Association v. New York City Transit Authority*.[122] This decision dealt with the constitutionality of a wage freeze provided in the New York State Financial Emergency Act for the City of New York.[123] In *Subway-Surface,* the petitioner was a labor organization which had a collective bargaining agreement with the respondent. In 1975, the New York state legislature found that a financial emergency existed in the City of New York and passed legislation which, among other things,

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& Loan Assn. v. Blaisdell, 290 U.S. 398, 428, 436 (1934), which held that although the impairment provision, literally read, proscribes "any" impairment of contract, it is "not an absolute one and is not to be read with literal exactness like a mathematical formula. ... The state's police power remains paramount, for a legislative body cannot bargain away the public health or the public morals."

117. *Id.* at 309-10, 591 P.2d at 8, 152 Cal. Rptr. at 910. It was predicted that local agencies would lose $7 billion in property tax revenues or a 22% reduction in revenue, and an estimated 270,000 local employees would be laid off, increasing unemployment from 7½% to 10%.

118. *Id.*

119. *Id.* at 310-11, 591 P.2d at 8-9, 152 Cal. Rptr. at 910-11.

120. *Id.* at 311, 591 P.2d at 9, 152 Cal. Rptr. at 911.

121. *Id.* at 314, 591 P.2d at 11, 152 Cal. Rptr. at 913. Although no emergency was found to exist in California after Proposition 13's passage, petitioners in *Sonoma* argued that even if an emergency was created, it would not justify an impairment of contracts. They reasoned that Proposition 13 was created by the state which meant that any emergency existing after the enactment of Proposition 13 was brought into existence by the state, and a contract cannot "be impaired because of a crisis created by the state's voluntary conduct." *Id.* at 313, 591 P.2d at 10, 152 Cal. Rptr. at 912. In support, petitioners in *Sonoma* cited cases holding that a state unconstitutionally impairs its "contracts if it limits its taxing power so as to disable itself from fulfilling its obligations." *Id. See* Hubert v. New Orleans, 215 U.S. 170 (1909); Wolff v. New Orleans, 103 U.S. 358 (1880). Nevertheless, the *Sonoma* court found no need to decide on this argument since no emergency was demonstrated.

122. 44 N.Y.2d 101, 375 N.E.2d 384, 404 N.Y.S.2d 323 (1978).

123. New York State Financial Emergency Act for the City of New York, N.Y. Laws chs. 868-870 (1975).

suspended wages, shift differentials and increments for a one year period.[124]

The New York court found that the Financial Emergency Act impaired the collective bargaining contract rights between the two parties, but did not find that the impairment violated the constitutional contract clause.[125] Since the petitioner in *Subway-Surface* accepted the fact that a fiscal emergency existed in New York City, it was undisputed that the act served a valid state purpose.[126] The question was whether the means chosen to meet the emergency were "reasonable and necessary."[127] The court stated that the circumstance of imminent total collapse of the city was sufficient to satisfy the "necessary" requirement for valid impairment.[128] As to the reasonableness of the remedy, the *Subway-Surface* court noted that the wage freeze impairment of contract was prospective so that its "effect was substantially less than what would have occurred had the statute withheld or reduced payment for services or consideration already performed or delivered."[129] Thus, the New York court went on to conclude that: "Confronted with the necessity to lighten the financial burden under which the city was laboring, the legislature's choice of prospective impairment of executory aspects of wage contracts was reasonable."[130]

It appears from the *Sonoma* decision that in order for a state to constitutionally impair contracts, it must first be demonstrated that there is a significant fiscal crisis. If such a threshold burden is met, then it is possible for the state, in the exercise of its police power, to override the provisions of a contract to serve an important public purpose. Finally, in fulfilling the public purpose (as in *Subway-Surface*), the state must meet the additional test that the means are necessary and reasonable.

CONCLUSION

California and Massachusetts have experienced a common problem in the general dilemma of high property taxation. Both states have been

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124. Subway-Surface Supervisors Association v. New York City Transit Authority, 44 N.Y.2d 101, 107, 375 N.E.2d 384, 387, 404 N.Y.S.2d 323, 326 (1978).

125. *Id.* at 109, 375 N.E.2d at 388, 404 N.Y.S.2d at 328.

126. *Id.* at 110, 375 N.E.2d at 389, 404 N.Y.S.2d at 328.

127. *Id.*

128. *Id.* at 111-12, 375 N.E.2d at 389-90, 404 N.Y.S.2d at 329.

129. *Id.* at 112-13, 375 N.E.2d at 390-91, 404 N.Y.S.2d at 330.

130. *Id.* at 113, 375 N.E.2d at 391, 404 N.Y.S.2d at 330. *See* Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal.3d 296, 312-13, 591 P.2d 1, 10, 152 Cal. Rptr. 903, 912 (1979), where the California court questions the reasoning of the New York court in *Subway-Surface* when it determined that since the employees had not rendered services for the second year of a two year contract, the impairment was prospective and therefore reasonable. *Sonoma* pointed out that you cannot separate part of a collective bargaining agreement for employees may give their services one year in anticipation of the next or anticipated wage increases in the second year may have influenced bargaining demands of the first year.

131. *See* Horton v. Att'y Gen., 269 Mass. 503, 508, 169 N.E. 552, 554 (1930).

subject to constitutional and legislative mandates to equalize the valuation of property — an outcome which would have shifted the property tax burden from the traditionally overvalued business community to the traditionally undervalued residential community. Similarly, both states have witnessed responses by the electorate through the approval of constitutional amendments dealing with property tax reform. In California, Proposition 13 was passed for the purposes of reducing overall valuation and limiting tax rate increases. In Massachusetts, the voters approved the classification amendments which allowed different property tax assessments depending upon the use of the property.

While the property valuation issue has been addressed in California and Massachusetts, the tax rate limitation portion of Proposition 13 is just being seriously considered in Massachusetts as part of Proposition 2½. In contrast to Proposition 13, however, Proposition 2½ contains a number of other tax proposals. It is the relationship of the provisions of Proposition 2½ to each other that gives rise to a state constitutional question.

The Massachusetts Constitution requires that when an initiative is submitted the Attorney General must certify that its contents are related and mutually dependent. In considering Proposition 2½, it is arguable that the elimination of final and binding arbitration for police and fire employee negotiations is not related or mutually dependent on property tax rate reductions or the elimination of fiscal autonomy of school committees. Since the certificate of the Attorney General is open to inquiry as to its conformity with the constitution,[131] the broad scope of Proposition 2½ could be challenged as violative of the Massachusetts Constitution. This possibility could be alleviated by the legislature if it eliminated those parts of Proposition 2½ which seem less related to tax reform; provided, however, that the original petitioners acquiesce to the changes in their initiative. A second resolution of the state constitutional issue might be a proposal by the legislature of yet another tax cutting proposal which could either be enacted or placed on the 1980 ballot as a separate question. If both Proposition 2½ and this alternative are approved and they are later determined by the Supreme Judicial Court to conflict, then the one with the most votes would win.

If Proposition 2½ is approved, the ultimate effect on revenues and services is yet undetermined. It is apparent, however, that the passage of Proposition 2½ raises the federal Constitutional question of impairment of contracts. Unlike Proposition 13, the Massachusetts proposal does not provide for any debt payment protection. Because of this omission, the likelihood of impairment of contracts is much greater in Massachusetts under Proposition 2½ than it was under Proposition 13 in California. The Supreme Court has held that "a state may not authorize a municipality to borrow money and then restrict its taxing

power so that the debt cannot be repaid."[132] The *Amador* court in California did not adhere to that holding in considering the constitutionality of Proposition 13 because the measure did not apply to taxes needed to pay for prior indebtedness approved by the voters, and the California legislature had set up a surplus indebtedness fund to insure that there would be no defaults. Massachusetts, on the other hand, is unlikely to have a large state surplus to aid the municipalities in the event they cannot meet their contractural obligations.

If a contract is impaired as a result of Proposition 2½, whether the indebtedness is approved by the voters or not, the final question deals with the presence of a legitimate state purpose to allow an impairment. In the two states that have dealt with a similar question, the key to the state argument to allow an impairment has been that the existence of a fiscal emergency is sufficient to permit the impairment of contracts. In California, the state court ruled that no fiscal emergency existed after the passage of Proposition 13 to warrant a reduction in benefits negotiated in a collective bargaining agreement. In New York, the state court found that legislation impairing contracts was constitutional since the public purpose of saving New York City from total fiscal collapse was a legitimate and reasonable approach.

In comparison, the property tax provision in Proposition 2½will not affect all Massachusetts cities and towns in the same manner. In a number of municipalities the property tax rate is already 2½% or below so there will be no change; while the heaviest impact will fall upon the larger municipalities who have much higher tax rates. It could be argued that the gradual reduction of fifteen percent on the tax rate until 2½% is reached for those communities over 2½% will cushion the impact of any contract impairment problem. Even so, the amount of revenue available for some municipalities will be greatly decreased over a period of years at a time when cost of living, interest rates and contract demands are increasing drastically. As a result contracts will have to be impaired or services cut in order to comply with the mandate of Proposition 2½. If an impairment of contract occurs, it will likely violate the federal constitution because there will be no legitimate state purpose. Unlike New York, the state would not be reacting to the prospect of fiscal collapse; it would be creating the likelihood of a severe strain on some municipalities. The solution will be in the willingness of the Massachusetts legislature to set aside revenue to aid those cities and towns which are hurt by the constraints of Proposition 2½ or to ignore the mandate of the electorate and repeal Proposition 2½. Exactly what

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132. *See* notes 98-99 and accompanying text *supra*.

course will be taken by the legislature of Massachusetts is not clear at this point, but the issue will certainly be raised in the event of passage of Proposition 2½.

KENNETH GRACE

CASE COMMENTS

Consumer Standing in Antitrust: *Reiter v. Sonotone Corp.*

Section 4 of the Clayton Act[1] provides a treble damage remedy for any person injured in his "business or property" resulting from an antitrust violation. This remedy was designed to encourage private parties to enforce the antitrust laws as well as to compensate those injured.[2] Congress further encouraged private enforcement by eliminating the jurisdictional amount, and by awarding treble damages plus costs and attorney's fees to successful plaintiffs.[3] In *Reiter v. Sonotone Corp.*,[4] the United States Supreme Court significantly strengthened antitrust enforcement policy by holding that consumers forced to pay more for goods due to antitrust violations sustain cognizable injury to their property and can sue for damages.[5]

The *Reiter* decision may signal the Court's willingness to abandon its reliance on the "direct purchaser rule" espoused in *Illinois Brick Co. v. Illinois,*[6] which limited the right to privately enforce the antitrust laws to those purchasing directly from the violator.[7] The Court in *Illinois*

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1. Section 4 of the Clayton Act is codified as 15 U.S.C. § 15 (1976). The statute provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Under section 4, plaintiffs may bring suit for violations of sections 1-7 of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), sections 73-76 of the Wilson Tariff Act, 15 U.S.C. § 1 (1976), and the Clayton Act, 15 U.S.C. § 12, *et seq.* (1976).

2. *See, e.g.*, Pfizer v. Government of India, 434 U.S. 308, 314 (1978); Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977); Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477, 485-86 (1977); Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 139 (1968).

Private actions supplement government enforcement. The Antitrust Division of the Department of Justice enforces the Clayton Act by bringing civil suits and enforces the Sherman Act by either civil or criminal actions. *See* 15 U.S.C. §§ 1, 2, 4, and 25 (1976). The Federal Trade Commission (FTC) has the power to enforce sections 2, 3, 7, and 8 of the Clayton Act, and those sections of the Federal Trade Commission Act dealing with other antitrust violations. *See* 15 U.S.C. §§ 21, 25, and 45 (1976). *See also* L. SULLIVAN, ANTITRUST 751-53 (1977). Yet, the private action is recognized as the most powerful enforcement weapon. *See* L. SULLIVAN, *supra* at 769. *See also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 755 (1977) (Brennan, J., dissenting). For example, the number of private antitrust suits averages 1,000 per year compared with an average of 65 suits per year brought by the Antitrust Division. S. REP. No. 239, 96th Cong., 1st Sess. 21 (1979).

3. It is often said that by offering these incentives, Congress intended to encourage private litigants to act as "private attorneys general." Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972), *citing* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969).

4. 442 U.S. 330 (1979).

5. 442 U.S. 330, 339 (1979).

6. 431 U.S. 720 (1977).

7. *Id.* at 729.

Brick reasoned that direct purchasers would be more likely to engage in private enforcement actions than indirect purchasers, and that violations would be easily discovered and proved by direct purchasers.[8] Moreover, by awarding direct purchasers the full amount of any overcharge, they would have greater incentive to sue.[9] The Court reasoned that for purposes of judicial economy, the enforcement objectives of antitrust policy would be sufficiently met by actions brought by direct purchasers. The price of the Court's *Illinois Brick* holding, however, was the denial of compensation to indirect purchasers, often retail consumers, who sustained injury. The *Reiter* decision, as well as legislation[10] designed to overrule the direct purchaser rule, indicate that removal of standing barriers to suits by indirect purchasers would more fully effectuate congressional intent. While it is unlikely that the Court will *sua sponte* abandon the direct purchaser rule, antitrust violators may soon be policed by indirect purchasing consumers.

Section I of this Comment discusses the *Reiter* decision in light of the goals underlying section 4 of the Clayton Act. Section II examines the obstacles created by federal courts which have heretofore frustrated consumer suits. The Comment concludes by discussing the effect of the *Reiter* decision and proposed legislation upon the enforcement and compensation goals underlying the treble damage remedy.

I. *REITER v. SONOTONE CORP.*

A. Factual Background

In *Reiter v. Sonotone Corp.*,[11] the defendants manufactured, sold and repaired hearing aids and related products.[12] Their products were sold directly to selected retailers. Wholesalers were seldom involved in the distribution process.[13]

The plaintiff, Kathleen R. Reiter, purchased two of the defendants' hearing aids from one of the selected retail dealers at a price allegedly

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8. *Id.* at 746.

9. *Id.*

10. The Antitrust Enforcement Act, S. 300 96th Cong., 1st Sess. (1979), was favorably reported out of the Senate Judiciary Committee on July 10, 1979. S. REP. NO. 239, 96th Cong., 1st Sess. (1979). A companion bill, H.R. 2060, 96th Cong., 2d Sess. (1979), was approved by the Monopolies and Commercial Law Subcommittee on September 8, 1979. [1979] CONG. Q. WEEKLY REP. (Cong. Q. Almanac) 917, 2067. In sum, the legislation would overrule the holding of *Illinois Brick* by allowing all persons to maintain suit under section 4 regardless of their location in the chain of distribution. *See* note 121 *infra.*

11. 442 U.S. 330 (1979).

12. The defendants in *Reiter* were Beltone Electronics Corporation, Dahlberg Electronics, Inc., Sonotone Corporation, Textron, Inc., and Radioear Corporation. Plaintiff alleged that other co-conspirators were involved, but did not identify them or name them as defendants. Plaintiff's Complaint at 3-5, Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

13. *Id.* at 5.

inflated by reason of the defendants' antitrust violations.[14] She subsequently brought a class action[15] in the United States District Court for the District of Minnesota, suing as representative of all persons in the United States who purchased defendants' hearing aid products at the retail level.[16]

The plaintiff alleged that the defendants were engaged in horizontal and vertical conspiracies[17] designed to fix the retail prices of their products. She claimed that the defendants conspired among themselves, and with unnamed co-conspirators and retail dealers, to fix the price of hearing aid products and services at prices above competitive levels in violation of the antitrust laws.[18] Forced to pay more for hearing aids than she would have paid in a competitive market, the plaintiff alleged injury to her property within the meaning of section 4 of the Clayton Act.[19]

The district court rejected the defendants' argument that the plaintiff, as a consumer, lacked standing to sue under section 4 of the Clayton Act, and denied motions for dismissal and summary judgment.[20] However, since the question of consumer standing

14. *Id.* at 2.

15. Class action suits are governed by FED. R. CIV. P. 23.

16. Plaintiff's Complaint at 1.

17. Horizontal price-fixing conspiracies involve agreements among competitors on the same distribution level to fix prices; vertical conspiracies (also known as resale price maintenance) refer to an attempt by manufacturers and wholesalers or retailers to control resale prices. *See* Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 326 F. Supp. 48, 53 (W.D. Pa. 1971).

18. Plaintiff alleged that respondents violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1976), by dealing with selected dealers and prohibiting all others from dealing in or repairing their hearing aids, requiring retailers to deal exclusively in their hearing aids and repair services, restricting territories and classes of customers, maintaining retail prices at 300% above the price respondents charged their dealers, and by appropriating dealers' lists for their own use. The plaintiff alleged that such conduct hindered and suppressed competition among respondents and between respondents and other manufacturers, and suppressed and eliminated competition among and between retail dealers. As a result, plaintiff alleged injury to her "property" because she and members of her class paid higher prices than they would have paid in a competitive market. *See* Plaintiff's Complaint at 8-12, Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977). *See also* Reiter v. Sonotone Corp., 442 U.S. 330, 335 n.1 (1979).

19. Plaintiff's Complaint at 11-12. Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

20. Reiter v. Sonotone Corp., 435 F. Supp. 933, 938 (D. Minn. 1977). The federal courts had been in disagreement as to whether consumers had standing to sue under section 4. One view answered in the negative on the theory that injury to "business or property" implies injury to commercial or competitive interests. *See, e.g.,* Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978); Weinberg v. Federated Department Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), *cert. denied,* 414 U.S. 1045 (1973). The other view allowed consumer standing, reasoning that payment of an inflated price constitutes property injury, and/or that a consumer is a party to a commercial transaction even within the meaning of the contrary construction of "business or property." *See, e.g.,* Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978), *vacated,* 595 F.2d 1209 (2d Cir. 1979); Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 938 (1974); *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, [1977-2] TRADE CAS. (CCH) ¶ 61, 639 (D. Cal. 1977). *See also* notes 54, 59 *infra.*

presented substantial ground for differences of opinion, the court stayed proceedings[21] and certified the issue for appellate review.[22] The Eighth Circuit Court reversed,[23] holding that consumers who fail to allege commercial or competitive injury do not sustain injury to their property within the meaning of section 4.[24] The court reasoned that the legislative history of section 7 of the Sherman Act,[25] its successor, section 4 of the Clayton Act, and judicial precedent all indicate that a section 4 injury must be sustained to a competitive or commercial interest before suit could be brought.[26] Since it viewed the antitrust laws as a mechanism designed solely for the purpose of enhancing business competition, the court held that only those injured in their ability to compete in the marketplace were entitled to compensation.[27]

The appellate court then addressed the policy issues of enforcement and compensation in the context of consumer suits. The court noted that the consumer class action method of enforcing the antitrust laws has proven to be ineffective because such suits seldom reach trial.[28] Moreover, the few consumer suits which are triable often result in unfair settlements with smaller businesses unable to afford the costs of litigation.[29] Only large firms are more likely to survive class action suits. Therefore, oligopolistic market conditions, in which a few sellers sell only a standardized product, are actually preserved and the costs of suit are simply passed on to consumers.[30] The court concluded that the goals of enforcement and compensation would be better served by *parens patriae* suits brought pursuant to the Antitrust Improvements Act of

21. Reiter v. Sonotone Corp., 435 F. Supp. 933, 938 (1977).

22. *Id.*

23. Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978), *rev'g* 435 F. Supp. 933 (D. Minn. 1977).

24. *Id.* at 1087.

25. Sherman Act, ch. 647 § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 15 (1976)).

26. Reiter v. Sonotone Corp., 579 F.2d 1077, 1084 (8th Cir. 1978).

27. *Id.* The court noted that the proposed version of section 7 of the Sherman Act contained broad language allowing "any person or corporation injured or damnified" by an unlawful combination to sue for damages. This language was revised, and as enacted, section 7 limited damages to persons injured in their "business or property." This rewording, the court reasoned, is indicative of Congress's intent to restrict the class of persons who may sue, and presumably excludes retail consumers. *Id.* at 1079. When section 4 of the Clayton Act was enacted containing the same language, the court continued, Congress's intention that only those suffering competitive or commercial injury, *i.e.*, businesses, may recover, remained constant. Moreover, in enacting section 16 of the Act, which grants injunctive relief to "[a]ny person . . . threatened [with] loss or damage," Congress intended consumers' only remedy to be injunctive relief. *Id.* at 1081.

28. *Id.* at 1086. The court cited Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach,* 85 YALE L.J. 626 (1976). In criticizing the then proposed *parens patriae* legislation, the Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h (1976), the authors noted that class actions have failed to benefit consumer interests largely due to manageability problems, *i.e.*, the burden of processing millions of claims usually results in denial of class certification. *Id.* at 628.

29. Reiter v. Sonotone Corp., 579 F.2d 1077, 1086 (8th Cir. 1978).

30. *Id.*

1976.[31] Brought by state attorneys general on behalf of consumers, the court opined that *parens patriae* suits would protect consumer interests without forcing small businesses to settle nonmeritorious claims.[32]

B. Holding and Reasoning

The United States Supreme Court reversed the Eighth Circuit Court's decision,[33] rejecting its interpretation of the statute and its legislative history. The Court held that consumers who pay higher prices for goods by reason of antitrust violations sustain injury to their "property" within the meaning of section 4 of the Clayton Act.[34]

In deciding *Reiter,* the Court first examined section 4 and concluded that it did not contain language restricting consumer suits. Section 4 allows *any person* injured in his business *or property* to bring suit.[35] The Court stated that the term "property" should be ascribed an independent meaning because canons of construction dictate that every word in a statute be given effect whenever possible, and words separated by disjunctives are to be accorded separate meanings.[36] Thus, the term "property," connoting "anything of material value owned or possessed,"[37] was sufficiently broad to include money.[38] In dismissing the argument that the substitution of the broad language contained in the proposed Sherman Act with narrower "business or property" language evinced a congressional intent to exclude consumers from its scope,[39] the Court explained that none of the legislative history of section 4 reflected such an intent, and floor debates even suggested that the Act

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31. 15 U.S.C. §§ 15c-15h (1976). Section 15c provides in pertinent part:

(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claim pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

32. Reiter v. Sonotone Corp., 579 F.2d at 1086 (1978).

33. Reiter v. Sonotone Corp., 442 U.S. 330 (1979), *rev'g* 579 F.2d 1077 (8th Cir. 1978).

34. *Id.* at 339.

35. *Id.* at 337.

36. The Court noted that respondents' argument that the phrase "business or property" refers to "business activity or property related to one's business" lacked merit because it ignored the disjunctive which ascribed a meaning to "property" independent of "business." *Id.* at 338-39. *See also* Brief for Respondent at 11 n.7, Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

37. 442 U.S. at 338 (1979) *citing,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1818 (1976).

38. 442 U.S. at 338 (1979).

39. *See* note 27 and accompanying text *supra.*

was designed primarily to protect consumers.[40] In addition, the Court noted that precedent clearly supported this construction.[41]

Secondly, the Court dealt with the policies of compensation and enforcement underlying the antitrust laws. The Court stressed that the treble damage remedy was primarily designed to compensate those injured by antitrust violations.[42] At the same time it noted that private actions promote enforcement by supplementing the limited number of suits brought by the Department of Justice.[43] The Court felt that potential problems of judicial administration such as overcrowded court dockets, are policy matters better left to the Congress and should not be controlling in light of the plain language of section 4.[44]

While not expressly stated, it would seem that lowering the standing barrier to private enforcement of the antitrust laws would not expose potential defendants to multiple liability or lead to administrative chaos.[45] As a result, one may speculate that after *Reiter* either all consumers have standing to sue under section 4, or that only those consumers not barred by *Illinois Brick's* direct purchaser rule may bring suit. At a minimum, the *Reiter* decision indicates that the Court may be willing to retreat from the harshness of its *Illinois Brick* holding.

II. BARRIERS TO CONSUMER SUITS

The federal courts have narrowly construed section 4 of the Clayton Act[46] to limit the class of persons who may bring suit.[47] Many courts have barred consumers from recovery under section 4 by construing "business or property" to mean "commercial interests or enterprises."[48] While a broad reading of that phrase would encompass the interests of consumers engaging in commercial transactions, most

40. 442 U.S. 342-43 (1979).

41. *See* note 51 and accompanying text *infra*.

42. 442 U.S. 330, 343 (1979).

43. *Id.* at 344.

44. *Id.* at 344-45.

45. *See generally* Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. AND MARY L. REV. 883 (1975).

46. *See* note 1 and accompanying text *supra*.

47. Courts have construed section 4 to exclude litigants whose injuries Congress did not intend to remedy. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973). *See also* L. SULLIVAN, ANTITRUST 770 (1977). Section 4 has also been construed narrowly to exclude nonmeritorious actions. *See* Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148 (6th Cir. 1975).

48. *See* notes 51-62 and accompanying text *supra*. In addition, the "by reason of" language in section 4 has barred litigants whose injuries are causally remote from the antitrust violation. In an attempt to define this language, the circuits have developed two major causation tests; however, the tests have not been consistently applied even within circuits, and courts in other circuits have rejected them altogether.

The "direct injury" test is essentially a privity requirement that denies a cause of action to any plaintiff who has not dealt directly with the violator. *See* Loeb v. Eastman Kodak Co., 183 F. 704,

courts have taken a contrary view. However, the most imposing barrier to consumer suits has been the "direct purchaser rule,"[49] which holds that only persons dealing directly with the antitrust violator may bring suit for damages under section 4 of the Clayton Act.[50]

A. Business or Property

In support of its conclusion that "consumer[s] deprived of money by reason of allegedly anticompetitive conduct" sustain injury to their "property,"[51] the *Reiter* Court relied on *Chattanooga Foundry and Pipe Works v. City of Atlanta.*[52] In that case, the City of Atlanta, which supplied water to its citizens, brought a treble damage action against pipe manufacturers under section 7 of the Sherman Act.[53] The city

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709 (3d Cir. 1910). This theory is predicated on the assumption that an injury sustained by a plaintiff more than one step removed from the violator is causally remote and indirect. As such, the theory is unsound because plaintiff's position in relation to the violator does not necessarily correspond to the extent of the injury. In Perkins v. Standard Oil Co., 395 U.S. 642 (1969), the United States Supreme Court criticized this test as arbitrary because the presence of an intermediary does not automatically render plaintiff's injury less severe. *Id.* at 648.

The more liberal and more popular "target area" test focuses on plaintiff's relationship to the area of the economy threatened by the violation. *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), *cert. denied,* 414 U.S. 1045 (1973). A plaintiff has standing to sue when he alleges that he has been injured in fact by defendant's conduct, and that he is within the area of the economy affected by the elimination of competition. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973), *cert. denied,* 414 U.S. 1045 (1973); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951). For example, a farmer suffering a reduced crop yield caused by a manufacturer's conspiracy to eliminate competition in the manufacture of air pollution equipment lacks standing to sue under section 4, since his interests fall outside the economic areas of research, development and manufacture of air pollution control devices. On the other hand, a manufacturer unable to market his air pollution control devices would have standing because his interests fall within the area of the economy targeted by the conspiracy. *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973), *cert. denied,* 414 U.S. 1045 (1973).

The Third and Sixth Circuit Courts have rejected both tests. In Malamud v. Sinclair Oil Co., 521 F.2d 1142 (6th Cir. 1975), the Sixth Circuit Court rejected the tests since, as standing theories, both "demand too much of plaintiffs at the pleading stage of a case." *Id.* at 1149. The Sixth Circuit Court stated that these "standing" tests enable a court to actually determine the "*merits* of a *claim* under the guise of assessing the *standing* of the *claimant*." *Id.* at 1150. Instead, the court applied a "zone of interests" test which allows plaintiffs to sue if they allege injury in fact, and if the interests they seek to protect fall within the zone of interests protected by the statute. *Id.* at 1151. The Third Circuit Court, in Bravaman v. Basset Furniture Industries, Inc., 552 F.2d 90 (3d Cir. 1977), *cert. denied,* 434 U.S. 823 (1977), replaced the traditional tests with a "balancing test" which examines the "factual matrix of each case." *Id.* at 99. This test weighs such factors as plaintiff's relationship to the defendant, his position in the threatened area of the economy, and the directness of his alleged injury in light of the policies underlying section 4. *Id.* at 99-100.

49. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

50. *Id.* at 739.

51. Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

52. 203 U.S. 390 (1906).

53. *Id.* at 395. Section 7 of the Sherman Act was superseded by section 4 of the Clayton Act in 1914. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 15 (1976)).

alleged that it was forced to pay an inflated price for the pipe it purchased due to defendants' price-fixing combination. Finding for the plaintiff, the Court held that "[a] person whose property is diminished by payment of money wrongfully induced is injured in his property."[54] In *Reiter,* significance was attached to the fact that the *Chattanooga Foundry* holding was based squarely on the plaintiff's property injury, independent of any injury sustained to its business.[55] In addition, the Court noted that Reiter's status as a noncommercial consumer was irrelevant since the Court had previously implied that noncommercial consumers were entitled to a section 4 remedy.[56]

The *Reiter* Court also stated that dicta in *Hawaii v. Standard Oil Co.,*[57] relied on by the Eighth Circuit Court, was not contrary to its decision in *Reiter.* In *Hawaii,* the state sued in its proprietary capacity, as *parens patriae,* and as class representative of consumers for damages resulting from defendants' conspiracy to fix petroleum prices. The Court in *Hawaii* held that section 4 of the Clayton Act permitted a state to sue in its proprietary capacity and as class representative, but not as *parens patriae.*[58] Unfortunately, the *Hawaii* Court mentioned in passing that "business or property" referred to "commercial interests or enterprises."[59] In an attempt to clarify its position, the *Reiter* Court ex-

54. 203 U.S. at 396 (1906). Many courts have adopted this construction of "business or property." *See, e.g.,* Cleary v. Chalk, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973) (transit riders paying illegally overpriced fares sustain injury in their property); Theophil v. Sheller-Globe Corp., 445 F. Supp. 131 (E.D.N.Y. 1978) (plaintiffs who purchased overpriced motor homes sustain injury to their property by being led to pay more than the worth of the article); *In re* Coordinated Pretrial Proceedings in Petroleum Antitrust Litigation, [1977-2] TRADE CAS. (CCH) ¶ 61, 639, at 72, 629 (C.D. Cal. 1977) (consumers of gasoline products need not suffer injury to commercial or competitive interests in order to sue for treble damages). Other cases not involving consumer plaintiffs have recognized that the disjunctive term "or" gives "property" an independent significance. *See, e.g.,* Waldron v. British Petroleum Co., Ltd., 231 F. Supp. 72, 86 (S.D.N.Y. 1964) ("The word 'property' has wider meaning and is more extensive than the word 'business'.").

55. 442 U.S. 330, 340 (1979). However, the Eighth Circuit Court had construed the *Chattanooga Foundry* holding as arguably grounded on the plaintiff's business injury. Reiter v. Sonotone Corp., 579 F.2d 1077, 1082 (8th Cir. 1978).

56. 442 U.S. 330, 340-41 (1979). Respondents had argued that *Chattanooga Foundry* was factually distinct because the plaintiff was engaged in a business, and thus could be characterized as a commercial consumer. The *Reiter* Court responded by citing Goldfarb v. Virginia State Bar, 421 U.S. 772 (1975), for the proposition that noncommercial consumer standing had been implicitly recognized by the Court. In *Goldfarb,* the Court held that a minimum attorney's fee schedule promulgated by a county bar association and enforced by the Virginia State Bar violated section 1 of the Sherman Act (15 U.S.C. § 1 (1976)). The action was instituted by a class of consumers, but the question of their right to bring suit under section 4 of the Clayton Act was neither raised nor discussed by the Court.

57. 405 U.S. 251 (1972).

58. *Id.* at 265-66. Congress responded by enacting the Antitrust Improvement Act of 1976, 15 U.S.C. §§ 15c-15h (1976). *See* note 31 *supra.*

59. *Id.* at 264. Many courts have cited this language to deny consumers a cause of action under section 4. *See, e.g.,* Reiter v. Sonotone Corp., 579 F.2d 1077, 1083 (8th Cir. 1978) (both the legislative history of section 4 and judicial construction dictate that only those suffering injury to a competitive interest may bring suit for damages); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir. 1973), *cert. denied,* 414 U.S. 1045 (1973) ("business or prop-

plained that "commercial interests" was broader in scope than "enterprises," thereby negating the contention that the phrase referred only to business interests.[60] In fact, the phrase "commercial interests" was used by the *Hawaii* Court to refer to the state's interest as a consumer in a commercial transaction.[61] Furthermore, the *Hawaii* Court's reaffirmance of the *Chattanooga Foundry* holding demonstrated that when read in context, "commercial interests" encompasses the monetary interests of consumers.[62]

B. The "Direct Purchaser Rule"

The greatest obstacle facing consumer antitrust suits is the direct purchaser rule[63] enunciated by the Supreme Court in *Illinois Brick Co. v. Illinois.*[64] That rule states that only plaintiffs purchasing directly from the antitrust violator state a cause of action under section 4 of the Clayton Act.[65] For example, manufacturers may conspire to illegally inflate the price of their products. The products would then pass to a distributor, wholesaler and retailer before they reach the consumer. Even if a consumer could prove an illegal overcharge was passed along through the chain of distribution, recovery under section 4 may not be possible because the consumer was an "indirect purchaser." Only the "direct purchaser," in this instance the distributor, may sue for treble damages. It is clear that the rule effectively frustrates the compensation policy of section 4 and directly hinders enforcement. To understand the importance of the *Illinois Brick* rule, a discussion of its precedent, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[66] is called for.

erty" is a term "definitively limited to interests in commercial ventures or enterprises"); Gutierrez v. E. & J. Gallo Winery Co., Inc., 425 F. Supp. 1221, 1225 (N.D. Cal. 1977), *modified,* 604 F.2d 645 (9th Cir. 1979) ("business or property" must be read as a conjunctive reference to business interests and not as a disjunctive reference to pure business interests and pure property interests; therefore, consumers who do not allege injury to a competitive business interest do not state a cause of action under section 4); Beckers v. Snowmobile Industry Ass'n, 581 F.2d 1308, 1311-12 (8th Cir. 1978), *aff'g* 388 F. Supp. 1184 (E.D. Ark. 1975) (whether or not barred by the *Illinois Brick* direct purchaser rule, plaintiff consumers are nevertheless barred by this circuit's holding in *Reiter v. Sonotone Corp.*); GAF Corp. v. Circle Floor Co., Inc., 463 F.2d 752, 757 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973) (only those alleging some diminution in their ability to compete state a cause of action under section 4 (dicta)). *See also* Weinberg v. Federated Department Stores, Inc., 426 F. Supp. 880, 884 (N.D. Cal. 1977); Smith v. Toyota Motor Sales U.S.A., Inc., [1977-1] TRADE CAS. (CCH) ¶ 61,251 (N.D. Cal. 1977).

60. 442 U.S. 330, 341 (1979).

61. *Id.* at 341-42.

62. *Id. See also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972). In addition, other language in the *Hawaii* opinion clearly recognizes that consumers may bring suit under section 4. For example, in denying states the right to sue as *parens patriae,* the Court stated that part of the injury to a state's economy is "no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4." *Id.* at 264.

63. *See* notes 6-9 and accompanying text *supra.*

64. 431 U.S. 720 (1977).

65. *Id.* at 729.

66. 392 U.S. 481 (1968).

In *Hanover Shoe* the plaintiff, a shoe manufacturer, alleged injury under section 4 of the Clayton Act due to the defendant's policy of leasing but not selling its shoe manufacturing equipment.[67] The plaintiff claimed damages equal to the difference between the rental cost and a fair market sales price for the machinery.[68] The defendant attempted to prove that the plaintiff had not sustained an injury because it had "passed on" the illegal overcharge to its customers in the form of higher shoe prices.[69] However, the United States Supreme Court rejected this "passing-on" defense by holding that a buyer who proves the fact and amount of an illegal overcharge has made out a *prima facie* case of injury within the meaning of section 4.[70] The Court stated that the buyer may recover the full amount of the overcharge, even if the overcharge has been passed on to customers.[71]

The defendant in *Hanover Shoe* proposed an exception to the passing-on rule in cases where the overcharge was imposed equally on the buyer and his competitors, and where the buyer's demand was inelastic.[72] The defendant argued that in such a case the buyer would sustain no loss because both he and his competitors could pass on the full amount of the overcharge.[73] In rejecting the proposal, the Court explained that "a wide range of factors" affect a buyer's pricing policies,[74] and that isolating the overcharge as the sole cause of increased prices would require "long and complicated proceedings involving massive evidence and complicated theories."[75]

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67. *Id.* at 483.

68. *Id.* at 484.

69. *Id.* at 488-89.

70. *Id.* at 489.

71. *Id.* The Court relied on *Chattanooga Foundry* for the proposition that a direct purchaser is entitled to recover the full amount of the overcharge regardless of whether the overcharge was passed on to customers. *Id. See also* Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 399 (1906).

72. Demand elasticities measure "the degree of responsiveness of the quantity demanded to changes in price." *See* Gellhorn, *An Introduction to Antitrust Economics,* 1975 DUKE L.J. 1, 19 (1975). The defendants in *Hanover Shoe* argued that because demand responds minimally to price increases in highly inelastic markets, buyers could pass on the entire overcharge without suffering a decline in sales. 392 U.S. 481, 492 (1968).

73. 392 U.S. 481, 492 (1968).

74. *Id.* The Court stated:

> Normally the impact of a single change in the relevant business conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. ... Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. ...

75. 392 U.S. 481, 493 (1969). The Court did, however, note one possible exception where the passing-on defense may be allowed. This is where the buyer (*i.e.*, the direct purchaser) has a pre-

The *Hanover Shoe* holding was essentially a policy decision designed to promote effective enforcement of the antitrust laws. Since enforcement could only be achieved by insuring that violators were deprived of the fruits of their illegal conduct, the defendants were precluded from asserting the passing-on defense and the buyers were allowed to recover the full amount of the overcharge, not merely lost profits.[76] Allowing the passing-on defense would have reduced and frustrated the effect of the treble damage remedy as an enforcement mechanism. If buyers were subject to the passing-on defense, antitrust violators could retain the fruits of their illegality since those who actually absorbed the overcharge, namely, the ultimate consumers, would have little incentive to sue due to the insubstantial size of their claims.[77]

Given the rationale of *Hanover Shoe,* logical consistency would not preclude indirect purchasers from bringing suit[78] since they could promote enforcement.[79] Although *Hanover Shoe* rewarded direct purchasers with the full amount of the overcharge, the decision conceivably was flexible enough to allow for apportionment of damages if direct purchasers joined suit. In addition, existing procedural devices could protect defendants from the risk of multiple liability if the direct and indirect purchasers brought separate actions.[80] Regrettably, the *Hanover*

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existing "cost-plus" contract with his customer. In this situation, the buyer's customer is committed to purchasing a fixed quantity at a price equal to the buyer's cost plus a mark-up for his services. Here, proving that the buyer passed on the overcharge would not require "long and complicated proceedings" because considerations forbidding the passing-on defense would not be present. *Id.* at 494.

76. Awarding direct purchasers the full amount of the overcharge is surely an incentive to bring suit, especially when one considers that, in addition to being awarded an amount greater than actual damages, the total will be trebled.

77. *Id.* at 494. The Court noted that "ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action." *Id.*

78. *See In re* Master Key Antitrust Litigation, [1973-2] TRADE CAS. (CCH) ¶ 74,680 at 94,979 (1973) (to read *Hanover Shoe* as establishing a general rule of privity for standing to sue would be stretching it beyond all recognition); Illinois Brick Co. v. Illinois, 431 U.S. 720, 751 (1977) (Brennan, J., dissenting) (*Hanover Shoe* cannot be read as limiting actions to parties in privity).

79. *See* West Virginia v. Charles Pfizer and Co., 440 F.2d 1079, 1087-88 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971) (*Hanover Shoe's* holding was motivated by a desire to encourage private treble damage actions); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974) (*Hanover Shoe* policy of depriving violators of the fruits of their illegality favors permitting offensive use of passing-on).

80. Such devices include consolidation, compulsory joinder, statutory interpleader, res judicata, collateral estoppel. In addition, litigations taking place simultaneously in different districts may be consolidated under the Multidistrict Litigation Act, 28 U.S.C. § 1407 (1976). *See In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), *modified,* 333 F. Supp. 291, 333 F. Supp. 299 (S.D.N.Y. 1971) where seven actions were transferred to the United States District Court for the Southern District of New York for resolution.

Proposed legislation would facilitate apportionment of damages in antitrust litigation. Proposal S. 1468, 96th Cong., 2d Sess. (1979), approved by the Senate Judiciary Committee on July 31, 1979 and reported on November 27, 1979 (S. REP. NO. 428, 96th Cong., 2d Sess.), would amend the Clayton Act by allowing defendants to sue nonparty conspirators for contribution. Co-

Shoe decision was used to frustrate the cause of consumers and other indirect purchasers in *Illinois Brick Co. v. Illinois.*[81]

In *Illinois Brick,* the defendants manufactured concrete block which was eventually incorporated into buildings bought by the plaintiffs. The plaintiffs were indirect purchasers of the block, which passed through masonry contractors and general contractors before reaching them.[82] The plaintiffs sued for treble damages, alleging that the defendants conspired to fix the price of block in violation of section 1 of the Sherman Act.[83] As indirect purchasers, the plaintiffs sought to prove injury by showing that the illegal overcharges were passed on to them by the masonry and general contractors. The United States Supreme Court held that the passing-on theory could not be used *offensively*[84] and that the direct purchaser alone shall be deemed to have suffered injury to his "business or property."[85]

The *Illinois Brick* holding sought to improve antitrust enforcement without subjecting violators to the risk of multiple liability.[86] To achieve this balance, direct purchasers were rewarded with a windfall in damages, and all others were barred from suit. The Court felt that to hold otherwise would be counterproductive. It reasoned that offensive use of passing-on by indirect purchasers would unfairly expose violators to multiple liability especially in light of the presumption, established in *Hanover Shoe,* that the direct purchaser was entitled to *full* recovery.[87] Since *Hanover Shoe* prevented violators from rebutting this presumption when sued by indirect purchasers,[88] the threat of multiple liability was clear.

Even if the risk of multiple liability could be reduced by employing procedural devices to bring all interested parties together in one action,[89] the Court noted that enforcement would have been weakened. "[M]assive multiparty litigations"[90] involving both direct and indirect

conspirators who have settled in good faith would be immune from claims of contribution. Additionally, the legislation would require trial judges to subtract from a plaintiff's award the amount of all settlements. The Senate Judiciary Committee has stated that the legislation's purpose is to protect small businesses from crippling damage awards. *See* [1979] CONG. Q. WEEKLY REP. (Cong. Q. Almanac) 2794.

81. 431 U.S. 720 (1977).

82. *Id.* at 726. The masonry contractors used the block to build masonry structures. These structures were incorporated into buildings by the general contractors, and sold to plaintiffs. *Id.*

83. 15 U.S.C. § 1 (1976). The violations essentially involved horizontal price-fixing. Illinois Brick Co. v. Illinois, 431 U.S. 720, 726-27 (1977). *See also* note 17 *supra.*

84. *Id.* at 728.

85. *Id.* at 747.

86. *Id.* at 730. The risk of multiple liability is substantial, especially when one considers that a violator may be held liable to each plaintiff for three times the amount of the overcharge.

87. *Id. See also* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489-90 (1968).

88. Illinois Brick Co. v. Illinois, 431 U.S. 720, 730 (1977).

89. *See* note 80 *supra.*

90. 431 U.S. 720, 740 (1977).

purchasers, would require the "long and complicated proceedings" that *Hanover Shoe* sought to prevent.[91] Not only would it be difficult to prove that the overcharge was passed on,[92] but apportioning damages among all the plaintiffs who may have absorbed part of it would also prove cumbersome.[93] Moreover, direct purchasers would have little incentive to sue because of increased litigation costs in resolving passing-on issues, and the prospect of sharing recovery with indirect purchasers.[94] The result, the Court concluded, would be a serious impairment of the private action as an enforcement weapon.[95]

Illinois Brick, like *Hanover Shoe,* was clearly grounded in the policy of antitrust enforcement. Aside from the problem of multiple liability, the motivating force behind the decision was the promotion of effective enforcement of the antitrust laws utilizing private actions. The price exacted for enforcement, however, was the severe impairment of the other objective underlying section 4 — compensation. In effect, *Illinois Brick* engrafted a privity requirement onto section 4; that is, consumers may bring suit only when they are direct purchasers or when they fall into one of two possible exceptions noted by the Court. The first exception was established in *Hanover Shoe*:[96] where the direct purchaser's customer is committed to buying a fixed quantity pursuant to a pre-existing cost-plus contract, passing-on will be allowed.[97] The second possible exception may be where the direct purchaser is owned or controlled by its customer.[98] In both situations, problems of proving that the overcharge was passed on would not exist because the market forces that determine price will have been effectively superseded. In these limited situations, *Illinois Brick* may allow consumers to sue, notwithstanding their status as indirect purchasers.

The *Illinois Brick* decision is important in three principal respects. First, it assumes that enforcement policy will be better served by allowing only the direct purchaser to bring suit. The assumption is questionable since in many instances the direct purchaser may choose not to sue.[99] If a direct purchaser's demand curve is highly inelastic, it is likely

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91. *Id.* at 732.

92. *Id.* The Court stated that offensive passing-on would create greater proof problems than defensive passing-on. The reason is that a defendant need only prove that the direct purchaser passed-on the overcharge to its customer, while a plaintiff must prove that the overcharge was passed-on by each individual in the distribution chain. *Id.*

93. *Id.* at 737.

94. *Id.* at 745.

95. *Id.*

96. 392 U.S. 481, 494 (1968). *See also* note 75 *supra.*

97. 431 U.S. 720 (1977).

98. *Id.* at 736. The Court did not phrase this possibility in terms of an exception. However, since this situation would not implicate the evidentiary problems the Court was seeking to avoid, it is arguably an exception to the direct purchaser rule.

99. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 749 (1977) (Brennan, J., dissenting).

that he will be able to pass on most of, if not the entire, overcharge to his customers by simply increasing his prices.[100] In situations where the direct purchaser must absorb part of the overcharge, he may compensate by increasing his volume of other, nonprice-fixed goods, or seek substitutes elsewhere.[101] In any event, it is unlikely that the direct purchaser would sue his supplier since the purchaser is often dependent on the supplier and may fear retaliation.[102] Second, *Illinois Brick* denies compensation to those who actually sustain injury. In most instances, the decision leaves consumers and other indirect purchasers without a remedy[103] in favor of an enforcement policy not soundly grounded in economic reality. Finally, the decision assumes that compensation and enforcement are mutually exclusive goals. It is probable that the *Illinois Brick* Court over-emphasized the problems of proof and apportionment that may arise if indirect purchasers are allowed to bring suit.[104]

III. REMOVING THE BARRIERS: *REITER* AND THE ANTITRUST ENFORCEMENT ACT

A. Reiter v. Sonotone Corp.

Whether *Reiter v. Sonotone Corp.*[105] will further the interests of consumers seeking redress for injuries suffered by reason of antitrust violations depends on the construction applied to the holding. The decision can easily be construed narrowly because the Court viewed the case as one of statutory construction. In essence, the Court held that consumers are proper parties to seek redress under section 4 of the Clayton Act. In contrast, *Illinois Brick* was a broad policy decision which did not attempt to interpret section 4 at all. Thus, if read narrowly, *Reiter* would merely have the effect of overturning those decisions holding that an injury to "business or property" must be to a "commercial interest or enterprise."[106] Since the question of whether the direct purchaser rule barred the plaintiff's claim was not before the Court and was not decided,[107] *Reiter* can be read as leaving that rule intact. This narrow construction is supported by the fact that the *Reiter* Court dealt

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100. *Id.*

101. *See* Schaefer, note 45 *supra.*

102. *Id.* at 913.

103. Note that the *Illinois Brick* holding also effectively frustrates the purpose of the Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h (1976). The Act provides that *parens patriae* suits may be used to enforce existing substantive rights of consumers. *See* note 31 *supra.* However, in light of *Illinois Brick, parens patriae* suits will succeed only when the class represented will not be barred by the direct purchaser rule. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977).

104. *See generally* Schaefer, note 45 *supra.*

105. 442 U.S. 330 (1979).

106. *See* note 59 and accompanying text *supra.*

107. Reiter v. Sonotone Corp., 442 U.S. 330, 337 n.3 (1979).

solely with the plaintiff as a consumer,[108] and was not concerned with her position in the chain of distribution as a direct or indirect purchaser. Similarly, the *Illinois Brick* Court dealt only with evidentiary problems and their implications with respect to enforcement, and not with the standing issue.[109] Therefore, the decisions dealt with different issues and may be read independently. Given this interpretation, the decision may aid consumers only where they are direct purchasers or fall within an exception to the *Illinois Brick* rule.[110]

Another consideration supporting a narrow construction of *Reiter* is that it is factually distinguishable from *Illinois Brick*. The defendants in *Reiter* were engaged in both horizontal and vertical conspiracies to fix prices,[111] whereas those in *Illinois Brick* conspired to fix prices horizontally.[112] The *Reiter* defendants effectively determined retail prices, whereas the defendants in *Illinois Brick* did not. This distinction is important since the evidentiary problems in tracing an overcharge along the chain of distribution do not present themselves in cases like *Reiter,* which involve resale price maintenance.[113] Thus, *Reiter* may be an exception to the direct purchaser rule. Such an exception was mentioned in *Illinois Brick,* where the Court suggested that where the direct purchaser is "owned or controlled by its customer" the direct purchaser rule may not have application. In such a situation, market forces affecting price would be superseded.[114] This exception may have been implicated in *Reiter,* where the retailers were clearly controlled by the defendants.[115] Alternatively, it could be argued that since defendants maintained such control over their retailers, the plaintiff was, in effect, a direct purchaser of hearing aids.[116] In either case, it is clear that the direct purchaser rule may not have been implicated because there would have been little difficulty in establishing that the prices charged by the retailers reflected the entire overcharge, and that the plaintiffs absorbed that overcharge.

Notwithstanding the above analysis, *Reiter* is susceptible to a construction squarely implicating the direct purchaser rule. Although the

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108. *Id.* at 334.

109. Illinois Brick Co. v. Illinois, 431 U.S. 720, 728 n.7 (1977).

110. *Id.* at 736.

111. Reiter v. Sonotone Corp., 442 U.S. 330, 335 n.1 (1979).

112. Illinois Brick Co. v. Illinois, 431 U.S. 720, 726-27 (1977).

113. Resale price maintenance is defined as an agreement between the seller and buyer to fix the price at which the buyer may resell the product. Resale price maintenance is prohibited by section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). *See* United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

114. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 n.16 (1977). *See also In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974).

115. Complaint at 8-11, Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

116. This argument was forwarded by the government as amicus curiae. *See* Brief for the United States at 24.

Court expressly refused to decide whether the plaintiff's claim was barred by the direct purchaser rule,[117] the opinion's broad language, coupled with its strong reaffirmation of the compensation objective underlying section 4, indicate that the rule may have been confronted and questioned *sub silentio*. The Court made no attempt to limit its holding to the facts of the case; therefore, *Reiter* may mean that regardless of their status as direct or indirect purchasers, consumers sustaining monetary injury could always state a cause of action under section 4 of the Clayton Act. Of course, this reading would render the two cases irreconcilable, and would leave *Illinois Brick* partially overruled.[118]

By issuing an opinion so clearly at odds with the spirit, if not the letter of *Illinois Brick,* the *Reiter* Court may have signalled a retreat from the *Illinois Brick* reasoning in favor of a policy of compensating those actually victimized by antitrust violations. In stressing the right of consumers to be compensated for wrongs suffered,[119] the Court recognized the private action as playing a significant role in enforcing the antitrust laws and in deterring future violations.[120] Unlike the *Illinois Brick* Court, the *Reiter* Court recognized that the goals of compensation and enforcement are not incompatible.

B. The Antitrust Enforcement Act

The Antitrust Enforcement Act,[121] currently under consideration in

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117. *See* note 107 *supra.*

118. If the direct purchaser rule remains intact after *Reiter,* it is difficult to understand why the Court did not dispose of the case by citing *Illinois Brick* and remanding for a determination of whether an exception to the direct purchaser rule existed in the case. In any event, that issue will be confronted on remand, when the defendants are expected to raise the *Illinois Brick* defense. The district court will have to determine whether the plaintiffs can be characterized as direct purchasers, or whether the above noted exception applies. *See* N.Y. Times, June 12, 1979, § D, at 1, col. 2.

119. Reiter v. Sonotone Corp., 442 U.S. 330, 342-43 (1979).

120. *Id.* at 344.

121. The Senate version, S. 300, 96th Cong., 1st Sess. (1979), would add the following pertinent provisions to section 4 of the Clayton Act:

> SEC. 4I(1) In any action under sections 4, 4A, or 4C of this Act, the fact that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery.
>
> (2) In any action under section 4, 4A, or 4C of this Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, in order to avoid duplicative liability to it, that the plaintiff has passed on to others, who are themselves entitled to recover under section 4, 4A, or 4C of this Act, some or all of what otherwise would constitute plaintiff's damage. . . .

Section 4 would itself be amended by the addition of the following pertinent provision:

> The Court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the plaintiff has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

The House version, H.R. 2060, 96th Cong., 2d Sess. (1979), would add the following pertinent provisions to section 4 of the Clayton Act:

the House and Senate,[122] was drafted in response to *Illinois Brick*.[123] According to the Senate Judiciary Committee, the purpose of the Act is to "compensate the real victims of antitrust violations, to deter conspiracies to monopolize and restrain trade, and to restore effective antitrust enforcement."[124] If passed, the Act would clear the way for consumer antitrust suits and, like *Reiter*, further the goal of compensating the victims of illegal corporate conspiracies.

Both versions of the Act would overrule *Illinois Brick* in that they would allow plaintiffs to prove injury by using passing-on theory. Although phrased differently, both measures would provide that plaintiffs shall not be barred from suit and recovery simply because they have not dealt directly with the violator.[125] To protect defendants from multiple liability, both versions would partially overrule *Hanover Shoe* in permitting defensive use of passing-on in limited instances. Each measure would assure that defensive passing-on is available only to guard against multiple liability, and not as an escape from liability. The Senate version would provide for defensive passing-on only if other purchasers in the chain of distribution would be entitled to recover.[126] Similarly, the House measure disallows defensive passing-on when other purchasers would be barred from suit.[127] In addition, the House version would forbid defensive use of passing-on when: 1) a plaintiff agrees to apportion damages with other parties to the suit; 2) when

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SEC. 4I(a) In any action under section 4, 4A, or 4C(a)(1), the United States or any person shall be deemed to be injured within the meaning of such section 4, 4A, or 4C(a)(1), as the case may be, if the United States or such person —

(1) was a purchaser in the chain of production, manufacture, or distribution of goods or of the performance of services and paid all or any part of an overcharge for such goods or services ... whether or not the United States or such person dealt directly with the defendant in such action.

(b) In any action under section 4, 4A, or 4C(a)(1) brought by any plaintiff injured as described in subsection (a), after such plaintiff proves a violation of the antitrust laws and the fact of injury, the amount of damages for which the defendant in such action would otherwise be liable shall be reduced proportionately by any amount of the overcharge or underpayment which such defendant proves was passed on by such plaintiff to other purchasers or sellers in the chain of production, manufacture, or distribution of goods or of the performance of services. . . .

122. *See* note 10 *supra*.

123. S. REP. No. 239, 96th Cong., 1st Sess. 2 (1979). The original bills (S. 1874, 95th Cong., 2d Sess. (1978), H.R. 11942, 95th Cong., 2d Sess. (1978) and several companion bills) were introduced in 1978. S. 1874 was favorably reported out of the Senate Judiciary Committee, S. REP. No. 934, 95th Cong., 2d Sess. (1978), but a threatened filibuster precluded its consideration on the Senate floor. The major House bill, H.R. 11942, was approved by the Judiciary Committee, H.R. REP. No. 1397, 95th Cong., 2d Sess. (1978), but no further action was taken once Senate approval of S. 1874 was threatened. *See* XXXIV CONG. Q. ALMANAC 194-96 (1978). The bills have been reintroduced in 1979. *See* note 10 *supra*.

124. S. REP. No. 239, 96th Cong., 1st Sess. 3 (1979).

125. *See* note 121 *supra*.

126. *See* note 121 *supra*. The Senate Judiciary Committee stressed that defensive passing-on is to be allowed only to prevent multiple liability. S. REP. No. 239, 96th Cong., 1st Sess. 41 (1979).

127. *See generally* H.R. 2060, 96th Cong., 2d Sess. (1979).

other purchasers who are given notice of the action fail to join or intervene within 120 days; or 3) when a plaintiff posts a bond or agrees to place any award in escrow.[128] As an added precaution, the House draft provides that defendants may introduce evidence of a previous judgment to estop subsequent plaintiffs on the issue of the amount of the overcharge that has been passed on. Finally, both measures protect defendants from oppressive or vexatious suits by providing that the plaintiffs must pay a prevailing defendant's attorney's fees.[129]

C. *Proof and Apportionment of Damages*

While issues of proof and apportionment of damages present difficult problems in the area of judicial administration, they do not justify barring recovery altogether. The Court's fears of "long and complicated proceedings" dealing with damage issues should be balanced against its policy of liberalizing the plaintiff's proof requirements in treble damages actions.[130] To state a claim upon which relief can be granted, plaintiffs should be required only to make allegations sufficient to show an injury resulting from a violation of antitrust laws.[131] This burden could be met by establishing the existence of an overcharge by a preponderance of the evidence.[132] As to the amount of damages, the Court has previously stated that the evidence need only show "the extent of the damages as a matter of just and reasonable inference, although the result would only be approximate."[133] Thus, the amount of the overcharge may be determined by comparing the inflated price with pre- or post-conspiracy prices.[134] Where the consumer plaintiff is actually or substantively the direct purchaser of the defendant's product, the amount of damage sustained would equal the amount of the overcharge since no intermediaries would be present to create passing-on problems.

Greater difficulty in assessing damages may be encountered when the product has passed through the hands of intermediaries before reaching an indirect purchaser. If intermediaries are present, the market conditions facing each of them at the time of sale would have determined their ability to pass on any overcharges. Reconstructing the market conditions which faced each intermediary could be an arduous and inexact

128. H.R. 2060, 96th Cong., 2d Sess. (1979), *reprinted in* [1979] ANTITRUST & TRADE REG. REP. (BNA) No. 930, E-1.

129. The House version would also charge plaintiffs with increased costs. *See* [1979] ANTITRUST & TRADE REG. REP. (BNA) No. 930, E-1.

130. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66 (1946).

131. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961).

132. *See* L. SULLIVAN, ANTITRUST 785 (1977).

133. Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563 (1931). *See also In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974).

134. *See* L. SULLIVAN, ANTITRUST 786 (1977).

process. It has been suggested, however, that the evidentiary problems related to passing-on issues are no more difficult than those encountered in determining damages in other antitrust cases.[135] In light of relaxed proof requirements,[136] expert testimony should suffice in establishing how much of the overcharge was passed on to the indirect purchaser and, where both direct and indirect purchasers are present in the same lawsuit, to apportion damages among the parties.[137] Expert witnesses could arrive at a "just and reasonable estimate" of the damages sustained by each plaintiff by using statistical techniques that would measure the supply and demand elasticities that faced each intermediary who resold the product.[138] For example, tax incidence theory[139] could establish that if the direct purchaser's demand curve was highly inelastic, he or she would have been able to pass on most, if not all, of the overcharge to his or her customers.[140] Conversely, if the demand curve were highly elastic, the direct purchaser would have been forced to absorb most of the overcharge.[141] Moreover, economists would not be confined to the perfect hypothetical models noted above; they could accurately measure how much of an overcharge would be passed on even in imperfect markets.[142]

Damage problems should not bar recovery in class actions brought by consumers.[143] Instead of requiring individual proof of damages at trial, the amount of damages could be calculated by aggregating the total amount of damages sustained by the class as a whole.[144] A damage fund

135. *See* Schaefer, *supra* note 45, at 196. *See also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 758 (1977) (Brennan, J., dissenting).

136. *See* note 130 and accompanying text *supra*.

137. *See generally* Schaefer, *supra* note 45.

138. *Id.*

139. Tax incidence theory treats an overcharge imposed by a monopolist as though it were a tax, and employs economic theorems used to measure the incidence of tax in calculating the effects of the overcharge on various members in the chain of distribution. *See* Schaefer, *supra* note 45, at 883.

140. *Id.* at 905-06.

141. *Id.* at 906.

142. *Id.* It should also be noted that the problem of apportioning damages is common in federal courts. The problem need not be "insurmountable" as the *Illinois Brick* Court feared, especially since a finite sum of money is involved. *See* S. REP. NO. 96-239, 96th Cong., 1st Sess. 42-43 (1979).

143. Class actions are often dismissed because they are unmanageable. *See* FED. R. CIV. P. 23(b)(3)(D). It should be noted that an onslaught of massive consumer class actions burdening the federal courts is unlikely to result from the *Reiter* holding. The major reason is that the Supreme Court's holding in Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974), interpreting Rule 23(C)(2) to require individual notice to all class members identifiable through reasonable effort, imposes a prohibitive cost on many class actions. *Id.* at 173. *See* L. SULLIVAN, ANTITRUST 780 (1977).

144. *See In re* Antibiotics Antitrust Litigation, 333 F. Supp. 278, 287 (S.D.N.Y. 1971), *modified,* 333 F. Supp. 291, 333 F. Supp. 299 (S.D.N.Y. 1971); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971), *reversed and class action dismissed,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 417 U.S. 156 (1974). Conventional class action procedure first establishes claims of individual plaintiffs and then aggregates them to arrive at defendant's total liability. *See* II P. AREEDA & D. TURNER, ANTITRUST LAW 157 (1978).

could then be established against which each class member could assert his claim. Although this "fluid recovery"[145] system has been rejected by the Second Circuit Court,[146] it has been codified for use in *parens patriae* actions under the Antitrust Improvements Act of 1976[147] and has been used successfully in other contexts.[148] Moreover, this device was initially included in the House version of the Antitrust Enforcement Act but was later excised for political reasons.[149]

CONCLUSION

The treble damage action operates as an "ever-present threat"[150] to deter antitrust violators and to compensate their victims. By significantly expanding the class of persons who may bring suit under section 4 of the Clayton Act, the *Reiter*[151] decision will strengthen these dual objectives considerably. If enacted, the Antitrust Enforcement Act will further expand the class of claimants, and thus restore section 4 to its former status in compliance with Congressional intent.[152] Since ultimate consumers are often the major victims of corporate price-fixing con-

145. In an attempt to remedy the manageability problem, some courts have employed the "fluid recovery" device to administer damage awards in large class actions. Fluid recovery involves three steps: 1) calculation of aggregate rather than individual damages; 2) the establishment of a damage fund against which class members may assert their claims; and, 3) the distribution of the unclaimed remainder in a manner calculated to benefit the class at large. *See* Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases,* 47 N.Y.U.L. REV. 477 (1972); Comment, *Due Process and Fluid Class Recovery,* 53 ORE. L. REV. 225 (1974).

146. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated,* 417 U.S. 156 (1974). In *Eisen,* the plaintiff brought an action on behalf of himself and approximately six million odd-lot investors against brokerage firms and the New York Stock Exchange for alleged antitrust violations. In deciding that the suit was manageable as a class action, the district court held that gross damages may be estimated without the necessity of proving individual damages, and that the unclaimed remainder of the damage fund may be applied to reduce odd-lot differentials. 52 F.R.D. 253, 264-65 (S.D.N.Y. 1971). On appeal, the Second Circuit Court held that the fluid recovery device was not authorized by Rule 23 of the Federal Rules of Civil Procedure and, furthermore, it was violative of due process. The court dismissed the class action, stating that the fluid recovery procedure was an illegal attempt to solve the manageability problems of class actions. 479 F.2d 1005, 1018 (2d Cir. 1973).

147. 15 U.S.C. §§ 15c-15h. Section 15d provides:

> In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of (the antitrust laws), damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

See H.R. REP. NO. 499, 94th Cong., 2d Sess. 13-17, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2583-86.

148. *See* West Virginia v. Chaz. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971) (fluid recovery used to administer a settlement fund).

149. *See* [1979] ANTITRUST& TRADE REG. REP. (BNA) No. 930, E-1; No. 931, A-18.

150. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

151. Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

152. *See* II P. AREEDA & D. TURNER, *supra* note 144, at 193.

spiracies,[153] it is imperative that they be entitled to seek compensation. Together, *Reiter* and the proposed legislation will further this goal, while simultaneously augmenting antitrust enforcement. Both the decision and the proposed legislation demonstrate that compensation and enforcement should not be sacrificed because of the presence of administrative problems.[154]

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153. *Id.*

154. *See In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974) ("The day is long past when courts, particularly the federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.").

Rosenberg v. Lipnick:[1] Status of Antenuptial Argeements in Massachusetts

The 1922 case of *Wellington v. Rugg*[2] established a strict standard of review in Massachusetts for determining the validity of antenuptial agreements[3] controlling the disposition of property upon death. Under *Wellington,* an antenuptial ageeement would not be void for mere non-disclosure of a spouses's assets.[4] This decision was in contravention to the great weight of authority of other jurisdictions.[5] The *Wellington*

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1. 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979).
2. 243 Mass. 30, 136 N.E. 831 (1922).
3. An antenuptial agreement is defined as follows:

   [a] contract between spouses made in contemplation of marriage. Antenuptial agreements are generally entered into by people about to enter marriage in an attempt to resolve issues of . . . wealth and division of property in the event of death. . . .

BLACK'S LAW DICTIONARY 85 (5th ed. 1979).

4. Wellington v. Rugg, 243 Mass. 30, 35, 136 N.E. 831, 834 (1922). The widow in the *Wellington* case alleged that the antenuptial agreement was void on two counts. First, the husband's failure to pay her the sum named in the agreement constituted a total failure of consideration. Second, the husband's failure to disclose his assets constituted fraud. *See* Wellington v. Rugg, 243 Mass. 30, 34, 136 N.E. 831, 833 (1922). On the fraud issue, the court decided that mere non-disclosure of assets did not constitute fraud. *Id.* at 35, 136 N.E. at 834. This decision was made notwithstanding the confidential relationship between the prospective spouses. *See also* Swinton v. Whitinsville Savings Bank, 311 Mass. 677, 679, 42 N.E.2d 808, 809 (1942) (plaintiff attempted to sue the bank for fraud based on the bank's failure to inform the plaintiff of the termite-ridden condition of the house; *Wellington* was cited as one of several cases containing "the rule of nonliability for bare nondisclosure"); Jekshewitz v. Groswald, 265 Mass. 413, 164 N.E. 609 (1929) (inducing her to marry him by representing their supposed marriage as legal, a man perpetrated fraud on a Latvian immigrant); Willett v. Herrick, 258 Mass. 585, 155 N.E. 589 (1927) (court cited *Wellington,* claiming that mere concealment of collateral facts concerning certain stocks did not constitute fraud). For further discussion of the standard of review employed in *Wellington, see* note 66-69 and accompanying text, *infra.*

5. *See, e.g.,* Suhor v. Gooch, 244 F. 361, 365 (C.C.A. 4th Va. 1917), *cert. denied,* 247 U.S. 517 (1918), (antenuptial agreements executed in the utmost good faith and confidence such that courts will closely scrutinize them to discover material concealment or failure to disclose material

standard was overruled in March, 1979, in the case of *Rosenberg v. Lipnick,*[6] which represents a major change in Massachusetts law. Under the standard established in *Rosenberg,* the Massachusetts Supreme Judicial Court affirmed a presumption of confidentiality between the spouses and delineated three factors[7] to be applied when assessing antenuptial agreements.

This comment examines the impact of the *Rosenberg* decision upon antenuptial agreements in Massachusetts. The nature of the antenuptial agreement is considered in Section I in terms of the property rights it addresses and the ramifications of the agreement upon probate proceedings. Section II traces the historical development of the antenuptial agreement in Massachusetts and provides a background against which to view the *Rosenberg* decision. The *Rosenberg* decision is analyzed, and the new standard of review presented is evaluated in Section III. Finally, Section IV addresses the problems of drafting an antenuptial agreement.

I. THE ANTENUPTIAL AGREEMENT

A. The Nature of the Agreement

The term antenuptial agreement denotes a contract between intended spouses.[8] Historically, antenuptial agreements have taken three forms:

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facts); Warner v. Warner, 235 Ill. 448, 462-63, 85 N.E. 630, 636 (1908) (if provision made for the wife in an antenuptial agreement found to be grossly disproportionate to husband's estate at time of execution, then those claiming under the husband have burden of proving wife's knowledge of material facts at execution); Lamb v. Lamb, 130 Ind. 273, 275-76, 30 N.E. 36, 37 (1872) (an antenuptial agreement executed between persons in a confidential relationship; misrepresentation of the instrument's legal effect constituted fraud); Fisher v. Koontz, 110 Iowa 498, 500, 80 N.W. 551, 552 (1899) (courts rigidly scrutinize antenuptial agreements which are apparently unjust, especially if the wife is deprived of interest in husband's estate); Denison v. Dawes, 121 Me. 402, 404-05, 117 A. 314, 315-16 (1922) (prospective spouses occupied a confidential relationship; presumption of fraudulent concealment placed on those upholding contract if provision for the wife is clearly disproportionate to the husband's wealth); Slingerland v. Slingerland, 115 Minn. 270, 274-75, 132 N.W. 326, 328 (1911) (prospective spouses occupied confidential relationship, presumption of fraud arose where contract appeared unconscionable in character); *In re* Warner's Estate, 207 Pa. 580, 583-84, 57 A. 35, 36-37 (1904) (presumption of fraud placed on those seeking to uphold contract; they must prove the wife acted intelligently if antenuptial agreement is unreasonable in its terms). *See also* 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90 (rev. ed. 1977); Posternak, *Antenuptial Agreements and the Requirement of Consideration in Massachusetts,* 48 MASS. L.Q. 303, 308-11 (1963).

6. 79 Mass. Adv. Sh. 853, 854, 389 N.E.2d 385, 386 (1979).

7. *See* notes 91-93 and accompanying text, *infra.* For a general discussion of the *Rosenberg* standard, *see* notes 89-143 and accompanying text *infra.*

8. *See* note 3 *supra.*

jointure,[9] a contract to be performed during coverture (marriage),[10] and a contract to be performed upon the death of the husband.[11] Today, the most commonly utilized form of antenuptial agreement contemplates the termination of the marriage by either divorce[12] or death of one of

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9. The basis for today's antenuptial contracts is the common law property settlement of jointure. *See* Wolsen, *Antenuptial Contracts,* 41 MICH. L. REV. 1133, 1134 (1943). A jointure is a freehold estate in lands or tenements secured to the wife and designed to take effect on the death of the husband. It is to continue during her life, unless she is the cause of its termination. BLACK'S LAW DICTIONARY 753 (5th ed. 1979). Prior to the enactment of the Statute of Uses in 1535, if a woman's husband had a use in the land, the woman had no claim to dower since the husband was not seized. Before marriage, by express deed, a special estate was given to the use of the husband and wife for their lives in joint tenancy, or jointure. This settlement provided for the wife if she survived her husband. Therefore, no contractual means existed by which a woman's right to dower could be barred. *See* Ronken, *Antenuptial Contracts: Their Origin and Nature,* 24 YALE L. J. 65 (1914).

After the Statute of Uses, a woman would have both the rights innuring to her as a joint tenant and dower rights. Thus, jointure became a method whereby dower alone could be barred. The courts subsequently came to recognize two types of jointure: legal and equitable. *See* Wolsen, *supra,* at 1134. Jointures strictly within the terms of the Statute of Uses constituted a legal bar to dower. Jointures not strictly complying with the Statute of Uses constituted an equitable bar, and they were considered equally as beneficial as those agreements constituting a legal bar. *See* Ronken, *supra,* at 69. In Massachusetts, the barring of dower by jointure has been recognized statutorily. *See* MASS. GEN. LAWS ANN. ch. 189, § 7 (West Supp. 1979).

10. Under the common law, a wife's identity is fictionalized to merge with that of her husband upon marriage. Thus, any contract entered into by prospective spouses is extinguished by their subsequent marriage. *See* LINDEY, *supra* note 5, at § 90-23-24. Early Massachusetts case law is indicative of how the common law fiction affected contracts to be performed during marriage: although not recognized at law, they were upheld in equity until a statute was passed to govern them. *See generally* Miller v. Goodwin, 74 Mass. (8 Gray) 542 (1857).

The Massachusetts legislature has enacted statutes addressing contracts to be performed during coverture. MASS. GEN. LAWS ANN. ch. 209, §§ 25-26 (West Supp. 1979). The statute changes the common law to prevent the extinguishment of such contracts by subsequent marriage of the parties. *See* Deshon v. Wood, 148 Mass. 132, 19 N.E. 1 (1888); Miller v. Goodwin, 74 Mass. (8 Gray) 542 (1857). It does not apply to antenuptial agreements which contemplate death of one of the spouses. In so construing these statutory provisions, the Massachusetts Supreme Judicial Court had said:

> The provisions of G.L. c. 153 § 26 [now c. 209, § 25] . . . apply only to antenuptial contracts enabling the respective parties to hold their separate property after marriage, and do not affect an antenuptial agreement relating only to the rights which a widow may claim in the estate of her deceased husband.

Collins v. Collins, 212 Mass. 131, 133, 98 N.E. 588, 589 (1912).

11. *See* notes 47-55 and accompanying text, *infra.*

12. Generally, agreements providing for alimony, a waiver of alimony, or a property settlement in the event of separation or divorce are held to be contrary to public policy and unenforceable. *See, e.g.,* Posner v. Posner, 233 So.2d 381 (Fla. 1970); Eule v. Eule, 244 Ill. App.3d 83, 320 N.E.2d 506 (1974); Ranney v. Ranney, 219 Kan. 428, 548 P.2d 734 (1976); Englund v. Englund, 286 Minn. 227, 175 N.W.2d 461 (1970); Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964). An antenuptial agreement limiting a husband's liability in case of divorce could possibly induce him

> to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited. . . . [A] husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he would otherwise have to pay.

Crouch v. Crouch, 53 Tenn. App. 594, 604, 385 S.W.2d 288, 293 (1964). However, this rule is not

the spouses. The *Rosenberg*[13] agreement falls into the latter category.

The antenuptial contract regulates the enjoyment and devolution of real and personal property.[14] By excluding the operation of statutory law respecting the property rights of prospective spouses,[15] it suggests the disposition of property upon the death of either spouse according to the intent of the spouses.[16] The agreement typically involves the transfer of property from the more affluent spouse to the other.[17] The property is usually given in exchange for a release of all claims the other may have against the transferor's property or estate.[18]

The prevailing view at law is that prospective spouses occupy a relationship of mutual confidence requiring the utmost good faith and candor.[19] These agreements are frequently utilized by persons of mature age[20] who have been previously married[21] and have continuing family responsibilities from their previous marriage(s).[22] Agreements between

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inflexible. For an indepth discussion of the effect of an antenuptial agreement upon divorce, *see generally* LINDEY, *supra* note 5, at § 90.

13. The facts of *Rosenberg* present only the question of an antenuptial agreement contemplating the death of a spouse. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979).

14. *See* 2 J. LOMBARD, MASSACHUSETTS PRACTICE SERIES § 1192, at 206-07 (1967).

15. *See* Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668 (1934); *In re* Strickland's Estate, 181 Neb. 478, 149 N.W.2d 344 (1967).

16. "By it, [the antenuptial agreement] the property rights of one or both of the prospective spouses are determined or are secured to one or both of them or to their children." Friedlander v. Friedlander, 80 Wash.2d. 293, 299, 494 P.2d 208, 212 (1972). *See also* Barnhart v. Barnhart, 376 Pa. 44, 53, 101 A.2d 904, 908 (1954).

17. *See* CCH ESTATE PLANNING GUIDE ¶ 330 (1979).

18. *Id.* One party could compensate the other for the release of certain statutory rights under the agreement by immediately transferring funds or property, or, the antenuptial agreement could contain a promise for compensation at some future date.

19. *See, e.g.*, Weeks v. Weeks, 143 Fla. 686, 197 So. 393 (1940) (prospective spouses occupy a relationship of confidentiality which requires good faith dealings with one another); Watson v. Watson, 5 Ill.2d 526, 126 N.E.2d 220 (1955) (confidential relationship of parties to antenuptial agreement creates a presumption of honesty and sincerity); Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967) (underlying presumption of candor and confidentiality between prospective spouses); Eaton v. Eaton, 233 Mass. 351, 124 N.E. 37 (1919) (parties to an antenuptial agreement do not deal at arm's length but occupy position of utmost good faith); *In re* Strickland's Estate, 181 Neb. 478, 149 N.W.2d 344 (1967) (confidentiality existing between prospective spouses creates underlying duty of honesty); *In re* Kaufman's Estate, 404 Pa. 131, 171 A.2d 48 (1961) (confidentiality of spouses requires good faith dealings with each other); Friedlander v. Friedlander, 80 Wash.2d 293, 494 P.2d 208 (1972) (confidentiality of marriage relationship creates a special duty of honesty and good faith).

20. *See* Stamets, *Husband and Wife: Drafting an Antenuptial Contract in Oklahoma,* 32 OKLA. L. REV. 220 (1979), *citing* Gamble, *The Antenuptial Contract,* 26 U. MIAMI L. REV. 692, 730-33 (1972), which canvassed antenuptial agreements in the Seventh Decennial Digest covering the years 1956-1966 to illustrate the typical couple entering into such an agreement. *See also* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 855, 389 N.E.2d 385, 386 (1979). Mrs. Rosenberg was fifty-eight when she met Mr. Rosenberg, who was sixty-nine at the time.

21. *See* Gamble, *supra* note 20. *See also* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 855, 389 N.E.2d 385, 386 (1979). Both Mr. and Mrs. Rosenberg had been previously married.

22. *See* Gamble, *supra* note 20. *See also* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 855,

such individuals are viewed with favor by the courts:[23] "[a]ntenuptial agreements are not against public policy, but, on the contrary, if freely and intelligently made, are regarded as generally conducive to marital tranquility and the avoidance of disputes concerning property."[24]

The major practical functions of an antenuptial agreement are threefold. First, the agreement may be used to secure specific property rights to either spouse or to certain children.[25] Second, the agreement may be used to prevent one spouse from contesting the other's will or otherwise impeding probate.[26] Third, the agreement offers protection against any attempt to place property beyond one's reach.[27] The antenuptial agreement is a contractual means of establishing and ordering one's financial and personal priorities at death. The distribution of one's estate is carried out according to the deceased's express intent because the survivor has relinquished all statutory claims to the estate via the agreement.

Historically, antenuptial agreements have been the most beneficial to the intended husband. The agreements were most often used to protect the intended husband's heirs, his children by a prior wife, or his property from the intended wife herself.[28] However, women are beginning to

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389 N.E.2d 385, 386 (1979). Both Mr. and Mrs. Rosenberg had children from their previous marriages.

23. *See, e.g., In re* Estate of Parish, 236 Iowa 822, 20 N.W.2d 32 (1945); Bibelhausen v. Bibelhausen, 159 Wisc. 365, 150 N.W. 516 (1915).

24. Seuss v. Schukat, 358 Ill. 27, 34, 192 N.E. 668, 671 (1934).

25. *See, e.g.,* Guhl v. Guhl, 376 Ill. 100, 33 N.E.2d 185 (1941) (agreement stated that each spouse desires his/her respective property to pass to respective children); Megginson v. Megginson, 367 Ill. 168, 10 N.E.2d 815 (1937) (widower with nine children desired that his children should inherit the bulk of his estate, but any child born to him and his second wife should share equally); Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967) (agreement barred right of each spouse to take in the estate of the other so that respective children, heirs, and devisees may be protected from any possible claim of surviving spouse); Friedlander v. Friedlander, 80 Wash.2d 293, 494 P.2d 208 (1972) (divorce agreement stated that separate property is to remain separate in community property state).

26. *See, e.g.,* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979) (Mrs. Rosenberg agreed to accept certain monetary gift in lieu of dower or any other right she might have as a survivor); Paine v. Hollister, 139 Mass. 144, 29 N.E. 541 (1885) (wife agreed to take certain monetary gift in lieu of all rights she may have in husband's estate); *In re* Kaufman's Estate, 404 Pa. 131, 171 A.2d 48 (1961) (Mrs. Kaufman agreed to waive any rights that she might have as surviving spouse in her husband's estate); *In re* McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950) (Mrs. McClellan agreed to relinquish any claim she may have as widow or heir).

27. The Commonwealth of Massachusetts has, for years, allowed a spouse to establish a revocable, inter vivos trust in which the settlor retains substantial control over the corpus of the trust property. This type of trust is often used to place property beyond the reach of the partner. *See generally* National Shawmut Bank of Boston v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950) (intent to deprive wife of property by establishing revocable, inter vivos trust in Massachusetts will not vitiate trust); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945) (to establish an inter vivos, revocable trust in an attempt to deprive one's wife of the property is valid). The antenuptial agreement presents a viable method for circumventing any ignoble motives a spouse might have in establishing such a trust.

28. *See* Wolsen, *supra* note 9, at 1134-35.

utilize these agreements for similar reasons.[29] With increasing equalization of the economic positions occupied by men and women, antenuptial agreements will inevitably become a more popular means to protect and to regulate one's property according to one's desires.[30]

B. Impact Upon Probate Proceedings

Once the marriage takes place, certain rights "necessarily incident to [it] spring into being."[31] The antenuptial agreement affects these marital rights[32] and impacts upon the probate procedure of the deceased spouse's estate. The threshold issue in probating the estate of a decedent who signed a premarital contract concerns the effect of the agreement upon the distribution of the testator's (or intestate's) property.

When the decedent has not executed a will, an antenuptial agreement may bar a spouse's right to take an intestate share.[33] Although

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29. As women become active in professions and careers, the interests which they seek to protect will become the same as those which men have traditionally sought to protect. *See, e.g.*, Osborn v. Osborn, 18 Ohio St.2d 144, 248 N.E.2d 191 (1969) (wealthy Massachusetts woman signed agreement whereby spouses waived all rights in the other's estate and agreed to keep respective property so that each could dispose of it as each saw fit); McFerron v. Trask, 3 Or. App. 111, 472 P.2d 847 (1970) (astute business woman who owned her own business agreed to the mutual waiver of marital property rights).

30. In Florida and Kentucky, a substantial increase in the litigation of antenuptial agreements has occurred. *See* Gamble, *supra* note 20, at 694, where the author postulates two reasons for this phenomenon. First, more people are utilizing antenuptial agreements to govern interspousal rights and liabilities. Second, more people are contesting them. The former conclusion, according to Gamble, is the more logical. *Id.* Gamble views the agreements as a largely "untapped source of private ordering of marital rights and liabilities." *Id.*

31. French v. McAnarney, 290 Mass. 544, 546, 195 N.E. 714, 716 (1935).

32. A spouse's marital property rights are those rights acquired as a result of marriage. *See* CCH ESTATE PLANNING GUIDE, *supra* note 17, at ¶ 330. In Massachusetts, surviving spouses have the right of homestead, which is a "freehold estate, defeasible during the life of the householder only by deed in which the spouse . . . joins or by acquiring a new homestead." DELLHEIM, Introductory Comment to MASS. GEN. LAWS ANN. ch. 188, at 691 (West). The maximum homestead is $40,000. *See* MASS. GEN. LAWS ANN. ch. 188, § 1 (West Supp. 1979).

A spouse also possesses a right to tenancy by dower, which is a life estate in one-third of all land owned by the deceased spouse at the time of death. *See* MASS. GEN. LAWS ANN. ch. 189, § 1 (West Supp. 1979).

A surviving spouse also has a right to an intestate share when the other spouse dies without executing a valid will under MASS. GEN. LAWS ANN. ch. 190, § 1 (West Supp. 1979). Further, the survivor has the right to waive the will and elect to take a forced share under MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1979).

Finally, a surviving spouse has the right to maintenance and sustenance by court decree from the estate immediately following the death of the spouse. This is known as the widow's (or widower's) allowance, governed by MASS. GEN. LAWS ANN. ch. 196, §§ 1-2 (West Supp. 1979).

33. In Sullings v. Richmond, 87 Mass. (5 Allen) 187 (1862), Mr. Sullings and his intended wife entered an antenuptial agreement providing for the transfer of stock to be held in trust for the wife in case of his predecease. In exchange, she agreed to relinquish all her claim to dower and to intestate share in his estate. The contract further provided that it was to be a legal and equitable bar to any claim made by her upon the estate. *Id.* at 189. This language was not ruled upon in the

Massachusetts has no statute expressly governing the effect of a release of a survivor's intestate share under an antenuptial agreement, there is relevant case law which governs the situation.[34] When a will has been executed, the courts of the Commonwealth have looked to the intent of the deceased as evidenced by the will and the antenuptial agreement to dispose of the testator's property.[35] If a valid antenuptial agreement is executed providing that its terms are in satisfaction of any terms under the will, then the surviving spouse will take only as provided in the antenuptial agreement.[36] Although Massachusetts lacks a comparable statute, several states statutorily provide that an antenuptial agreement supersedes a will.[37]

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instant case, but it was later held that had the husband performed according to the contract, the widow would have been bound by its terms. *See* Sullings v. Sullings, 91 Mass. (9 Allen) 234, 237-38 (1864). These cases suggest that valid antenuptial contracts which have been performed and which bar the right of distribution, will bar the survivor's claim if such were the terms of the antenuptial agreement. *See also* Tarbell v. Tarbell, 92 Mass. (10 Allen) 278, 280 (1865) (the court decreed specific performance of a contract under which the wife had relinquished any and all claim or interest in her deceased husband's estate; expressly upheld *Sullings v. Richmond).*

34. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979). *See also* note 33 *supra. See generally* Posternak, *supra* note 5, at 305.

35. In Taft v. Taft, 163 Mass. 467, 40 N.E. 860 (1895), the antenuptial agreement provided that the wife would be endowed in only one-half of her husband's lands upon his predecease, that she would receive only one-sixth of his personalty rather than one-third, and that all her property would remain her separate property. In his will, the husband made provisions for his wife which were less than her share under the agreement. Taken together, the provisions of the will and of the antenuptial agreement did not equal the portion of the estate to which she would have been entitled if the contract had not been made. The court found nothing in the will to show that its provisions were intended by the testator to supersede the agreement. Furthermore, absent his wife's consent, the testator could not diminish his wife's rights under the agreement. Such consent not being given, the court held that she was entitled to take under both instruments. *Id.* at 470, 40 N.E. at 862. *See also* Bailey v. Milligan, 256 Mass. 90, 152 N.E. 75 (1926), wherein the husband executed a will on the same day that he and his wife executed an antenuptial agreement. The wife agreed to accept the provisions of the will in lieu of all her interest in the estate. The husband agreed not to change his will. The court held that testamentary provisions for the widow took priority over all other claimants.

36. In Eaton v. Eaton, 233 Mass. 351, 124 N.E. 37 (1919), the prospective spouses executed an antenuptial agreement wherein the wife agreed to accept testamentary provisions, to be made in her behalf by her husband, in lieu of all other claims. Executing a will wherein he fulfilled his duties to his wife under the agreement, the husband complied with the terms of the agreement. The widow contested the will and petitioned for a widow's allowance. The executors named under the will brought a suit in equity to enjoin her from so doing. The court found that the widow could not contest any will made by the deceased if he had met his obligations under it.

37. For example, in Oklahoma, antenuptial agreements are expressly authorized by statute to supersede provisions made by will. The applicable Oklahoma statute provides that "[e]very estate in property may be disposed of by will; provided however, that a will shall be subservient to any antenuptial marriage contract in writing; but no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law. . . ." OKLA. STAT. ANN. tit. 84, § 44 (West 1971). Massachusetts has no similar statute despite the recent change in Massachusetts probate law effected by the Massachusetts Omnibus Probate Act of 1976. *See* 1976 Mass. Acts ch. 515 (codified in various sections of MASS. GEN. LAWS ANN.). *See generally* Project, *Massachusetts Probate Reform — The Massachusetts Omnibus Probate Act and the Uniform Probate Code: A Comparative Study,* 14 NEW ENGLAND L. REV. 513 (1979).

Dower rights also come into being at the time of marriage. In Massachusetts, a contract purporting to bar a spouse's claim to dower is governed by statute.[38] Under its terms, an antenuptial agreement will bar dower if a statisfactory pecuniary provision for the survivor is made and if the provision is taken in lieu of all rights or interests which the survivor might have in the estate of the deceased. Many of the antenuptial contracts executed in Massachusetts have specifically mentioned a surrender of dower.[39] Others, utilizing broad terms with respect to the widow's rights but not specifically mentioning dower,[40] have been upheld.

The utilization of a flexible standard of review in other jurisdictions generated substantial antenuptial agreement litigation within those jurisdictions.[41] In light of the new standard of review which the Massachusetts Supreme Judicial Court declared to be applicable subsequent to the publication of *Rosenberg*,[42] the Massachusetts judiciary should not anticipate a similar increase. Since the effect of antenuptial agreements upon the settlement of estates is so important, a general understanding of their historical development is necessary.

II. LEGAL DEVELOPMENT OF THE ANTENUPTIAL CONTRACT IN MASSACHUSETTS

The type of contract utilized by the Rosenbergs[43] is an outgrowth of those contracts which operated to bar dower by express agreement[44] rather than by property settlement or conveyance. The courts of England upheld the validity of these contracts after the passage of the Statute of Uses.[45] Traditionally, disputes concerning antenuptial

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38. *See* MASS. GEN. LAWS ANN. ch. 189, §§ 7-9 (West Supp. 1979). These statutes are of little relevance, however, since Massachusetts has effectively abolished dower. *See* note 150 *infra*.

39. *See, e.g.*, Worcester County National Bank v. Commissioner of Corporations and Taxation, 275 Mass. 216, 219, 175 N.E. 726, 728 (1931) (the terms of the agreement were to be in full satisfaction of dower " 'or other of her rights in the property of the deceased husband if she [the wife] were to survive him. . . .' "); Wellington v. Rugg, 243 Mass. 30, 33, 136 N.E. 831, 833 (1922) (the contract provided that the wife would take $5,000 in lieu of all dower and other rights); Eaton v. Eaton, 233 Mass. 351, 366, 124 N.E. 37, 38-39 (1919) (*see* note 36 *supra*); Tarbell v. Tarbell, 92 Mass. (10 Allen) 278 (1865) (the contract terms were accepted in full satisfaction of any claim to dower and to interest in the estate of the deceased) (*see* note 33 *supra*); Sullings v. Richmond, 87 Mass. (5 Allen) 187, 188 (1862) (the contract was a bar to dower or intestate rights on the part of the intended wife) (*see* note 33 *supra*).

40. *See, e.g.*, Hill v. Treasurer & Receiver General, 227 Mass. 331, 332, 116 N.E. 509, 510 (1917) (agreement provided that the widow would receive $250,000 upon the death of her spouse as a substitute for and in place of all claims, interests, and rights in her spouse's property or estate to which she would be entitled as a widow).

41. *See* note 30 *supra*.

42. *See* text accompanying notes 89-93 *infra*.

43. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979).

44. *See* note 9 *supra*.

45. *See* Ronken, *supra* note 9, at 67.

agreements were resolved in a court of equity.[46] Massachusetts followed this pattern.[47]

Over the years, antenuptial contracts of the *Rosenberg* genre have caused considerable controversy in the Commonwealth.[48] A major problem concerned determining the type of antenuptial contract to which the governing statute[49] applied; a contract to be performed during marriage or a contract whose provisions contemplated the death of a spouse.[50] If the statute applied to a contract to be performed during marriage, the common law fiction merging a wife's identity with that of her husband would be vitiated. The proper remedy for cases involving the statute would be at law rather than in equity.[51] In the case of *Collins*

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46. American courts traditionally considered antenuptial contracts of the *Rosenberg* type to be equitable in nature. *See* Wolsen, *supra* note 9, at 1134. At common law, contracts between prospective spouses were extinguished with marriage. Therefore, the only remedy was to be found in equity. *See also* Parniawski v. Parniawski, 33 Conn. Sup. 44, 45, 359 A.2d 719, 720 (1976) (woman sought dissolution of marriage as well as monetary support; the court, as background for its analysis, discussed historical concepts concerning antenuptial agreements).

47. In Miller v. Goodwin, 74 Mass. (8 Gray) 542 (1857), the court found that the antenuptial contract for the conveyance of land would not be extinguished by marriage, and decreed specific performance of a written agreement made by deceased and intended wife before marriage, in consideration of her past service to him and of the contemplated marriage. Sullings v. Richmond, 87 Mass. (5 Allen) 187 (1862) established the antenuptial agreement as a creature of equity.

48. Briefly, the problem areas have concerned the applicability of MASS. GEN. LAWS ANN. ch. 209, § 25 and the appropriate contract principles to be utilized in determining the validity of the contract. For a concise historical discussion of the antenuptial agreement in Massachusetts, *see generally* Posternak, *supra* note 5, at 307-12.

49. MASS. GEN. LAWS ANN. ch. 209, §§ 25 and 26 was originally enacted in the St. of 1845, c. 208, §§ 1, 2. *See* Deshon v. Wood, 148 Mass. 132, 134, 19 N.E. 1, 3 (1888). The text of MASS. GEN. LAWS ANN. ch. 209, § 25 presently reads in pertinent part:

> At any time before marriage the parties may make a written contract providing that, after the marriage is solemnized, the whole or any designated part of the real or personal property or any right of action, of which either party may be seized or possessed at the time of marriage, shall remain or become the property of the husband or wife, according to the terms of the contract. Such contract may limit to the husband or wife an estate in fee or for life in the whole or any part of the property, and may designate any other lawful limitations. All such limitations shall take effect at the time of the marriage in like manner as if they had been contained in a deed conveying the property limited.

MASS. GEN. LAWS ANN. ch. 209, § 25 (1979 West Supp.).

50. *See* Welch v. King, 279 Mass. 445, 448-50, 181 N.E. 846, 848 (1932) (REV. LAWS c. 153, §§ 26-28 was found to be inapplicable; (REV. LAWS c. 153, §§ 26-28 has been re-codified as MASS. GEN. LAWS ANN. ch. 209, §§ 25-27); Hill v. Treasurer and Receiver General, 227 Mass. 331, 334, 116 N.E. 509, 510 (REV. LAWS c. 153, § 26 was held to be inapplicable); Deshon v. Wood, 148 Mass. 132, 134, 19 N.E. 1, 2-3 (1888) (Pub. Sts. c. 147, §§ 26-27 applied to contracts performed during marriage because the statute was an enabling statute; Pub. Sts. c. 147, §§ 26-27 has been re-codified as MASS. GEN. LAWS ANN. ch. 209, §§ 25-27).

51. *See* Deshon v. Wood, 148 Mass. 132, 134, 19 N.E. 1, 3 (1888), wherein the court discussed the controverted enabling statute, Pub. Sts. c. 147, §§ 26-27:

> The statute is an enabling statute. At common law, antenuptial agreements, to take effect upon marriage, or to be performed during coverture, were extinguished by the marriage. . . . The statute was intended to give legal validity to antenuptial contracts. . . . Apart from this statute, courts of equity recognize antenuptial contracts, and enforce them between husband and wife. . . .

However, Pub. Sts. c. 147, §§ 26-27 has been re-codified as MASS. GEN. LAWS ANN. ch. 209, §§ 25-27. *See also* note 49 *supra*.

v. Collins,[52] the Massachusetts Supreme Judicial Court firmly settled the issue by holding that the statute did not apply to contracts contemplating the death of a spouse.[53] Therefore, the action and remedy for contract contemplating performance during marriage has been at law. However, this necessarily meant that the action and remedy for contracts of the *Rosenberg* genre[54] remained in equity, with case law governing the applicable contract principles which courts considered when determining the validity of the agreements. Thus, Massachusetts has statutes governing two of the historical classifications[55] of the antenuptial contract: the contract barring dower by jointure or pecuniary provision[56] and the contract performed during marriage.[57]

The second problem area regarding antenuptial contracts concerned the requirement of consideration in antenuptial contracts.[58] Substantial tension existed between the conflicting theoretical premises of spousal contracts and the fundamental requirement of consideration.[59] Early Massachusetts case law indicated that the courts would look beyond simple contract principles when considering the validity of antenuptial

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52. 212 Mass. 131, 133, 98 N.E. 588, 588-89 (1912). The court held enforceable in equity a contract providing that husband and wife were to retain their respective property and in consideration of the agreement, the wife would receive $1,000 in release of all claims after the death of the husband. *See also* note 10 *supra.*

53. *See* note 10. For the specific language used by the court, *supra.*

54. A *Rosenberg* type contract is a contract whose terms provide for the disposition of property upon the death of a spouse. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 855, 389 N.E.2d 385, 386 (1979) (Mrs. Rosenberg agrees to relinquish her rights in her husband's estate for $5,000).

55. *See* notes 9-10 and accompanying text *supra.*

56. *See* note 9 and accompanying text *supra.*

57. *See* note 10 and accompanying text *supra.*

58. The issue of consideration came to the fore in Wellington v. Rugg, 243 Mass. 30, 136 N.E. 831 (1922). In *Wellington*, the Massachusetts Supreme Judicial Court found that the promise to bequeath a sum in lieu of claims to the estate was good consideration. *Id.* at 34, 136 N.E. at 833. For a discussion of *Wellington, see* note 4 *supra.*

59. In the *Wellington* case, the court acknowledged the confidential relationship presumed to exist between prospective spouses and the assumption of good faith by referring to the *Eaton* decision. *See* Wellington v. Rugg, 243 Mass. 30, 35, 136 N.E. 831, 833-34 (1924). The earlier decision of Eaton v. Eaton, 233 Mass. 351, 371, 124 N.E. 37, 41 (1919), had indicated that contracts executed within a relationship of confidentiality would receive stricter scrutiny for the protection of the spouses. However, the court in *Eaton* noted that parties to commercial transactions dealt with one another at arm's length. Consequently, commercial contracts were not subject to the same type of close judicial control as were contracts executed within an aura of confidentiality. *Id.* at 371, 124 N.E. at 41. *See also* notes 5 and 19 *supra,* and 61-63 and accompanying text *infra.*

Yet, in *Wellington,* the court ignored the implicit duty of the husband to exercise honesty with his wife by stressing strict adherence to contract law:

> The agreement is an executory bilateral contract, and the failure of the intestate to carry out his promise is not a ground for setting the contract aside; the consideration on his part is his promise to give the plaintiff $5,000 by his will. The result of his failure to perform entitles the plaintiff to maintain an action for damages for breach of the contract.

Wellington v. Rugg, 243 Mass. 30, 34, 136 N.E. 831, 833 (1922).

agreements.[60] Authority indicated that the analysis of the premarital agreement should be premised upon two presumptions. First, the prospective spouses were not absolutely free to do with their property as they chose. Second, an aura of confidentiality was created by the contemplated marriage. Therefore, the spouses were held to reasonableness and to good faith in all matters pertaining to the agreement.[61] Although the courts would try to effectuate the intent of the parties,[62] the antenuptial agreement should give something of value to the survivor rather than being a mere empty form.[63]

However, in the 1922 case of *Wellington v. Rugg,*[64] the court applied contract principles strictly, holding that the failure of the husband to disclose his assets did not constitute fraud;[65] and since the widow was claiming nondisclosure, an action did not lie.[66] The antenuptial contract

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60. *See* Eaton v. Eaton, 233 Mass. 351, 124 N.E. 37 (1919). In *Eaton,* the prospective spouses executed an antenuptial agreement in which the wife agreed to accept testamentary provisions in lieu of all other claims in her husband's estate. The deceased husband fulfilled his obligations and executed a will providing for his wife. The executors brought suit to enjoin the widow from contesting the will.

For an analysis of the far reaching control the Massachusetts Supreme Judicial Court was willing to exercise upon the contrast in the *Eaton* decision (as opposed to the moderate review afforded commercial contracts), *see generally* notes 5, 19 and 59 *supra,* 61-63 with accompanying text *infra.* For a collection of cases consonant with the *Eaton* decision at the time it was rendered, *see* cases cited in note 5, *supra.* A large number of jurisdictions have held that the consideration may be any valuable consideration, the marriage itself, or reciprocal stipulations. *See* LINDEY, *supra* note 5, § 90, at 32. Jurisdictions continue to differ as to the value of marriage as sufficient consideration. *Compare* Welsh v. Welsh, 150 Minn. 23, 184 N.W. 38 (1921) (marriage alone will not support the agreement) *with* Friedlander v. Friedlander, 80 Wash.2d 293, 494 P.2d 208 (1972) (marriage is consideration of the highest value). Furthermore, although a husband's waiver of his rights in the estate of his wife may constitute valuable consideration, if the wife possesses no assets, the promise is worthless. *See* Taylor v. Taylor, 144 Ill. 436, 444, 33 N.E. 532, 533 (1893).

Some jurisdictions use the "alternative requirement rule" to determine adequate consideration. *See* note 71 and accompanying text *infra.* Antenuptial agreements will be sustained "if they are free from fraud, violative of no statute, are equitably and fairly made and are fair and reasonable in their terms. . . ." Welsh v. Welsh, 150 Minn. 23, 25, 184 N.W. 38, 38 (1921). *Accord,* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 861, 389 N.E.2d 385, 389 (1979). The *Rosenberg* court stated that, "such agreements [must] be executed fairly and understandingly and be free from fraud, imposition, deception, or overreaching." This general rule indicates that the problems encountered in adjudicating antenuptial agreements extend beyond rudimentary contract law. Indeed, the framers of the Model Probate Code have pointed out that the rules to be applied when considering antenuptial contracts are "unique and quite distinct from the requirements for the execution of a simple contract." Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 754 (Mo. 1970), *referring to* the MODEL PROBATE CODE, § 39 (Simes ed. 1964). One commentator has voiced the hope that Massachusetts "will adopt the sounder and simpler ground of absence of valuable consideration. . . ." Posternak, *supra* note 5, at 312.

61. *See* Eaton v. Eaton, 233 Mass. 351, 370, 124 N.E. 37, 40 (1919).

62. The court stated: "The contract is . . . to be interpreted according to its words." *Id.*

63. *Id.* at 375, 124 N.E. at 42.

64. 243 Mass. 30, 136 N.E. 831 (1922). For a further discussion of *Wellington, see* notes 4 and 59 *supra.*

65. *Id.* at 31-32, 136 N.E. at 833.

66. *Id.* at 34-35, 136 N.E. at 833-34. One may be tempted to conclude that the case concerns

in this decision was enforced as written, giving the widow only the consideration to which she was entitled under the agreement.[67] *Wellington* was not only inconsistent with earlier Massachusetts case law,[68] but it was also incongruous when compared to the existing weight of authority in other jurisdictions,[69] since the decision stands for the proposition that the perpetration of fraud in the disclosure of assets will vitiate an agreement.[70]

Other jurisdictions have developed workable standards consonant with the premises of early Massachusetts case law for evaluating antenuptial agreements.[71] However, *Wellington* remained controlling law in the Commonwealth for fifty-seven years. During the fifty-seven

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fraud only in the disclosure of assets. However, subsequent cases indicate that the issue of fraud is not limited to the disclosure of assets. Rather, it extends to the international misrepresentation of an material fact. *See* cases cited in note 4 *supra*. Thus, in the wake of *Wellington*, an action would not lie for the nondisclosure of a salient or material fact. Rather, the proper action would be one in deceit if fraud were the basis for vitiating the contract. The action would be comprised of the following elements: a false representation of a material fact made by the defendant; the knowledge or belief on the part of the defendant that the representation was false (often referred to as scienter); an intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; justifiable reliance on the representation by the plaintiff; and damage as a consequence of the reliance. *See* W. PROSSER, THE LAWS OF TORTS § 105 (4th ed. 1971). *Wellington* has also been cited as standing for the proposition that promises to be executed in the future could not be a ground of liability in deceit. *See* Morrison v. Tremont Trust Co., 252 Mass. 389, 147 N.E. 872 (1925).

With regard to the disclosure of assets in the execution of an antenuptial agreement, the case of Anderson v. Anderson, 354 Mass. 565, 238 N.E.2d 871 (1968), is typical. There, the prospective husband induced his prospective wive to sign an antenuptial agreement after telling her that other than his salary, he was without assets. Actually, he was in possession of stock which he later sold for $700,000. The court found that "[t]he classic elements of deceit could have been found. . . ." *Id.* at 569, 238 N.E.2d at 870.

67. *See* Wellington v. Rugg, 243 Mass. 30, 136 N.E. 831 (1922). To support its conclusions, the court cited G.S. BOWER, ACTIONABLE NONDISCLOSURE § 135; Potts v. Chapin, 133 Mass. 276 (1882); and Windram Manufacturing Company v. Boston Blacking Company, 239 Mass. 123, 131 N.E. 454 (1921). Even though it mentioned the confidential nature of the transaction in *Wellington*, the court dealth with the prospective spouses as if they stood at arm's length. The widow could have pressed her husband to disclose the information, or she could have investigated prior to signing the contract. *See* Wellington v. Rugg, 243 Mass. 30, 35, 136 N.E. 831, 834 (1922).

68. *See* Eaton v. Eaton, 233 Mass. 351, 124 N.E. 37 (1919). *See also* notes 58-63 and accompanying text, *supra*.

69. For a collection of cases consonant with *Eaton* and the majority view at the time the *Wellington* decision was rendered, *see* note 5, *supra*.

70. *See* notes 4 and 66, *supra*.

71. Courts in Florida, Maryland, Pennsylvania, and Missouri have utilized the alternative requirement rule or some derivation in determining the validity of antenuptial agreements. In Florida and Missouri, the judicial guidelines have been codified. For an overview of the Missouri and Florida statutes, *see* notes 135 and 144 *infra*.

Under the alternative requirement rule, an antenuptial agreement may be upheld in one of three ways: (1) a fair and reasonable provision may be made for the wife; (2) absent such a provision, a full and frank disclosure may be made by the husband to the wife prior to the execution of the agreement as to his financial worth; and, (3) absent such disclosure, the wife may possess some general and approximate knowledge as to his worth. *See, e.g.*, Del Vecchio v. Del Vecchio, 143 So.2d 17, 20 (Fla. 1962). In weighing the fairness and reasonableness of any provision, consideration should be given to the relative situations of the parties, their respective properties, family ties

year period, the case was cited eight times.[72] However, none of these cases concerned the type of antenuptial agreement evidenced in *Wellington* and *Rosenberg*.[73] Antenuptial agreements have been litigated in the Commonwealth since the *Wellington* decision, but the instances have certainly been few when compared to the number of agreements

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and connections, the wife's needs, their respective health and experience, and any factors which would tend to show that the agreement was understandingly made. *Id.*

For example, the Supreme Court of Pennsylvania applied the rule to uphold an antenuptial agreement executed between a very wealthy businessman and his prospective bride who had been his secretary for three years. The agreement provided that the bride waived all her rights in her prospective husband's estate in exchange for the promise of stocks, a California residence, and a life interest in the entire income of a trust. *See In re* Kaufmann's Estate, 404 Pa. 131, 135-36, 171 A.2d 48, 49-50 (1961).

In Maryland, the rule was applied to uphold an agreement between a man and a woman, both financially stable and of approximately the same age. The contract provided that each would retain their respective holdings and neither would claim any interest in the estate of the other. The woman, in return for this promise, was to receive an inter vivos transfer of stock. *See* Hartz v. Hartz, 248 Md. 47, 50-55, 234 A.2d 865, 867-70 (1967).

In Missouri, the Supreme Court applied the rule, embodied in a statute, to uphold a contract executed between two elderly persons who had been childhood friends. Each spouse renounced his/her respective interests in the estate of the other. *See* Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 752 (Mo. 1970).

Antenuptial agreements also appear to be litigated with some frequency in Illinois. The Illinois courts have been fairly consistent in their treatment of them. *See, e.g.,* Watson v. Watson, 5 Ill.2d 526, 528-29, 126 N.E.2d 220, 222-223 (1955) (obtaining release of claims in his estate from his bride for the payment of $1,000, an elderly widower took advantage of an elderly spinster; court vitiated the contract by holding that the general reputation of the husband's wealth was insufficient to charge the wife with adequate knowledge as to his property); Brown v. Brown, 329 Ill. 198, 199-200, 160 N.E. 149, 150, 153 (1928) (prospective spouses, each financially stable, executed an agreement wherein the husband obtained release of wife's claims in his considerable estate for a meager $3,000; agreement upheld on the basis that the woman was charged with knowledge of his estate after having been his neighbor and his nurse); Megginson v. Megginson, 367 Ill. 168, 179, 10 N.E.2d 815, 820 (1937) (the bride, whom the court described as a highly intelligent, young, property owner, accepted a promissory note with interest in lieu of all claims in her husband's estate; since the woman had some knowledge of her husband's vast estate, the court upheld the agreement even though the woman claimed that she did not know the full value of the estate).

It appears that these courts look to the same types of factors to determine the essential fairness of the agreement: "antenuptial agreements must be so construed as to give full effect to the parties' intentions, but we are concerned that such agreements be executed fairly and understandingly and be free from fraud, imposition, deception, or overreaching." Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 862, 389 N.E.2d 385, 389 (1979).

72. The cases citing *Wellington* in Massachusetts have been predominantly commercial cases. *See, e.g.,* Swinton v. Whitinsville Savings Bank, 311 Mass. 677, 42 N.E.2d 808 (1942) (termite-ridden house sold to plaintiffs who sued upon a theory of actionable nondisclosure); Barry v. Frankini, 287 Mass. 196, 191 N.E. 651 (1934) (a lease of land in which the lessor covenanted to pay the taxes on the demised premises); Goodwin v. Agassiz, 283 Mass. 358, 186 N.E. 659 (1933) (suit by a corporate shareholder for losses suffered by him when shares in a mining company were sold to the corporate directors); Carchidi v. Kalayjian, 260 Mass. 120, 156 N.E. 835 (1927) (building sold based on a fraudulent misrepresentation); Willet v. Herrick, 258 Mass. 585, 155 N.E. 589 (1927) (plaintiff was forced to relinquish his majority stock interest in corporations when a banker and a note broker conspired together to obtain the shares); Morrison v. Tremont Trust Co., 252 Mass. 383, 147 NE. 870 (1925) (a trust company gave a written guarantee of payment which the plaintiff sought to enforce).

73. *See* cases cited in note 72 *supra.*

litigated in other jurisdictions.[74] Since 1922, there has been neither judicial nor statutory development in the law of antenuptial agreements.[75] Then, in March 1979, resuming consistency with the majority of other jurisdictions, the Massachusetts Supreme Judicial Court decided *Rosenberg v. Lipnick*[76] and gathered the shattered shards of past case law.

III. *ROSENBERG V. LIPNICK*

A. The Facts

In 1958 the prospective Mrs. Rosenberg, then fifty-eight, met Mr. Rosenberg, then sixty-nine, and the two embarked upon an eighteen-month courtship. Both had children from previous marriages. When Mr. Rosenberg proposed marriage, he informed his prospective bride that he would like her to sign an antenuptial agreement, the terms of which provided that she would accept $5,000 from his estate in lieu of dower or of any other rights she might have in case of his predecease.[77]

Mrs. Rosenberg was advised by her brother, a practicing attorney, that in his opinion, the agreement was "unfair and called for more explanation,"[78] especially since his sister had no knowledge of Mr. Rosenberg's resources. Despite her brother's advice, she was eager to sign because she feared that her request for disclosure might terminate the engagement.[79] The brother drafted a second agreement providing for Mr. Rosenberg's surrender of any claim he would have in his future wife's estate in the case of her predecease.[80] The agreements were executed in October, 1959, and shortly thereafter the couple were married. At the time of the marriage, Mr. Rosenberg owned a dwelling and a block of stores in Chelsea, Massachusetts, from which he operated his

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74. Perhaps something may be said for the fraud standard, since the Massachusetts courts were not clogged with disputes arising out of antenuptial agreements. *See also* Gamble, *supra* note 20, at 692-93. One might infer that the lack of litigation in Massachusetts stems not from the infrequency of use, but from the infrequency of litigation, which in turn arises from the difficulty in overcoming the fraud standard. However, in *Rosenberg*, the Massachusetts Supreme Judicial Court took the view that numerous agreements in the Commonwealth had been drafted based upon the *Wellington* standard. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 855, 389 N.E.2d, 385, 386 (1979).

75. In 1974, a proposal for interspousal contracts was introduced in the Massachusetts House of Representatives. *See* MASS. H.R. 2200 (1974). Although the proposal did not deal specifically with the contracts of the *Rosenberg* type, the broad spectrum of interspousal contracts were addressed. The proposed legislation was sweeping, and if passed, would have been a landmark in domestic relations. For an analysis of the proposal, *see generally* Note, *Interspousal Contracts: The Potential for Validation in Massachusetts,* 9 SUFFOLK U.L. REV. 185 (1974).

76. 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979).

77. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 855, 389 N.E.2d 385, 386 (1979).

78. *Id.*

79. *Id.* at 862, 389 N.E.2d at 386, 389.

80. *Id.* at 856, 389 N.E.2d at 386-87.

electrician's business. Mr. Rosenberg died on July 4, 1976, leaving an estate with an approximate value of $119,000.[81]

When difficulties arose in probating the estate, Mrs. Rosenberg sought the invalidation of the agreement.[82] Based on a master's finding, the *Wellington* case was held to be controlling; since no fraud had been perpetrated in the nondisclosure of Mr. Rosenberg's assets,[83] the trial court ruled against Mrs. Rosenberg. The case was heard on direct appeal to the Massachusetts Supreme Judicial Court.[84]

B. The Holding

On appeal, the Massachusetts Supreme Judicial Court expressed disenchantment with the *Wellington* standard. Chief Justice Hennessey's opinion flatly ridiculed fraud in disclosure as a standard of review for antenuptial agreements,[85] but he declined to overrule that standard in the *Rosenberg* case.[86] He reasoned that since the *Wellington* precedent had been relied upon since 1922 by attorneys drafting antenuptial agreements, to apply a new standard retroactively would produce too harsh a result. Accordingly, the court evaluated the Rosenberg agreement in light of the standard of review promulgated in *Wellington*.[87] Since "nothing short of proof of fraud will invalidate an antenuptial agreement, irrespective of the unfairness of the agreement's provisions,"[88] Mrs. Rosenberg was not entitled to relief under a *Wellington* analysis. Thus, the opinion of the trial court was affirmed.

In dicta, Chief Justice Hennessey delineated a new standard of review to be applied by Massachusetts courts to antenuptial agreements executed after the publication of *Rosenberg*.[89] The *Rosenberg* rule implements a flexible test in place of the rigid analysis employed in *Wellington*. In applying the new rule, the court will first presume a confidential relationship between the spouses.[90] Premised upon the confidential

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81. *Id.* at 856, 389 N.E.2d at 387.

82. In the *Rosenberg* case, the widow was entitled to $5,000 out of the deceased's estate under the antenuptial agreement, but the executors of the estate failed to make payment. Plaintiff's Motion for Declaratory Judgment, at 1-2. *See also* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979). Alleging fraud on the part of her deceased husband as well as a large discrepancy between the amount provided under the agreement and the amount to which she would otherwise be entitled, Mrs. Rosenberg filed a complaint for declaratory judgment to define her rights pursuant to MASS. GEN. LAWS ANN. ch. 231A, §§ 1-3 (West 1971), against the executors of the estate. *See* Plaintiff's Motion for Declaratory Judgment, *supra* at 1-3.

83. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 854, 389 N.E.2d 385, 386 (1979).

84. *Id.*

85. *Id.* at 858-60, 389 N.E.2d at 387-88.

86. *Id.* at 854-55, 389 N.E.2d at 386.

87. *Id.*

88. *Id.* at 857, 389 N.E.2d at 387.

89. *Id.* at 855, 389 N.E.2d at 386. *See also* note 42 *supra*.

90. *Id.* at 860, 389 N.E.2d at 388.

relationship, the court is to inquire into three factors when evaluating an antenuptial agreement: (1) the extent of provision for the surviving spouse as measured at the time of execution;[91] (2) the degree of disclosure made by the spouse;[92] and (3) whether an express waiver of common law rights was signed.[93] Hypothetically, the *Rosenberg* court applied this rule to the Rosenbergs' agreement and concluded that the result may have been the same for Mrs. Rosenberg as under the *Wellington* analysis.[94]

C. *Analysis of the Rosenberg Rule*

An analysis of the treatment accorded premarital contracts by other jurisdictions, in conjunction with the standard outlined in the *Rosenberg* decision, provides insight to the future development of antenuptial agreements in Massachusetts. In so doing, each of the three factors of the *Rosenberg* rule should be analyzed separately.

1. Extent of Provision

The Massachusetts Supreme Judicial Court stated in *Rosenberg* that in the future, it would scrutinize the agreement to determine the fairness and reasonableness of the provision for each spouse. In so doing the court made reference to the parties' respective worth, ages, intelligence, literacy, business acumen, and prior family ties or commitments.[95] Apparently, inadequacy of provision will not, by itself, vitiate the agreement.[96] All the facts are to be construed together, and none are to be considered in isolation.[97] This stage of inquiry is the most discretionary in the analysis because it is necessarily the most factually weighted. The facts of each particular case will bear upon the court's willingness to uphold the agreement in question.

Other jurisdictions have proved adept in weighing the facts of the

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91. *Id.*

92. *Id.* at 860-61, 389 N.E.2d at 388.

93. *Id.* at 861, 389 N.E.2d at 388.

94. *Id.* at 861-62, 389 N.E.2d at 389.

95. *Id.* at 861, 389 N.E.2d at 389. The list is by no means exhaustive. The Florida courts have considered the woman's needs and the health of the respective parties. *See* Del Vecchio v. Del Vecchio, 143 So.2d 17, 20 (Fla. 1962). Other courts have considered independent legal counsel for both parties to be a factor. *See, e.g.*, Linker v. Linker, 30 Colo. App. 23, 470 P.2d 921 (1970); *In re* McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950); Friedlander v. Friedlander, 80 Wash.2d 293, 494 P.2d 208 (1972).

96. This is in accord with Del Vecchio v. Del Vecchio, 143 So.2d 14 (Fla. 1962), which the *Rosenberg* court cites frequently in its footnotes. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 861 n.3, 4, 398 N.E.2d 385, 388 (1979).

97. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 861, 389 N.E.2d 385, 389 (1979).

cases.[98] For example, in *McFerron v. Trask,*[99] an Oregon appellate court sustained the validity of an antenuptial agreement after a review of the relevant factors.[100] The court found that the predominant factor in the case was Mrs. McFerron's business acumen[101] which effectively overshadowed all other factors, including her lack of independent counsel and claim of failure to fully comprehend the implications of the agreement.[102]

The *McFerron* court summarily treated factors which other courts have found to be dispositive. While the parties' respective worth was not thought to be controlling, several jurisdictions have found the relevant financial positions to be of merit.[103] Although the court mentioned the spouses' ages in *McFerron,* it did not find this fact to be peculiarly dispositive, as have other courts.[104] Intelligence was considered an implicit component of business acumen by the *McFerron* court.[105] Other

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98. *See* note 71, *supra.* One may wonder how these consistencies have arisen. It may be attributable to luck, or to the expertise developed over the years in judging the validity of these agreements. The latter explanation is the more logical.

99. 3 Or. Ct. App. 111, 472 P.2d 847 (1970).

100. *Id.* The prospective spouses mutually waived their rights in the other's estate. They were fifty-nine years of age. Both had been previously married (third marriage for the wife, second for the husband). Both were well versed in the ways of business. The woman owned two floral shops. She was accustomed to supporting herself. At the trial, a dispute in testimony arose as to whether the attorney who drafted the agreement had read it to the woman and whether she had fully understood its implications. At the time of execution, Mrs. McFerron was not represented by independent counsel. *Id.* at 113-14, 472 P.2d at 848.

101. *Accord. In re* Estate of Nelson, 224 Cal. App.2d 138, 36 Cal. Rptr. 352 (1964) (Mrs. Nelson's youth and lack of business acumen were severely taken advantage of by her husband, an experienced and wiley businessman twenty-eight years her senior); Linker v. Linker, 30 Colo. App. 25, 470 P.2d 921 (1971) (foreign woman could not comprehend her position due to her illiteracy, unsophistication, and lack of independent counsel, all of which were aggravated by the undue influence exercised by the husband's attorney); *In re* Spieth, 181 Neb. 11, 146 N.W.2d 746 (1966) (court relied heavily on the woman's business acumen and the fact that she had competent legal advice before executing the agreement); Osborn v. Osborn, 18 Ohio St.2d 144, 248 N.E.2d 191 (1969) (court relied heavily on the woman's business acumen and the candor of her husband during the transaction).

102. *See* McFerron v. Trask, 3 Or. Ct. App. 111, 472 P.2d 847, 849-50 (1970).

103. *See, e.g.,* Brown v. Brown, 329 Ill. 198, 160 N.E. 149 (1928) (wife waived claim in large estate for only $3,000); Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967) (financially stable spouses mutually waived marital property rights, and woman received additional stock); *In re* Kaufmann's Estate, 404 Pa. 131, 171 A.2d 48 (1961) (wealthy businessman made extensive provisions for his bride who had been his secretary).

104. *See, e.g., In re* Estate of Nelson, 224 Cal. App.2d 138, 36 Cal. Rptr. 32 (1964) (twenty-eight year age difference between spouses); Linker v. Linker, 30 Colo. App. 25, 470 P.2d 921 (1970) (twenty-one year age difference between spouses); Watson v. Watson, 5 Ill.2d 526, 529, 126 N.E.2d 220, 222 (1955) (elderly spinster presented with antenuptial agreement two days before wedding); Denison v. Dawes, 121 Me. 402, 405, 117 A. 314, 316 (1922) (elderly spinster presented with contract on the morning of the wedding).

105. *But see* Linker v. Linker, 30 Colo. App. 25, 470 P.2d 921 (1971) (man took unfair advantage of a foreign woman newly arrived in America; court placed emphasis on the woman's illiteracy and lack of sophistication).

jurisdictions have also assimilated intelligence with shrewd professional expertise.[106] Prior offspring were not considered in the *McFerron* agreement, but other agreements have made provisions for the spouses' numerous children.[107]

Upon close reading of the aforementioned cases, it should be apparent that although one or two factors will be outstanding or dispositive, these factors are never viewed in isolation. Rather, they are considered as integral components of intricate factual mazes with even seemingly minor facts afforded mention. The *Rosenberg* court was indeed correct when it observed that no single factor can ever be considered without regard for the others.[108]

2. Disclosure

The *Rosenberg* court suggested that some degree of disclosure is required in executing an antenuptial agreement.[109] The extent of this disclosure has not be definitively formulated in the traditional antenuptial contract analysis. Rather, it has been assumed that the spouses would exercise sincerity, candor, and good faith in their dealings with one another.[110] Thus, in other jurisdictions, the level of acceptable disclosure has varied widely, ranging from knowledge garnered from long association[111] to the attachment of a schedule of assets to the

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106. *See, e.g., In re* Spieth, 181 Neb. 11, 146 N.W.2d 749 (1966) (competent businesswoman bound to terms of agreement); Osborn v. Osborn, 18 Ohio St.2d 144, 248 N.E.2d 191 (1969) (woman with shrewd business sense bound by contract).

107. *See, e.g.,* Guhl v. Guhl, 376 Ill. 100, 102, 33 N.E.2d 185, 186 (1941) (spouses each have children who are to inherit from respective parent); Megginson v. Megginson, 367 Ill. 168, 170-71, 10 N.E.2d 815, 816-17 (1937) (widower with nine children wished them to inherit his vast estate); Matter of Estate of Abbot, 571 P.2d 311, 312 (Colo. Ct. App. 1977) (husband with eight children desired them to inherit his estate).

108. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979).

109. *Id.* at 860-61, 389 N.E.2d at 388, where the court stated:

> In judging the validity of . . . an antenuptial agreement . . . we may consider . . . whether . . . the contested party was fully informed of the other party's worth prior to the agreement's execution, or had, should have had, independent knowledge of the other party's worth. . . .

110. *See* Weeks v. Weeks, 143 Fla. 686, 197 So. 393 (1940); Watson v. Watson, 5 Ill.2d 526, 126 N.E.2d 220 (1950); Denison v. Dawes, 121 Me. 402, 117 A. 314 (1922); Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967); Eaton v. Eaton, 233 Mass. 351, 124 N.E. 37 (1919); Slingerland v. Slingerland, 115 Minn. 270, 132 N.W. 326 (1911); *In re* Strickland's Estate, 181 Neb. 478, 149 N.W.2d 344 (1967); *In re* Kaufman's Estate, 404 Pa. 131, 171 A.2d 48 (1961); Friedlander v. Friedlander, 80 Wash.2d 293, 494 P.2d 208 (1972).

111. *See, e.g.,* Watson v. Watson, 5 Ill.2d 526, 528, 126 N.E.2d 220, 223 (1955) (court invalidated the agreement, but considered the argument that the widow should have known of her husband's vast land holdings since she had spent all her life in the same town where he lived and which was the situs of the property); Brown v. Brown, 329 Ill. 198, 202, 204, 160 N.E. 149, 153 (1928) (woman charged with knowledge of her husband's estate because she lived across the road from him and had been his nurse); Johnston v. Johnston, 134 Ind. Ct. App. 351, 359-60, 184

agreement.[112] Courts have held businesswomen possessing professional expertise to a high level of knowledge.[113] In contrast, conventional tort and contract law provide that mere silence or a passive failure to disclose facts of which a person has no knowledge does not amount to fraud and does not give rise to a cause of action.[114] Parties who do not enjoy fiduciary or confidential relationships deal with one another at arm's length,[115] and they are not held to exercise any degree of disclosure.[116]

In ascertaining the degree of disclosure mandated by *Rosenberg*, a Massachusetts court will look for express disclosure of assets, or a spouse's independent knowledge of a partner's worth.[117] In the absence of either condition, a court could impute constructive knowledge to a spouse in the interest of equity.[118] In applying its new guidelines, the *Rosenberg* court felt that even if some degree of disclosure were required, Mrs. Rosenberg's claim should still be denied because an attorney had advised her to press her husband for disclosure.[119] The court gave little credence to Mrs. Rosenberg's fear that had she pressed for disclosure, her prospective spouse might have terminated the engagement.[120] Although the court laid a burden on each spouse to

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N.E.2d 651, 653 (1962) (court sustained agreement where husband and wife had known each other for thirty-five years before marrying).

112. *See, e.g.*, Johnson v. Johnson, 140 So.2d 358, 360 (Fla. Ct. App. 1967) (husband attached a complete listing of his property and its respective values); *In re* Spieth, 181 Neb. 11, 13, 46 N.W.2d 746, 748 (1966) (a schedule of assets was attached to the agreement); *In re* McClellan's Estate, 365 Pa. 401, 404, 407-08, 75 A.2d 595, 596 (1950) (husband attached a small listing of certain stocks, but the list was both inaccurate and incomplete; the court held the contract invalid due to fraud).

113. *See, e.g.*, McFerron v. Trask, 3 Or. Ct. App. 111, 115, 472 P.2d 847, 849 (1970) where a business woman claimed that she did not understand the ramifications of the agreement when her husband's attorney read it to her. The Oregon appellate court stated that her degree of business acumen overshadowed this claim. This is an example of a court constructively imputing knowledge of a spouse's assets to the other. *See* notes 105, 106 and accompanying text, *supra*.

114. *See* W. PROSSER, *supra* note 64, at § 106, n.22, *citing to* Windram Manufacturing Company v. Boston Blacking Company, 239 Mass. 123, 126, 131 N.E. 454, 455 (1921).

115. *See generally,* W. PROSSER, *supra* note 66 at §§ 105, 106.

116. Hence, the court in *Wellington* merely mentioned confidentiality and proceeded to hold the contract valid, undisturbed by the husband's failure to disclose his assets and his wife's apparent total lack of knowledge concerning them. *See* Wellington v. Rugg, 243 Mass. 30, 34-35, 136 N.E. 831, 833-34 (1922).

117. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 861, 389 N.E.2d 385, 388 (1979).

118. *Id.* at 861, 389 N.E.2d at 388.

119. *Id.* at 861-62, 389 N.E.2d at 386.

120. *Id.* at 862, 389 N.E.2d at 389. Such a fear may give rise to a suspicion of undue influence, which "may easily be exercised under the intimate relation created by the engagement to marry." Lamb v. Lamb, 139 Ind. 273, 276, 30 N.E. 36, 37 (1892). Proof of the confidential relationship, without more, does not give rise to an inference of undue influence in the making of an antenuptial agreement. *See* Polsky v. Polsky, 467 S.W.2d 861 (Mo. 1971), *citing* Sebree v. Rosen, 349 S.W.2d 865, 873 (Mo. 1961). Although this reasoning may be fully applicable to younger, more sophisticated persons in today's world, it does not seem equally applicable to elderly persons raised in a world which expected a wide variance in the traditional sexual roles.

make volitional disclosure,[121] in absence thereof, Mrs. Rosenberg was required to make inquiry of her husband.[122]

Disclosure is an ambiguous term. The *Rosenberg* court, when discussing disclosure, referred to it as "'knowledge of the other party's worth. . . .'"[123] The court elaborated on this point and included the character, amount, and value of the parties' respective assets as components of disclosure.[124] Other jurisdictions concur in this judgment.[125] Some courts further require that the woman's statutory interests in her husband's estate be disclosed to her.[126] The most equitable view would require a woman to have knowledge of the worth, extent, and nature of her husband's assets, knowledge of her statutory rights, and knowledge of the interrelationship between these two factors.[127] This would seem to necessitate not only a considerable amount of work for an attorney drafting an antenuptial agreement, but it also seems to necessitate his presence.[128]

The level of accuracy, detail, and itemization of property required is also at issue. Although exact value is not required,[129] one must be cautious if itemization is attempted.[130] It should be remembered that the underlying policy of disclosure is to avoid fraud and overreaching[131]

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121. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 854, 389 N.E.2d 385, 388 (1979).

122. *Id.* at 861-62, 389 N.E.2d at 389.

123. *Id.* at 861, 389 N.E.2d at 388.

124. *Id.* at 859, 389 N.E.2d at 388.

125. *See* Del Vecchio v. Del Vecchio, 143 So.2d 17, 20 (Fla. 1962) (disclosure includes knowledge of the value, amount, and character of the spouse's assets); Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 756-57 (Mo. 1970) (full disclosure of the nature and extent of property interests or knowledge equivalent thereto is required); Friedlander v. Friedlander, 80 Wash.2d 293, 302, 494 P.2d 208, 214 (1972) (although exact financial status need not be shown, there must be disclosure of all material facts relating to the amount, character, and value of the property so that an intelligent decision can be made).

126. *See, e.g.,* Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 758 (Mo. 1970), where it was held that a spouse must have sufficient knowledge as to what is to be gained or lost for a contract to be enforceable. Further, the Missouri Supreme Court discussed the interrelation between the marital property rights and the value of a spouse's assets while analyzing fraud and overreaching. The court stated that surviving spouse needs more than abstract explanations when evaluating an antenuptial agreement. *Id.* at 756-57. A spouse must have sufficient facts to evaluate an agreement. If a spouse knows the extent of her husband's assets without knowledge of the marital property rights and their monetary implications, she will not comprehend the amount of the estate to which she is statutorily entitled. Therefore, the relationship between the extent of one's assets and the statutory share to which a spouse is entitled should be disclosed to both spouses.

127. However, the *Rosenberg* court rule requires only disclosure of the amount, character, and value of the parties' respective assets. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 859, 389 N.E.2d 385, 388 (1979).

128. *See* Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 756-57 (Mo. 1970); Friedlander v. Friedlander, 80 Wash.2d 293, 302, 494 P.2d 208, 214 (1972).

129. Even under the stringent *Friedlander* standard, exact accounting is not required. *See* Friedlander v. Friedlander, 80 Wash.2d 293, 302, 494 P.2d 208, 214 (1972).

130. *See, e.g.,* Johnson v. Johnson, 140 So.2d 358, 360 (Fla. Dist. Ct. App. 1962); *In re* McClellan's Estate, 365 Pa. 401, 406, 75 A.2d 595, 596 (1950).

131. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 862, 389 N.E.2d 385, 389 (1979).

and to provide spouses with information sufficient to make intelligent decisions.[132] Therefore, it would seem prudent for a list of property, with sufficient itemization of holdings and their value, to be attached to an agreement. It could thereby be shown that a spouse was cognizant of the other's worth.[133]

The modern trend indicates that women are being held to a high level of knowledge and expertise when executing antenuptial agreements.[134] Therefore, it is advisable for women to have independent counsel, to press a prospective spouse for full disclosure, and to request that an attorney fully explain the marital property rights not only in abstract, but also in financial terms.

Some states have attempted to codify a standard for the disclosure of assets.[135] However, even under these statutes, courts cannot seem to formulate concrete rules concerning asset disclosure.[136]

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132. *Id.* As the court stated: "we recognize that antenuptial agreements must be so construed as to give full effect to the parties' intentions, but we are concerned that such agreements be executed fairly and understandingly and be free from fraud, imposition, deception, or overreaching." *Id.* at 862, 389 N.E.2d at 389.

133. *See* Johnson v. Johnson, 140 So.2d 358 (Fla. Dist. Ct. App. 1962) (court upheld an antenuptial agreement where wife signed disclosure statement specifically itemizing husband's real and personal property); *In re* Estate of Spieth, 181 Neb. 11, 146 N.W.2d 746 (1966) (attachment of a schedule of assets and agreement upheld); *In re* McClellan's Estate, 363 Pa. 401, 75 A.2d 595 (1950) (doctor of considerable means minimized value of stock holdings in a list of assets which did not take account of his extensive holdings; court invalidated the agreement).

134. One court observed that: "[B]etween persons in prematrimonial state . . . a mystical confidential relationship which anesthesizes the senses of the female partner" will no longer be assumed by the judiciary. *See* Potter v. Collin, 321 So.2d 128 (Fla. Dist. Ct. App. 1975), *quoting* Gamble, *supra* note 20, at 719. The court in *Del Vecchio* claimed that the courts "will no longer indulge the archaic presumption of dominance by the husband. . . ." Del Vecchio v. Del Vecchio, 143 So.2d 17, 21 (Fla. 1962).

In *Rosenberg* the court made little of Mrs. Rosenberg's fear of pressing her husband for disclosure, even though her brother advised it. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 861-62, 389 N.E.2d 385, 389 (1979). *See also In re* Estate of Spieth, 181 Neb. 11, 146 N.W.2d 746 (1966); McFerron v. Trask, 3 Or. Ct. App. 111, 472 P.2d 847 (1977); Osborn v. Osborn, 18 Ohio St.2d 144, 248 N.E.2d 191 (1969); *In re* Kaufman's Estate, 404 Pa. 131, 171 A.2d 48 (1961).

135. For example, the Missouri statute provides:

> The right of election of a surviving spouse . . . may be waived before . . . marriage by a written contract, agreement or waiver . . . after full disclosure of the nature and extent of the right, if the thing or the promise given to the waiving party is a fair consideration under all the circumstances. . . .

MO. STAT. ANN. § 474.220 (Vernon). A similar standard governs the waiver of rights of inheritance with respect to an intestate decedent. *See* MO. STAT. ANN. § 474.120 (Vernon Supp. 1979).

136. In interpreting the statute, note 135, *supra*, the Missouri Supreme Court has had difficulty in formulating a satisfactory rule as to the sufficiency of disclosure since the necessary degree of disclosure is "ordinarily dependent on the circumstances of the case." Estate of Youngblood v. Youngblood, 457 S.W.2d 750, 757 (Mo. 1970). In *Youngblood,* both parties were elderly and had children from previous marriages. When they married, both possessed property. In the agreement, a recital of asset disclosure was made, followed by mutual waivers of interest. The contract was to bar any claim the survivor might have. *Id.* at 752. The widow later revealed that both she and her husband had only eighth grade educations and that she had little conception of her husband's financial status. *Id.* at 752-53. The court discussed the statute, and analysis revealed a weighing process of *Rosenberg* type factors. The court concluded that under the circumstances, the contract should be upheld. *Id.* at 755-58. Although full and adequate disclosure of

3. Waiver

The third factor for consideration enunciated in *Rosenberg* is that of a waiver of the marital property rights.[137] Waiver has been defined as the voluntary, intentional relinquishment of a known claim, right, or privilege.[138] Any waiver of common law and statutory rights must be clearly defined and incorporated in the agreement.[139] Once incorporated, a waiver will be upheld if it is reasonable, fairly and intelligently executed, based on sufficient consideration, and free from fraud.[140] Viewed in light of the other factors mentioned by the court — the extent of the monetary provision[141] and disclosure[142] — it may be concluded that in form, the waiver may be very general[143] because the fairness of the agreement will be evidenced by the other factors.

A few states have codified these considerations.[144] The statutes indicate that the waiver of rights must be based upon full disclosure not only of a party's assets but also of the rights acquired by a spouse upon marriage. The consideration given for the waiver should be fair under all the circumstances. These statutes reveal the types of considerations which attorneys and prospective spouses should bear in mind.

Ironically, the problems which might arise in applying this rule are

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the nature and extent of the marital property rights must be made, the court did not seem amenable to full and voluntary disclosure of assets as a strict requirement. However, disclosure of the extent and nature of the marital property rights necessarily demands a full disclosure of one's assets.

137. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 861, 389 N.E.2d 385, 388 (1979). The Massachusetts Supreme Judicial Court cited authority from other jurisdictions to delineate the nature of the waiver. *See, e.g.*, Hartz v. Hartz, 248 Md. 47, 54, 234 A.2d 865, 869 (1967) (agreement stated that it barred the right of each in and to the property and estate of the other so that the marriage could take place and the children would be protected from any claim of the surviving spouse); *In re* Kaufman's Estate, 404 Pa. 131, 134-37, 171 A.2d 48, 50 (1961) (Mrs. Kaufman waived and released any and all rights " 'that she may acquire as Mr. Kaufman's surviving spouse in his estate upon his death' "); *In re* McClellan's Estate, 365 Pa. 401, 402-03, 75 A.2d 595, 596 (1950) (agreement provided that wife shall take $5,000 in full satisfaction, payment, and discharge of any and all claims that she may have as the widow under any law); Friedlander v. Friedlander, 80 Wash.2d 293, 295, 494 P.2d 208, 210 (1972) (the wife would make no claim on the husband's estate in the event of divorce).

138. Pitcher, *Waiver of Spousal Rights in Estate of Deceased Spouse*, 7 AM. JUR. PROOF OF FACTS 2d 443, 447 (1975).

139. *Id.*

140. *Id.* The *Rosenberg* court stated that it will uphold agreements which are executed fairly and are free from fraud, imposition, deception, and overreaching. Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 861, 389 N.E.2d 385, 389 (1979).

141. *See* notes 95-108 and accompanying text *supra*.

142. *See* notes 109-36 and accompanying text *supra*.

143. For example, in *In re* McClellan's Estate, 335 Pa. 401, 402-03, 75 A.2d 595, 596 (1950), the agreement provided that the widow would take $5,000 in full satisfaction of all claims that she may have under the law as either widow or heir. For cases where such clauses have been found effective in Massachusetts, *see* notes 39 and 40 *supra*.

144. For example, the Arizona statute provides:

The right of a surviving spouse . . . may be waived . . . before . . . marriage, by a written

demonstrated by the court's own application to the situation at bar. Theoretically, each spouse has an affirmative duty to disclose pertinent financial information under the new rule.[145] Neither Mr. Rosenberg nor Mrs. Rosenberg made disclosure, and because Mrs. Rosenberg declined to press her husband for disclosure, the court chastised her for not making inquiry[146] and held that the application of the *Rosenberg* rule yielded the same result.[147] However, this alternative holding is actually incongruous to the new standard of review since the new rule did not indicate that inquiry was a necessary element.[148] If the court is intending to mandate inquiry of the spouses, then the requirement of disclosure is tenuous at best.

Even assuming this rule were workable, by applying it prospectively rather than retroactively, the Massachusetts Supreme Judicial Court is producing a harsh result for those spouses who were victimized by their more assertive partners. The *Wellington* standard permits coercion, undue influence, and any type of covert pressure short of fraud. By reasoning that many antenuptial agreements were executed in reliance upon the *Wellington* analysis, the court is admitting the inequities perpetrated by more influential spouses. Thus, by employing the *Rosenberg* rule in future cases only, the Supreme Judicial Court is sanctioning past inequitable utilization of antenuptial agreements.

D. Suggestion for Legislation in Light of Rosenberg

The Massachusetts Supreme Judicial Court has been prudent in its update of the law. The standard of review formulated by *Rosenberg* will require courts to closely scrutinize antenuptial agreements. This special treatment by the courts may be necessitated because of the strong possibility of abuse within the marital relationship.[149] Also, the rights typically relinquished are the marital property rights which the

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contract, agreement or waiver signed by the parties after a fair disclosure. . . . A waiver of all rights in the property or estate of a present or prospective spouse . . . in anticipation of . . . dissolution of marriage is a waiver of all rights to an allowance in lieu of homestead . . . and a renunciation by each of all benefits which would otherwise pass to him from the other by will executed before the waiver or property settlement.

ARIZ. REV. STAT. ANN. § 14-2204 (West 1975).

The Florida Statute provides:

The right of election of a surviving spouse, the rights of the surviving spouse as an intestate successor or as a pretermitted spouse, and the rights of the surviving spouse to homestead, exempt property, and family allowance . . . may be waived . . . before . . . marriage . . . by a written contract, agreement, or waiver, signed by the waiving party.

FLA. STAT. ANN. § 732.702 (1979 West Supp.).

145. *See* Rosenberg v. Lipnick, 79 Mass. Adv. Sh. 853, 859, 389 N.E.2d 385, 388 (1979).

146. *Id.* at 861-62, 389 N.E.2d at 389.

147. *Id.*

148. *Id.* at 860-61, 389 N.E.2d at 388.

149. *See generally,* Wolsen, *supra* note 9, at 1135.

legislature has, for years, afforded the survivor in order to protect the family which the decedent leaves behind.[150]

However, judicial fiat is, by itself, insufficient to cope with the complexities posed by antenuptial agreements. Whereas the Massachusetts legislature has enacted statutes governing the barring of dower by jointure or pecuniary provision and governing the validity of contracts to be performed during marriage, the legislature should now follow the lead of the Massachusetts Supreme Judicial Court and of other state courts by enacting legislation to govern antenuptial contracts of the *Rosenberg* genre. As previously noted, the problems inherent in these contracts have proven troublesome for hundreds of years, and strict statutory safeguards could substantially eradicate these problems.

Indeed, the Massachusetts legislature should consider the need for legislation in light of the *Rosenberg* decision. A Massachusetts statute should flatly require both full disclosure of assets by the spouses and full disclosure of the nature and extent of the rights relinquished. The statute should also require consideration which is fair and reasonable under the circumstances and indicate the criteria for sufficient consideration such as the performance of marriage, mutual waivers, and monetary provision for the survivor. Since, under such a statute, full disclosure of assets and of the marital property rights would be made, any waiver clause would not require painstaking specificity. A general waiver clause would suffice.

IV. DRAFTING AN ANTENUPTIAL AGREEMENT UNDER *ROSENBERG*

In the wake of the *Rosenberg* decision, the Massachusetts attorney is challenged to draft an antenuptial agreement which will meet the ambiguous requirements postulated by the *Rosenberg* rule. Under the *Wellington* standard,[151] any conduct short of fraud was permissible;[152]

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150. The government has, for many years, seen fit to provide for the surviving spouse and family. The "legislative history on the law pertaining to intestate estates manifests a purpose to protect a surviving spouse and a family unit before considering other relatives outside the immediate family." J. LOMBARD, 31 MASS. GEN. LAWS ANN. ch. 190, at 3 (West). The law also provides an allowance for the maintenance and sustenance of the surviving family immediately following death of the spouse. *See* MASS. GEN. LAWS ANN. ch. 196, §§ 551-52 (West Supp. 1979). However, the Commonweath has virtually disinherited the surviving spouse by amending the laws pertaining to dower. *Compare* MASS. GEN. LAWS ANN. ch. 189, § 1 (Ter. Ed. 1932) (surviving spouse has a life estate in one-third of all land owned by the deceased spouse) *with* MASS. GEN. LAWS ANN. ch. 189, § 1 (West Supp. 1970) (survivor receives a life estate in one-third of the land which deceased spouse owned at death). The courts, recognizing the importance of the marital property rights, have forbidden spouses the complete contractual freedom to dispose of their property as they please. *See* Eaton v. Eaton, 233 Mass. 35, 37, 124 N.E. 37, 40 (1919).

151. The standard propounded by the *Wellington* decision was fraud. *See* Wellington v. Rugg, 243 Mass. 30, 35, 136 N.E. 831, 834 (1922). *See also* notes 4, 66 and accompanying text *supra.*

152. *See* Wellington v. Rugg, 243 Mass. 30, 35, 136 N.E. 831, 834 (1922).

therefore, scrupulous, professional supervision was not necessary.[153] With the adoption of the *Rosenberg* rule, a client's interest is best served by an attorney who comprehends the need for judicious drafting.

A. The Role of the Attorney

The combined mystical, romatic, and economic aspects of marriage make the antenuptial agreement a difficult instrument to draft. Ideally, the couple would approach the situation rationally, viewing the agreement realistically as a transaction designed to secure a mutually agreeable disposition of property. The prospective spouses would voluntarily make full disclosure of assets, with review provided by independent counsel. However, courts and legislatures must monitor the execution and performance of these agreements since history has taught that spouses abuse the contract.[154]

When consulted, the attorney will be influential in regulating the environment in which the antenuptial agreement is drawn, executed, and performed. Agreements of this type are utilized to avoid future dispute. Therefore, it is in the best interest of the spouses to be honest with each other, and this honesty should be promoted by the attorney.[155] Counsel should urge disclosure of assets and of other pertinent information, aiding the efficient settlement of the estate. This would constructively limit the grounds for contesting the agreement.

Each spouse should be represented by separate counsel.[156] The spouses have differing interests, and one spouse's attorney should not handle the entire process of drafting, execution, and performance. Representation by separate counsel would be a safeguard against fraud, duress, or undue influence. In essence, the agreement should be the culmination of negotiation among the spouses and their respective attorneys.

B. Practical Suggestions

Counsel should exercise foresight when called upon to draft an antenuptial agreement. The attorney should draft the agreement knowing that the burden of proving the invalidity of the agreement will rest upon the party contesting it. The drafting attorney must also remember that if the provision made for the surviving spouse is either grossly in-

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153. *Id.*

154. *See* Wolsen, *supra* note 9, at 1135-36.

155. Cathey, *Antenuptial Agreements in Arkansas — A Drafter's Problem*, 24 ARK. L. REV. 275, 290 (1970).

156. *See* note 95 and accompanying text *supra*.

adequate or disproportionate to the value of the estate, then a presumption of fraudulent concealment will arise. The burden of proof of adequate disclosure will then be shifted to the estate.[157]

The attorney should anticipate conflicts of law problems arising from changes in residence, in location of assets, or in the nature of the assets. If the contract is designed to include real property assets, special attention should be given to local property laws.[158] With regard to personal property, the attorney should consider a clause declaring Massachusetts law to be governing notwithstanding a change in domicile or in location of nonrealty assets.[159] As a general rule, an attorney should be aware that choice of law clauses will be upheld as long as they are reasonable and are not the product of an adhesion contract.[160]

The agreement should avoid any reference to divorce or separation. Antenuptial agreements anticipating divorce have been struck down as violative of public policy.[161] A *Rosenberg* type agreement is a very specific type of premarital settlement, and its terms should address only the disposition of property at death. A will executed subsequent to the couple's marriage should specifically state the effect the will is to have upon the antenuptial agreement.[162]

When the antenuptial agreement provides for a spouse to receive less than the statutory share, a specific statement to this effect should appear in the contract.[163] Such a statement should be sufficient to overcome a presumption of fraudulent concealment if the agreement is later contested.[164] The *Rosenberg* mandate of disclosure should caution an attorney to outline carefully each spouse's financial position. The statement should address real property, checking accounts, savings accounts, cash, stocks, bonds, and any personal property worth more

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157. *See, e.g.,* Del Vechhio v. Del Vecchio, 143 So.2d 17, 19 (Fla. 1962) (court presumed concealment where, without disclosure, a man worth a half million dollars provided his prospective wife with a home in Washington, D.C., in return for a release of her claims upon his property); Watson v. Watson, 5 Ill.2d 526, 529, 126 N.E.2d 220, 223 (1955) (husband with extensive land holdings agreed to give wife $1,000 in lieu of all her claims to his estate; the court found the provision grossly disproportionate); *In re* Kaufman's Estate, 404 Pa. 131, 139, 171 A.2d 48, 52 (1961) (court upheld agreement and rejected woman's claim that she would have received more after probating deceased husband's estate than she did under the agreement) (the husband agreed to devise a Palm Springs estate, a life interest in the income of a large trust, and a large portfolio of stocks to the wife); *In re* McClellan's Estate, 365 Pa. 401, 405-06, 75 A.2d 595, 597 (1950) (court found unreasonable and grossly inadequate the promise of a wealthy doctor with assets totalling over a million dollars to give his wife $5,000 in lieu of her claims). *See also* note 5 *supra.*

158. *See* RESTATEMENT OF CONFLICT OF LAWS 238(b) (1934). *See generally* Cathey *supra* note 155.

159. *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW, 478-80 (3rd ed. 1977).

160. *Id.* at 100.

161. *See* note 12 *supra.*

162. *See* notes 35-37 *supra.*

163. *See* Cathey, *supra* note 155, at 290.

164. *See* note 133 and accompanying text *supra.*

than five hundred dollars.[165] Additionally, when a couple's willingness to execute the agreement is not dependent upon their respective financial positions, this should be noted in the agreement.[166]

A properly drafted agreement is a piece of scrupulous engineering. It should evidence both the gravity of the exchange and the circumstances giving rise to the contract. Just as in a will, the antenuptial agreement should be viewed with an eye for symbolic formality.[167] Couples should be aware of the need for completeness, cooperation, and prudence in the drafting stage. Wise drafting can lead to a smooth, efficient distribution of property upon the death of a spouse. The problems traditionally presented by the premarital contract are ancient relics. However, to make the agreement effective for present needs, the difficulties inherent in the litigation of the contract must be eradicated. Until the legislature acts, a prudent attorney could be an invaluable component in that process.

CONCLUSION

By abandoning *Wellington,*[168] Massachusetts law became consistent with the majority of American jurisdictions to the extent that fraud is no longer necessary to vitiate an antenuptial agreement.[169] These agreements are now governed by the *Rosenberg* rule.[170] Due to the underlying presumption of confidentiality coloring these agreements, courts must look beyond general contract principles when scrutinizing them, and consider the actual knowledge of the surviving spouse or impute constructive knowledge where it is reasonably within the power of the surviving spouse to make an intelligent decision.

However, the impact of the new rule is unclear despite the adoption of a seemingly liberal standard of review. It appears that both parties are being held to a high level of expertise when executing premarital contracts. Therefore, it is advisable for couples utilizing these contracts to obtain separate counsel and to negotiate the terms of the agreement following full disclosure of assets.

Although other types of interspousal contracts have been codified in Massachusetts,[171] antenuptial agreements of the *Rosenberg* genre are

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165. *See* Gamble, *supra* note 20, at 734.

166. *See* Cathey, *supra* note 155, at 290-91.

167. *See* Gulliver & Tillson, *Classification of Gratuitous Transfers,* 51 YALE L.J. 1, 2-10 (1941).

168. Wellington v. Rugg, 243 Mass. 30, 136 N.E. 831 (1922). *See also* notes 4, 64-70 and accompanying text *supra.*

169. *See* notes 5, 71 and accompanying text *supra.*

170. *See* notes 90-143 and accompanying text *supra.*

171. Specifically, these are the contract barring dower by jointure or pecuniary provision and the contract contemplating performance during marriage. *See* notes 9 and 10 and accompanying text *supra.*

not governed by statute. Legislation is needed which would mandate both full disclosure of assets and of marital property rights. Moreover, the statute should require that the agreement be supported by fair and reasonable consideration. Finally, a clear standard of review should be set forth. With such codification, the legislature would be reaffirming its interest in the protection of the family unit. Furthermore, couples would have an efficient means for effectuating their desires concerning the disposition of property at death. Finally, courts would have clear guidelines when evaluating these agreements.

The *Rosenberg* decision has opened the door for new and expansive use of antenuptial contracts. Couples with special concerns may exercise prudence by utilizing an antenuptial contract of the *Rosenberg* type. The attorney, in his/her role as counsellor, will be an integral part of this process.

DANA D. EILERS

The Patentability of Living Organisms Under 35 U.S.C. § 101: *Parker v. Bergy (Parker v. Chakrabarty)*

Congress has been granted the power by the Constitution, "to promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries."[1] Toward this end, Congress has diligently provided a statutory framework to secure protection for inventors' creations.[2] Patents now embrace a wide ranging spectrum of discoveries that are becoming increasingly complex and sophisticated. Within the rapidly changing field of genetic technology it is probable that scientific advances will surpass the scope of patent coverage.[3] The concern raised by this likelihood is that meritorious advances may be excluded from patent protection by failing to fit within any present category of statutory subject matter.

On October 29, 1979, the United States Supreme Court, in the consolidated cases of *Parker v. Bergy*[4] and *Parker v. Chakrabarty*[5] agreed

1. U.S. CONST. art. I, § 8, cl. 8. This provision of the Constitution is actually two propositions merged into one. The clause which permits "Writings" refers to protection for copyrights. In addition, the word "discoveries" refers to constitutional protection granted for patents. *See* H.R. REP. NO. 1923, 82nd Cong., 2d Sess. 4 (1952); S. REP. NO. 1979, 82nd Cong., 2d Sess. 3 (1952), *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 2394-98.

2. The patent laws are presently codified in 35 U.S.C. § 1 *et seq.* (1976). *See* 1 A. DELLER, DELLER'S WALKER ON PATENTS §§ 1-82 (2d ed. 1964). Deller outlines the scope of the statutes and refers to the legislative history of our present patent laws. *See generally* Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 18 GEO. WASH L. REV. 50 (1949).

Procedurally, a patent application is first reviewed by a Patent and Trademark Office Examiner. If rejected, an applicant can petition the P.T.O. Board of Appeals for review. Any subsequent appeal is brought before the Court of Customs and Patent Appeals. Finally, an unsatisfied party may seek relief by petitioning the United States Supreme Court.

3. *See* H. EDELBUTE, MICROBIOLOGICAL APPLICATIONS AND PATENTS, ENCYCLOPEDIA OF PATENT PRACTICE AND INVENTION MANAGEMENT 567 (Calvert ed. 1964). The commentator presents his position that the patent statutes should be effectuated to meet the exigencies of modern industry and technology. To encourage inventions that benefit society, including the development of microorganisms, is to fulfill the mandate of the Constitution. *See also How Genetech Made Human Insulin*, NEW SCIENTIST, Sept. 28, 1978, at 926 (company scientists produced insulin through recombinant DNA procedures in possible violation of federal law). *See generally Genetic Engineers Plug Brain Gene Into Bacteria*, NEW SCIENTIST, Nov. 10, 1977, at 333.

4. Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979), *cert. granted*, No. 79-136 (U.S., Oct. 29, 1979).

5. Parker v. Chakrabarty, 596 F.2d 952 (C.C.P.A. 1979), *cert. granted*, No. 79-136 (U.S., Oct. 29, 1979).

to decide whether forms of life are proper subject matter for a patent coverage.[6] The simple living organisms created by Dr. Bergy and Dr. Chakrabarty may well fit into one of the categories of patentable subject matter[7] — indeed, living organisms when incorporated into processes have been patented before[8] — however, it is the spectre of patenting more complex forms of genetically engineered products that presents cause for reflection. It is argued that if we patent these genetically engineered microorganisms, there will be no impediment to patenting more sophisticated life forms — such as genetically created humanoids.[9] Thus, the decision, when rendered, will have far reaching

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6. In brief, section 101 enumerates the following four categories of patentable subject matter: (1) useful processes; (2) machines; (3) items manufactured; and (4) compositions of matter. 35 U.S.C. § 101 (1976). Part II of this comment analyzes judicial decisions interpreting the scope of these four classes. *See* notes 21-37 and accompanying text *infra*. In addition, the fifty states have been preempted from enacting patent statutes of their own since Congress has exercised constitutional authority in this area. U.S. CONST. art. VI. *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (preemption is based upon the concept that state legislative authority is displaced when Congress, acting within the scope of its powers, enacts conflicting and/or superseding statutes).

7. *See* notes 21-32 and accompanying text *infra*.

8. *See* City of Milwaukee v. Activated Sludge, Inc., 69 F.2d 577 (7th Cir. 1934), *cert. denied,* 293 U.S. 576 (1934) (process for purifying sewage, which employed live bacteria, was held to be patentable statutory subject matter); Cameron Septic Tank Co. v. Village of Saratoga Springs, 159 F. 453, 460-63 (2d Cir. 1908), *cert. denied,* 209 U.S. 548 (1908) (living bacteria used in the production of the original septic tank); *Ex parte* Prescott, 19 U.S.P.Q. 178, 180 (Pat. Of. Bd. App. 1932) (bacteriological production of butyl and isopropyl alcohol held patentable). In addition, the C.C.P.A. majority in *Bergy* cited numerous examples where living organisms themselves have been held to be patentable subject matter:

> The following are *typical* of living matter patented as compositions of matter and are by no means exhaustive . . .
>
> 1) Bacteria . . . 1963 . . . [r]eference to the patent file indicates emphasis on the living character of the composition, and of synergistic effects.
>
> 2) Yeasts . . . 1959 . . . [c]laim 21 is drawn to dry baker's viable yeasts comprising the yeast. . . .
>
> 3) Yeasts and Bacteria . . . 1933. . . .
>
> 4) Mushroom mycellia . . . 1941 . . . [c]laims 1-10 are drawn to pulps overgrown with mushroom mycellium.
>
> 5) *Virus* . . . 1942 . . . distemper virus vaccine . . . cholera virus . . . live polio viruses made by a specified process.
>
> 6) *Plant seeds* . . . 1963 . . . seed covered with medication.
>
> 7) *Eggs* . . . 1963 . . . egg treated by the method of addition of hormones. . . .

Parker v. Bergy, 596 F.2d 951, 985-86 (*citing* Daus, *Microbiological Plant Patents,* 10 IDEA 87 (1966)) (emphasis added).

9. The possibility of creating humans and other forms of life has been a subject of discussion in Congress. Indeed, the following remarks of Senator Nelson of Wisconsin indicate this concern:

> As soon as you discuss patenting living organisms, people have visions of 1984 . . . "I'm not sure the court's ruling [in Parker v. Bergy] is quite as limited as it says," asserts one corporate attorney. "It raises the question of whether ultimately someone could patent a human being — and that should be up to Congress, not to a couple of judges."
>
> [W]hether such inventions should be patentable . . . ought to be a major policy question in its own right.

124 CONG. REC. S. 7883-84 (daily ed. May 19, 1978) (remarks of Sen. Nelson, *quoting* Otten, *Politics and People,* Wall St. J., Jan. 26, 1978, at 18, col. 3). *See* Noonan, *Patentability of Micro-Organisms: Legal Control of Life,* 47 U.M.K.C. L. REV. 130, 130 n.6 (1978) (the author colorfully

ramifications in the scientific community since the Court will decide whether patents should be granted on discoveries in the field of genetic engineering.

This comment will analyze *Bergy* and *Chakrabarty* in an attempt to determine how far, if at all, their holdings have extended the boundaries of patent law. Part I will discuss the history of the cases, and outline what types of subject matter are patentable under section 101 of the patent statutes.[10] In Part II, patent case law will be analyzed in order to assess whether it provides precedent for patenting living organisms. Since plant patent legislation has been traditionally viewed as the sole patent extension for living things, Part III will examine the legislative history of the Plant Patent Act[11] to ascertain whether it precludes the patentability of other life forms. Finally, Part V will discuss the ethical and policy considerations concerning the desirability of patenting living matter. In conclusion, the author will comment on the implications of the *Bergy* and *Chakrabarty* cases, and assess their probable outcome when adjudicated by the United States Supreme Court.

I. *PARKER V. BERGY*[12]

When initially faced with the issues raised in *Bergy* and *Chakrabarty,*[13] the Supreme Court remanded the case to the Court of Customs and Patent Appeals (C.C.P.A.) for consideration under section 101 of the Patent Act[14] and in light of its holding in *Parker v. Flook.*[15] In *Flook,* the Supreme Court rejected a patent claim for a

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illustrates a genetically created human as a potential "Frankenstein — alive, but grotesque and misshapen"). *But see* 124 CONG. REC. S. 6214 (daily ed. April 24, 1978) (remarks of Sen. Schmitt, *paraphrasing* Davis, *DNA Research Scare,* Wall St. J., April 5, 1978, at 18, col. 4) Senator Schmitt states that potential hazards of recombinant DNA research are overblown, and that careful consideration should be given to research in this area lest "we regulate present and future generations out of the benefits of new science and the application of such science."

10. 35 U.S.C. § 101 (1976).

11. 35 U.S.C. §§ 161-64 (1976). Note, however, that not all classes of plants are covered by the Plant Patent Act. For example, propagated plants such as corn, wheat, and soybeans are expressly excluded.

12. For purposes of reconsideration, *Bergy* and *Chakrabarty* were consolidated by the Court of Customs and Patent Appeals. Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979).

13. *In re* Bergy, 563 F.2d 1031 (C.C.P.A. 1977), *vacated and remanded sub nom.* Parker v. Bergy, 438 U.S. 902 (1978), *aff'd on rehearing,* 596 F.2d 952 (C.C.P.A. 1979), *cert. granted,* No. 79-136 (U.S., Oct. 29, 1979); *In re* Chakrabarty, 571 F.2d 40 (C.C.P.A. 1978), *cert. denied,* Banner v. Chakrabarty, 439 U.S. 801 (1978), *aff'd on rehearing,* Parker v. Chakrabarty, 596 F.2d 952 (C.C.P.A. 1979), *cert. granted,* No. 79-136 (U.S., Oct. 29, 1979).

14. 35 U.S.C. § 101 (1976).

15. 437 U.S. 584 (1978). In *Flook,* a method for updating alarm limits in a catalytic conversion process was held unpatentable under 35 U.S.C. § 101 because the method of calculation used, although part of a larger process, was held not to be proper statutory subject matter. *Id.* at 592-96. For an analysis of *Bergy* in light of *Flook, see* notes 73-98 and accompanying text *infra.*

computer program, holding that the application failed to conform with the subject matter requirements under the Act.[16] Thus, an analysis of patentable subject matter under the Patent Act is central to an understanding of both *Flook* and *Bergy*. Additionally, an understanding of patentable subject matter is essential because of the intricate technologies employed in the applications of *Bergy* and *Chakrabarty*. In sum, an explanation of section 101 will better facilitate comprehension of the subsequent history of *Bergy*.

A. Patentable Subject Matter

Section 101 specifies four classes of subject matter under which inventions or discoveries can be patented.[17] The statute mandates that a patent be granted for the discovery or invention of "any new and useful process, machine, manufacture, or composition of matter."[18] The terms "new" and "useful" are separate and distinct requirements which must be determined after the claimed invention or discovery is deemed to be proper statutory subject matter.[19] In examining *Bergy*, there is only need to analyze the classifications of patentable *subject matter*, in that none of the courts which have dealt with *Bergy* have reached either the "new" or "useful" prerequisites.[20]

The four categorizations of patentable subject matter are:

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16. Parker v. Flook, 437 U.S. 584, 592-96 (1978).

17. 35 U.S.C. § 101 (1976).

18. *Id.*

19. Both the "new" and "useful" prerequisites are restated in subsequent sections of the Patent Act and are not interjected into the patent granting process until the subject matter requirements of section 101 are met. Illustrating this point, a document executed contemporaneously with the codification of the statutes states:

> Part II relates to patentability of inventions and the grant of patents. Referring first to section 101, this section specifies the type of material which can be the subject matter of a patent. Section 101 sets forth the subject matter that can be patented "subject to the conditions and requirements of this title" . . . and Section 102 covers the conditions relating to novelty.

H.R. REP. NO. 1923, 82d Cong., 2d Sess. 4 (1952); S. REP. NO. 1979, 82d Cong., 2d Sess. 3 (1952), *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 2394, 2398-99. *See generally* S. MONSMA, AMERICAN POLITICS: A SYSTEMS APPROACH (2d ed. 1973); Wasby, *Legislative Materials as an Aid to Statutory Construction: A Caveat*, 12 J. PUB. L. 262 (1963).

20. The following remarks of the *Bergy* court indicate that they were solely deciding whether the claims were patentable subject matter within the meaning of section 101:

> Admittedly, this is a case of first impression in the courts, which means, simply, that this court *has* to decide whether the biologically pure culture of Bergy and the newly created bacterium of Chakrabarty do or do not fall within the term "manufacture" or the term "composition of matter" in § 101.

Parker v. Bergy, 596 F.2d 952, 987 (C.C.P.A. 1979). Further, "whether they *otherwise* qualify for patents under § 102 and § 103 is a question not before us." *Id.* at 975.

processes,[21] machines,[22] manufactures,[23] and compositions of matter.[24] Since the courts have broadly construed these categories to cover a wide range of inventions, two categories may cover a single discovery.

A "process," as defined by the Supreme Court in *Cochrane v. Deener,*[25] "is a mode of treatment ... [by] an act, or a series of acts performed upon the subject matter to be transformed and reduced to a different state or thing." For example, in *Tilgham v. Proctor,*[26] the discovery was for the "process" of separating the component parts of fats and oils. A "process" or "method,"[27] however, can be distinguished from other subject matter classes in that it invokes a series of steps, whereas a claim drawn to a "machine" must differ in structure since it involves concrete or tangible parts.[28] For instance, a "machine" can be anything from a railroad car to a piano.[29] However, where the resulting product is the consequence of chemical action, or a power of nature, the product is considered to be a "process."[30] A "manufacture" is a product of physical labor or machinery. Courts have liberally interpreted the term "manufacture" to include whatever new products are made through the art of industry by man.[31] A "composition of matter" includes "all compositions of two or more substances ..., [and] all composite products, whether they are the result of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids."[32]

In contrast, while courts have broadly construed the classes of subject

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21. 35 U.S.C. § 101 (1976).

22. A machine is any system formed or connected to alter, transmit, or direct applied forces to accomplish a specific objective. Mechanical devices are the most commonly patented types of machine discoveries. *See* A. DELLER, *supra* note 2, at § 16.

23. The term manufacture has been broadly interpreted. For instance, the committee reports regarding the 1952 revision of the patent laws stated that: "[A] person may have invented a machine or manufacture *which may include anything under the sun made by man* ...." H.R. REP. NO. 1923, 82d Cong., 2d Sess. at 6, *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 2394, 2399 (emphasis added). *But see* Anheuser Busch Ass'n v. United States, 207 U.S. 556 (1907) (wherein a manufacture did not evidence a significant enough change to qualify for patent protection); American Fruit Growers, Inc. v. Brogdex Co., 283 U.S. 1 (1931) (the mere injection of a mold into citrus fruit did not constitute a manufacture).

24. *See* A. DELLER, *supra* note 2, at § 18.

25. 94 U.S. 780, 787-88 (1876).

26. 102 U.S. 707 (1880).

27. A process and/or method are interchangeable terms for purposes of patent law construction. *See* A. DELLER, supra note 2, at § 15.

28. A. DELLER, *supra* note 2, at § 16. *See also Ex parte* Forsyth and Hancher, 151 U.S.P.Q. 55 (P.T.O. Bd. of App. 1965).

29. *See* A. DELLER, *supra* note 2, at § 16.

30. *See, e.g.,* Corning v. Burden, 56 U.S. (15 How.) 252, 267 (1853); P.E. Sharpless Co. v. Crawford Farms, Inc., 287 F. 655, 658 (2d Cir. 1923).

31. *See* A. DELLER, *supra* note 2, at § 17.

32. *Id.* at § 18.

matter, they have also delineated certain areas of subject matter that fall outside the purviews of patent coverage. For example, a subject matter is not patentable where its novelty consists merely of an arrangement of printed matter.[33] The same holds true for a phenomenon of nature which is the basic tool for scientific and technological research,[34] a mathematical formula,[35] or a power of nature used in its natural state.[36] Generally, where the bare phenomenon of the subject matter itself is a thing attempted to be patented, exclusion from coverage is the result.[37] Thus, the inquiry in *Bergy* is whether the subject matter wholly encompasses a natural phenomena, or whether it merely recites a non-naturally occurring composition of matter which is the tool for utilizing the phenomena to produce a novel result.

Although the living organisms created by *Bergy* and *Chakrabarty* might be categorized as "manufactures" or "compositions of matter" under section 101, the Patent and Trademark Office (P.T.O.) asserts they are neither.[38] Rather, the P.T.O. claims that the organisms are either "products of nature" or living things; natural phenomena outside the ambit of patentable subject matter.[39] Secondly, the P.T.O. contends that plant patent legislation is the sole extension of the patent laws covering living substances.[40] Therefore, unless they are plants, all living matter is excluded from patent coverage. Thirdly, the *Bergy* patents should be denied because of the Supreme Court decision in *Flook* which stated that patent law should not be extended into areas wholly unforeseen by Congress.[41]

B. Application of Bergy

Malcolm Bergy, John Coats, and Vedpal S. Malik of the Upjohn Company[42] submitted a patent application for a process which utilized the microorganism *Streptomyces vellosus* to produce the antibiotic lincomycin with increased efficiency.[43] The application claims the

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33. *See* Conover v. Coe, 99 F.2d 377 (D.C. Cir. 1938) (arrangement of a detachable railway ticket was held unpatentable).

34. *See* Gottschalk v. Benson, 409 U.S. 63 (1972).

35. *Id.* In *Gottschalk*, a mathematical formula was such an integral part of a computer program that the essence of the program was the formula itself. *Id.* at 72.

36. For example, electro-magnetism (a natural phenomenon) used in developing the first telegraph system, was held unpatentable as it was a power of nature used in its natural form. *See* O'Reilly v. Morse, 56 U.S. (15 How.) 61 (1853).

37. Parker v. Bergy, 596 F.2d 952, 996 (C.C.P.A. 1979) (Baldwin, J., concurring).

38. *Id.* at 971.

39. *Id.*

40. Petition for a Writ of Certiorari for the Acting Commissioner of Patents and Trademarks at 5, Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979).

41. *Id.* at 3.

42. Throughout the remainder of the text the inventors will be collectively referred to as Bergy.

43. In effect, when attempting to produce a presently known antibiotic, Bergy discovered a

discovery of a purified form of the living microorganism and the process in which it is used. Patent claims 1-4 of the Bergy application indicate the manner in which the process functions; the process does not function without this particular form of microorganism, nor does the microorganism have any known use outside of the process.[44] Subsequently, claim 5 was added to the application and has developed into the pivotal claim in the case. Claim 5, a rewording of claims 1-4, claims discovery for the microorganism itself in its purified or isolated form.[45]

The Examiner for the Patent and Trademark Office (P.T.O.) rejected the Bergy application on the basis of claim 5. Specifically, the Examiner contended that claim 5 was not statutory subject matter because the microorganism was a "product of nature."[46] Bergy filed for reconsideration of the Examiner's rejection, supporting his second request with the affidavits of three scientists noted in the field of microbiology. In essence, these scientists stated that Bergy's purified form of microorganism was not a "product of nature." Rather, they stated that the microorganism was the product of the microbiologist who isolated *Streptomyces vellosus* in its purified state.[47] However, the P.T.O. Ex-

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new microorganism. The abstract of the Bergy patent claim illuminates the process:

> Microbiological process for preparing the antibiotic lincomycin at temperatures ranging from 18°C. to 45°C. using the newly discovered microorganism *Streptomyces vellosus*. The subject process advantageously results in the preparation of lincomycin without the concomitant production of lincomycin B (4'-depropyl-4'-ethyllincomycin). The absence of lincomycin B production results in increased lincomycin recovery efficiency.

The newly discovered microorganism (NRRL 8037) was deposited at the Northern Regional Research Laboratory, Peoria, Illinois. Parker v. Bergy, 596 F.2d 952, 967 (C.C.P.A. 1979).

44. Patent claims 1-4 describe the process which utilizes the microorganism, *Streptomyces vellosus*. This is a "novel process for preparing the antibiotic lincomycin which comprises cultivating *Streptomyces vellosus*, having the identifying characteristics of NRRL 8037, and lincomycin-producing mutants thereof, in an aqueous nutrient medium under aerobic conditions until substantial antibiotic activity is imparted to said medium by the production of lincomycin." As noted by the *Bergy* court, lincomycin is a useful pharmaceutical product. Parker v. Bergy, 596 F.2d 952, 967-68 (C.C.P.A. 1979).

45. Claim 5 reads: "A biologically pure culture of the microorganism *Streptomyces vellosus*, having the identifying characteristics of NRRL 8037, said culture being capable of producing the antibiotic lincomycin in a recoverable quantity upon fermentation in an aqueous nutrient medium containing assimilable sources of carbon, nitrogen and inorganic substances. Claim 5 is a claim for the microorganism itself." *Id.* at 967.

46. *Id.* at 971. Furthermore, the P.T.O. examiner cited the case of *In re Mancy*, where a patent claim was rejected for a microorganism that was aerobically cultivated. This was a process similar to that used in *Bergy*. *See In re* Mancy, 499 F.2d 1289 (C.C.P.A. 1974). *See also* notes 121-41 and accompanying text *infra*.

47. Of significance is the fact that the microbiologists who supported Bergy's claim work for the Upjohn Company, as does Bergy. A Dr. Grady stated that, "[i]t is only by the discovery and skills of the microbiologist that biologically pure cultures of microorganisms come into existence." Microbiologist Alma Dietz noted that "[m]icroorganisms found in the soil are complex in kind and cannot be taxonomically characterized without first producing a biologically pure culture." This clearly establishes that the "biologically pure culture" of Claim 5 is *not* found in nature; it is the product of the microbiologist. Finally, Dr. Miller summed up the support for

aminer again rejected claim 5, reasserting his position that the microorganism was a "product of nature."[48]

Subsequently, Bergy petitioned the P.T.O. Board of Appeals to review his application. The Board of Appeals rejected the application on the basis that the microorganism was a "living thing" and, therefore, not patentable under section 101.[49] The Board of Appeals, basing its rejection on the animateness of the microorganism, disregarded the "product of nature" doctrine enunciated by the Examiner. Although products of nature and living things are related patent concepts, the Board of Appeals did not mention the former theory until the end of their holding. At that point, the Board stated that there was no "need to decide the product of nature issue."[50] Furthermore, the Board based its rejection of the Bergy application on its reading of the Plant Patent Act[51] and the Plant Variety Protection Act of 1970,[52] reasoning that there would have been no need for the enactment of plant patent legislation had Congress intended to include living things under section 101 of the Patent Act.[53]

On appeal, the Court of Customs and Patent Appeals (C.C.P.A.) reversed the P.T.O. decision and held Bergy's claim to be patentable statutory subject matter.[54] The C.C.P.A. determined that the living microorganism of Bergy's claim 5 fell within the categories of statutory subject matter enumerated in section 101. The C.C.P.A. reasoned that the purified organism could not have existed but for the efforts of the microbiologist. Thus, it was entitled to classification as either a "manufacture" or "composition of matter."[55]

The Solicitor General, on behalf of the P.T.O., appealed the C.C.P.A. decision to the United States Supreme Court. Consequently,

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Bergy by stating: "It is clear to me that the 'biologically pure culture' of Claim 5 is a product of the microbiologist and *not* a product of nature." Parker v. Bergy, 596 F.2d 952, 972 (C.C.P.A. 1979).

48. *Id.* In essence, the statement of the P.T.O. examiner after the second hearing of the Bergy application best summarizes their basic contention, which was later rejected by the C.C.P.A. The examiner, in succinct terms, held: "Claim 5 is rejected under 35 U.S.C. § 101 as drawn to nonstatutory subject matter. Claim 5 defines a microorganism which is a product of nature. . . ." *Id.* at 972. For a discussion of the "product of nature" doctrine, *see* notes 37-39 and accompanying text *supra*.

49. Despite its holding that living organisms are unpatentable statutory subject matter, the P.T.O. Board of Appeals did not cite any case "directly on point" to support its proposition. *Id.* at 972. *Compare* notes 37-39 and accompanying text *supra*.

50. The C.C.P.A. commented on the Board's abdication of the "product of nature" basis for rejection: "The circumstances persuade us that the Board went in search of another reason to support the rejection because it realized the Examiner's rejection was untenable." *In re* Bergy, 563 F.2d 1031, 1035 (1977).

51. 35 US.C. §§ 161-64 (1976).

52. 7 U.S.C. §§ 2321-583 (1976).

53. Parker v. Bergy, 596 F.2d 952, 978 (C.C.P.A. 1979).

54. *In re* Bergy, 563 F.2d 1031, 1035 (C.C.P.A. 1977), *vacated and remanded sub nom.*, Parker v. Bergy, 438 U.S. 902 (1978), *aff'd on rehearing*, 596 F.2d 952 (C.C.P.A. 1979), *cert. granted*, No. 79-136 (U.S., Oct. 29, 1979).

the Supreme Court vacated the C.C.P.A. holding and remanded the case for further consideration "in light of Parker v. Flook."[56] On remand, the C.C.P.A. reasserted its earlier position, holding that Bergy was entitled to patent protection under its construction of section 101.[57] In reaffirming its holding, the C.C.P.A. relied on its original bases for analysis and support. In summary, the C.C.P.A. in *Bergy* held that section 101 as defined by case law does not preclude the patentability of an invention merely because part of it is "alive"; that the passage of plant patent legislation does not signify that Congress intended plants to be the only living organisms patentable under the Act; and that the Supreme Court's decision in *Flook* has little bearing on the facts and holding of *Bergy*.[58]

C. *Application of Chakrabarty*

Doctor Ananda Chakrabarty, a microbiologist at the General Electric Company, created a bacterium by genetic engineering that possessed the ability to devour oil slicks. In contrast to Bergy's isolation of a purified form of microorganism, Chakrabarty actually built or genetically engineered a microorganism.[59] The product developed by Chakrabarty was absolutely unique; by combining four enzymes into one package, Chakrabarty's resulting composition could degrade the basis components of crude oil.[60] Of the four groups of claims in Chakrabarty's application, two, claiming discovery of a process incorporating the bacterium were accepted, and two, claiming invention of the bacterium itself were rejected by the Patent and Trademark Office (P.T.O.) Examiner.[61] As in *Bergy,* the Examiner held that the genetically created

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55. *Id.* at 1037.

56. 437 U.S. 584 (1978). For a discussion of *Bergy* in light of *Flook, see* notes 73-98 and accompanying text *infra.*

57. Parker v. Bergy, 596 F.2d 952, 973 (C.C.P.A. 1979). For a discussion of the C.C.P.A. decision on remand, *see* notes 59-72 and accompanying text *infra.*

58. *Id.* at 965. For analysis of patent case law, *see* notes 99-141 and accompanying text *infra.* For an analysis of plant patent legislation, *see* notes 142-68 and accompanying text *infra.* For an analysis of Parker v. Flook, *see* notes 73-98 and accompanying text *infra.*

59. Chakrabarty invented a new strain of *Pseudomonas* (a bacteria species) having the unique capability of rapidly degrading oil. The development of this new strain was effectuated by transmitting four plasmids (*i.e.,* bacterial cells) into one bacterial cell — each plasmid retaining the capacity to degrade and digest various components of crude oil. Chakrabarty accomplished this development by fusing the plasmids together with DNA-splicing techniques. The recombined DNA structure resulted in stabilizing the four plasmids in a single bacteria cell. Unlike any previously known bacteria, Chakrabarty's bacteria could operate independently and expeditiously. The following NRRL specification illustrates the effect the bacterium has on oil:

> *Degradative pathway* . . . a sequence of enzymatic reactions (e.g., 5 to 10 enzymes are produced by the microbe) converting the primary substrate [*i.e.,* oil] to some simple common metabolite, a normal food substance for microorganisms.

In re Chakrabarty, 571 F.2d 40, 41-43 (C.C.P.A. 1978).

60. *Id.*

61. When compared to the rejected claims (Claims 7-9, 13, 15, 17, and 21), the accepted claims (Claims 27-29, 30-32, 35, and 36) seemingly differ only in form. For example, the accepted

bacterium could not have been invented by Chakrabarty because it was a "product of nature," and, therefore, unpatentable.[62] On direct petition to the P.T.O. Board of Appeals, Chakrabarty's application was rejected on the ground that the organism was a living thing.[63] In addition, in reasoning identical to that in *Bergy,* the Board founded its second ground for rejection on the enactment of plant patent legislation.[64]

On appeal, the C.C.P.A. reversed the P.T.O. Board of Appeals, holding that neither case law nor plant patent legislation excluded living matter from patentability under section 101.[65]

While the C.C.P.A. decision in *Chakrabarty* was being appealed to the Supreme Court, the Supreme Court remanded *Bergy* to the C.C.P.A. for rehearing in light of its decision in *Parker v. Flook.*[66] As a result of the *Bergy* remand, and because both *Bergy* and *Chakrabarty* involved similar subject matter, the C.C.P.A. vacated its own judgment in *Chakrabarty* and consolidated the two cases for reargument.[67] On rehearing, the C.C.P.A. firmly stated: "We adhere to our former decisions that Bergy's and Chakrabarty's appealed claims define subject matter that falls within the categories named in § 101 and are thus 'statutory subject matter.' "[68]

After the C.C.P.A. decision on rehearing, the Solicitor General on behalf of the Commissioner of Patents and Trademarks filed a petition for certiorari, challenging the C.C.P.A. holding that living organisms can be patented.[69] Specifically, the P.T.O. petition sets forth three contentions: First, that patent case law upholds the proposition that living matter is not patentable; second, the Plant Patent Act was passed because the former, and presently existing, statutes did not cover the

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claims describe the bacteria *Pseudomonas* in connection to its use with straw. The straw is inoculated with the bacteria and spread over an oil spill. In contrast, the rejected claims describe the bacteria *Pseudomonas* alone. *See* Parker v. Bergy, 596 F.2d 952, 970-71 (C.C.P.A. 1979).

62. *Id.* at 971. For a discussion of "product of nature," *see* notes 121-41 and accompanying text *infra.*

63. The P.T.O. Board of Appeals, similar to its decision regarding the *Bergy* claim, conceded that Chakrabarty's bacterium could not be rejected on the untenable ground that it was a "product of nature." *In re* Chakrabarty, 571 F.2d 40, 42 (C.C.P.A. 1978). *See* notes 121-41 and accompanying text *infra.*

64. *See* Parker v. Bergy, 596 F.2d 952, 971 (C.C.P.A. 1979).

65. *In re* Chakrabarty, 571 F.2d 40 (C.C.P.A. 1978), *cert. denied,* Banner v. Chakrabarty, 439 U.S. 801 (1978), *aff'd on rehearing,* Parker v. Chakrabarty, 596 F.2d 952 (C.C.P.A. 1979), *cert. granted,* No. 79-136 (U.S., Oct. 29, 1979). In sum, the *Chakrabarty* court upheld the patent application on the same bases as it decided *Bergy. See* Comment, *The Patentability of Living Organisms Under 35 U.S.C. § 101: In re Bergy,* 91 HARV. L. REV. 1357 (1978).

66. Parker v. Bergy, 438 U.S. 902 (1978).

67. Parker v. Bergy, 596 F.2d 952, 957 (1979) [hereinafter when not referring to the specific subject matter of each claim, the *Bergy* and *Chakrabarty* holding will be collectively cited as *Bergy*].

68. *Id.* at 973.

69. Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979), *appeal docketed,* No. 79-136 (U.S., Oct. 29, 1979).

patentability of living things; third, that the principles of construction regarding new technological subject matter, recently restated by the Supreme Court in *Parker v. Flook,*[70] apply to *Bergy* and *Chakrabarty* and exclude their respective claims from patent protection.[71] Following submission of the P.T.O. petition, the United States Supreme Court granted certiorari.[72]

D. In Light of Parker v. Flook[73]

An indication of the Supreme Court's posture towards patenting new technology can be derived by analyzing their initial disposition of *Bergy.*[74] As directed by the Supreme Court, the C.C.P.A. reheard *Bergy* and *Chakrabarty* "in light of Parker v. Flook."[75] On rehearing, the C.C.P.A. reaffirmed its prior holding.[76]

The Solicitor, on behalf of the Patent and Trademark Office (P.T.O.), contended that the Supreme Court's decision in *Flook* was a clear message to the C.C.P.A. that it should not extend patent coverage to living organisms. To sustain its position, the P.T.O. relies on a passage from *Flook,* wherein the Court stated that "[w]e must proceed with caution when asked to extend patent rights into areas wholly unforeseen by Congress."[77] Second, the P.T.O. asserts that *Flook* itself was decided on the authority of *Gottschalk v. Benson.*[78] In *Benson,* the Supreme Court rejected a process or method claim which involved a new technology.[79] Since *Bergy* also involves claims for processes employing new technologies, the P.T.O. argues that the rationale for

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70. For a discussion of subject matter construction under the Patent Act, *see* notes 73-98 and accompanying text *infra.*

71. Brief for the Acting Commissioner of Patents and Trademarks at 1-5, Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979).

72. Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979), *cert. granted,* No. 79-136 (U.S., Oct. 29, 1979).

73. 437 U.S. 584 (1978).

74. Parker v. Bergy, 438 U.S. 902 (1978).

75. *Id.* at 902.

76. Parker v. Bergy, 596 F.2d 952, 987 (C.C.P.A. 1979).

77. Parker v. Flook, 437 U.S. 584, 596 (1978). *See* Petition for a Writ of Certiorari for the Acting Commissioner of Patents and Trademarks at 3, Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979).

Although courts should not extend patent protection beyond the scope of the Patent Act, certainly the authors of our Constitution and the Congress could not have foreseen events such as a man on the moon, jet airplanes, or photocopiers. Indeed, over 50,000 patents per year are issued to inventors, many of which are ideas that were not even thought of twenty-five years ago. *See* Graham v. John Deere Co., 383 U.S. 1, 15, 18 (1966).

78. 409 U.S. 63 (1972), *rev'g sub nom. In re* Benson, 441 F.2d 682 (C.C.P.A. 1971).

79. Although the specific technologies in *Benson* (a mathematical formula) and *Bergy* (living microorganisms) were dissimilar, the fact that the technologies were both new processes or methods is the probable reason why the P.T.O. views them as similar. *See* Gottschalk v. Benson, 409 U.S. 63, 64-66 (1972).

rejecting the *Benson* and *Flook* claims should be applied to the *Bergy* claims.[80]

Third, the P.T.O. cites language from the Supreme Court holding in *Deep-South Packing Co. v. Laitram Corp.*[81] as evidence of the Court's intent to strictly construe patent law. In pertinent part, the Supreme Court stated:

> We would require a clear and certain signal from Congress before approving the position of a litigant who, as respondent here, argues that the beachhead of privilege is wider, and the area of public use narrower, than the courts have previously thought. No such signal legitimizes the respondent's position in this litigation.[82]

As correctly cited by the P.T.O., *Flook* was rendered on the basis of the Supreme Court holding in *Benson*. Correct also is the fact that both *Benson* and *Flook* involved method or process claims which were the subject of rejection.[83] However, no method or process claims are at issue in *Bergy*.[84] In fact, the process claims in *Bergy* and *Chakrabarty* were approved. Additionally, the Supreme Court in *Flook* limited the subject matter of their decision to mathematical principles. Specifically, the Court stated that, "[v]ery simply our holding today is that a claim for an improved *method of calculation,* even when tied to a specific end use, is unpatentable subject matter under § 101."[85] However, in *Bergy* no such method of calculation is claimed. The subject matter claimed in the respective cases is entirely different. Their only common link is that they are both technologically new processes. The products in *Bergy* were significantly altered (purified by Bergy; created anew by Chakrabarty) from their original state; if the scientists in *Bergy* had not intervened, the resulting products could not have been found to exist in nature. The same cannot be said of the method of calculation in *Flook*. Moreover, unlike *Flook,* in *Bergy* there is no attempt to patent subject matter traditionally excluded from patent coverage.[86]

The C.C.P.A. distinguished the heavily relied upon passage from

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80. Parker v. Bergy, 596 F.2d 952, 964-65 (C.C.P.A. 1979). *See also* Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (wherein the Court held that criteria for extension into new fields of patent coverage are to be strictly construed under the present statutes).

81. 406 U.S. 518 (1972). The issue in *Deep South* was whether the petitioner infringed a patent by selling unassembled parts of a machine. The unassembled parts were made up of patented combinations.

82. *Id.* at 531.

83. *See* notes 15-16 and 78-79 and accompanying text *supra.*

84. In fact, the P.T.O. has approved Bergy's process claims 1-4, and Chakrabarty's process claims 27-29. *See* notes 43-45 and 59-61 and accompanying text *supra.* It is possible, however, to view the method or process claim in *Benson* as merely a framework for an attempt to patent a mathematical formula itself. This is because the formula used in the method was so central to it, it actually was the method. *See* Gottschalk v. Benson, 409 U.S. 63, 64-66 (1972). *See also* text accompanying note 78 *supra.*

85. Parker v. Flook, 437 U.S. 584, 595 (1978).

86. As previously noted, neither the patent statutes nor case law directly supports the conten-

Deep-South concerning expanding the "beachhead" of patent law[87] as having been taken out of clear context by the P.T.O.[88] Although the Supreme Court did state that it would require a clear and certain signal from Congress before expanding the patent laws, the statement was made in reference to expanding territorial patent rights, not subject matter patent coverage.[89] While territoriality is fixed by statute and case law, patentable subject matter is still open to interpretation. Indeed, this premise is borne out by the fact that the C.C.P.A. regards *Bergy* as a case of first impression.[90]

The final contention raised by the P.T.O. was the Supreme Court's admonition in *Flook* that courts "must proceed cautiously when ... asked to extend patent rights into areas wholly unforeseen by Congress."[91] However, the Court did not illuminate any criteria for determining whether a certain field of subject matter was wholly unforeseen by Congress. It would be a mistake to assume that the Supreme Court intended that every new technological advance be considered by Congress before patent protection was granted. Surely, such an inflexible patent system would run counter to the flexible approach suggested by the Constitution.[92] In fact, there is doubt as to whether patenting living matter is an area wholly unforeseen. Congress has, indeed, granted protection for classes of living matter as can be evidenced by their enactments of the Plant Patent Act[93] and the Plant Variety Protection Act.[94] Arguably then, it is not automatic that granting a patent for novel living bacteria is an extension of the patent laws into an area *wholly* unforeseen by Congress. Perhaps the Supreme Court in *Flook* was reading nonexistent limitations into the patent statutes.[95] If so, its dicta and holding in *Flook* was justifiably interpreted by the C.C.P.A. as inapplicable to *Bergy*.

Although the *Bergy* and *Chakrabarty* applications both involve patenting living matter, the two patent claims are distinguishable. The microorganism claimed by Bergy was an extract of a fungal cell, purified to increase the efficiency of an antibiotic. The claim that it is a patentable "composition of matter" rests on the fact that it is

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tion that living matter is unpatentable. *See* 35 U.S.C. § 1 *et seq.* (1976). *See also* Wegner, note 122 *infra*. In fact, as the court in *Bergy* stated, this is a case of first impression. Parker v. Bergy, 596 F.2d 952, 984-85 (C.C.P.A. 1979).

87. Deep South Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972).

88. *See* Parker v. Bergy, 596 F.2d 952, 966 (C.C.P.A. 1979).

89. *Id.* at 966.

90. *Id.* at 967.

91. Petition for a Writ of Certiorari for the Acting Commissioner of Patents and Trademarks at 3, Parker v. Bergy, 596 F.2d 952 (C.C.P.A. 1979).

92. *See* notes 1, 6, 8, and 21-24 *supra*; notes 124, 134, and 142 *infra*.

93. 35 U.S.C. §§ 161-64 (1976).

94. 7 U.S.C. § 2321 *et seq.* (1976).

95. *See, e.g.*, United States v. Dubilier Condenser Corp., 289 U.S. 178, 199 (1933) (the Supreme Court stated that limitations should not be read into the patent laws that do not exist).

purified.[96] Therefore, Bergy's claim can be likened to those claims previously approved for other pure form products.[97] When compared, the product created by Chakrabarty is significantly different. The genetically engineered bacterium developed by Doctor Chakrabarty was a totally new, never before seen, microorganism. The microorganism was built by a recombinant DNA process; it was not just a purified form of a preexisting organism.[98] Like Dr. Frankenstein, Dr. Chakrabarty created a living thing. Thus, if there is any doubt as to whether *Bergy* raises the issue of patenting living matter, *Chakrabarty* removes it. Since *Bergy* and *Chakrabarty* have been consolidated by the C.C.P.A., now, before the United States Supreme Court lies the question — is life patentable?

II. Patent Case Law

Prior to the decisions in *Bergy*[99] and *Chakrabarty,*[100] neither the Patent and Trademark Office (P.T.O.) nor the Court of Customs and Patent Appeals (C.C.P.A.) had ever directly addressed the question of whether living matter itself was patentable under section 101. Notwithstanding, the P.T.O. relies on the dicta of two cases, *In re Mancy*[101] and *Guaranty Trust Co. of New York v. Union Solvents Corp.,*[102] to support its contention that living things have previously been held to be nonpatentable statutory subject matter.

In *In re Mancy,* the patent applicant claimed discovery for a new process that produced an antibiotic by aerobically cultivating a microorganism known as *Streptomyces bifurcus.* Upon review, the C.C.P.A. rejected the claim because it failed to meet the novelty requirement of section 102.[103] The C.C.P.A. did not, however, reject the claim for failure to fit under the enumerated classes of statutory subject matter.

While the dictum in *Mancy* appeared to support the proposition that

96. *See* notes 43-45 and accompanying text *supra.*

97. *See* note 8 *supra*; notes 124, 134, and 142 *infra.*

98. *See* note 59 and accompanying text *supra.*

99. *In re* Bergy, 563 F.2d 1031 (C.C.P.A. 1977), *vacated and remanded sub nom.* Parker v. Bergy, 438 U.S. 902 (1978), *aff'd on rehearing,* 596 F.2d 952 (C.C.P.A. 1979), *cert. granted,* No. 79-136 (U.S., Oct. 29, 1979).

100. *In re* Chakrabarty, 571 F.2d 40 (C.C.P.A. 1978), *cert. denied,* Banner v. Chakrabarty, 439 U.S. 801 (1978), *aff'd on rehearing,* Parker v. Chakrabarty, 596 F.2d 952 (C.C.P.A. 1979), *cert. granted,* No. 79-136 (U.S., Oct. 29, 1979).

101. 499 F.2d 1289 (C.C.P.A. 1974).

102. 54 F.2d 400 (D. Del. 1931), *aff'd per curiam,* 61 F.2d 1041 (3d Cir. 1932), *cert. denied,* 288 U.S. 614 (1933).

103. In reference to its rejection predicated upon lack of novelty, the C.C.P.A. stated the following:

> [N]ot only have [the applicants] no allowed claim to the novel strain of *Streptomyces* used in their process but would, we presume (without deciding), be unable to obtain such a claim because the strain, while new in the sense that it is not shown by any [prior] art of record, is, as we understand it, a "product of nature."

the C.C.P.A. would not affirm patents for living things, the *Bergy* court concluded that the *Mancy* claim was rejected for lack of novelty and nothing else.[104] Novelty was not at issue in *Bergy*.

Guaranty Trust, the second case relied on by the P.T.O. as "especially pertinent," and by the Solicitor as "judicial precedent,"[105] involved a patent for producing isopryl alcohol through a fermentation process utilizing a strain of bacteria discovered by its inventor.[106] Directly from the *Guaranty Trust* holding, the P.T.O. relied on the statement that "[w]ere the patent for bacteria per se, a different situation would be presented," as signifying that living organisms alone (apart from the process they are used in) would be unpatentable.[107] However, the question of whether bacteria per se could be patented was not the issue before the court in *Guaranty Trust.*[108] In fact, the court in that case *did not* uphold the contention that living matter was unpatentable.[109] Moreover, as the *Bergy* court noted, the *Guaranty Trust* holding supports the proposition that "processes, one of the categories of subject matter specified in Section 101, are uniformly and consistently considered to be statutory subject matter notwithstanding the employment therein of living organisms ...."[110] In fact, many prior judicial decisions have held that living organisms, when instrumental in a process, are considered patentable subject matter — regardless of the type of bacterium or microorganism involved.[111]

A further indication that the C.C.P.A. has not interpreted section

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In re Mancy, 499 F.2d 1289, 1294 (C.C.P.A. 1974).

104. The court reached this conclusion in both its first and second considerations of *Bergy* and went on to state:

> [*Mancy* involved] something pre-existing and merely plucked from the earth and claimed as such, [it is] a far cry from the biologically pure culture produced by great labor [in *Bergy*].
>
> Furthermore it appears to us, in light of what we have learned ... about the separation and identification of new strains of *Streptomyces,* that our dictum [in *Mancy*] was ill-considered. Had we known what we know, we would likely have abjured the stated presumption.

Parker v. Bergy, 596 F.2d 952, 976 (C.C.P.A. 1979).

105. *Id.* at 976.

106. 54 F.2d 400 (D. Del. 1931).

107. Parker v. Bergy, 596 F.2d 952, 977 (C.C.P.A. 1979) (*quoting* Guaranty Trust Co. of New York v. Union Solvents Corp., 54 F.2d at 401 (D. Del. 1931)).

108. In *Guaranty Trust,* the applicant was attempting to patent a bacteriological fermentation *process* to produce butyl alcohol and acetone. The applicant was not trying to patent *life itself. See* Guaranty Trust Co. of New York v. Union Solvents Corp., 54 F.2d 400, 401-03 (D. Del. 1931) (emphasis added).

109. *Id.* at 410.

110. Parker v. Bergy, 596 F.2d 952, 977 (C.C.P.A. 1979).

111. *See* note 8 and accompanying text *supra. See also* Dick v. Lederle Antitoxin Laboratories, 43 F.2d 628 (S.D.N.Y. 1930) (patent granted for the development of a scarlet fever antitoxin utilizing a microorganism in the process). In the initial C.C.P.A. decision regarding *Bergy,* the dissent cited the computer program line of cases to support its contention that processes which primarily rely on products of nature are unpatentable. By analogy to the computer cases, the dissent propounded that merely because a process involving a microorganism is patentable, it does not mean that the microorganism itself is patentable. As an example the dissent cited *In re*

101 to exclude living organisms from patentability can be found in its decision in *In re Merat.*[112] The applicant in *Merat* attempted to patent a process for an improved breed of chicken. The P.T.O. Examiner and the Board of Appeals held the process to be unpatentable, claiming that the hybrid chicken was not proper statutory subject matter.[113] Subsequently, the C.C.P.A. affirmed the rejection, but did so on the basis of section 112 of the Plant Patent Act, which requires precise identification of the item being patented.[114] Section 101 was not a basis for rejection by the C.C.P.A. Furthermore, although the C.C.P.A. rejected Merat's claim, the decision was not predicated on whether the chicken was proper statutory subject matter because it was "alive." Indeed, if the "life" characteristic of the chicken presented an impediment, one is left wondering why it was not used as a ground for rejection. Thus, it does not appear that the C.C.P.A. has settled the question of patentability of living organisms as is suggested by the P.T.O.

To support the position that the living organisms in *Bergy* were patentable, the C.C.P.A. noted the case of *Funk Bros. Seed Co. v. Kalo Inoculant Co.*[115] In *Funk Bros.*, the patent application was for a leguminous plant inoculant derived from a mixture of noninhibitive strains of bacteria useful in developing certain crops such as soybean and wheat. Before this invention, several inoculants were required to accomplish the same task that the new inoculant alone could now do.[116] The Court of Appeals for the Seventh Circuit held that the new inoculant was patentable because of the unique process utilizing it.[117]

However, the Supreme Court, with Justice Douglas writing the opinion, reversed the Court of Appeals on several grounds — none of which

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Waldbaum, 559 F.2d 611 (C.C.P.A. 1977), wherein a patent claim was approved for a process utilizing an algorithim, but certain claims were rejected for a patent of the algorithim itself. *See also* Gottschalk v. Benson, 409 U.S. at 65 (1972); *In re* Bergy, 563 F.2d 1031, 1041 (C.C.P.A. 1977).

However, Judge Miller, the dissenter in both the first and second *Bergy* cases, does not restate the computer case analogy in his second dissent. Instead, he objects to patent coverage for the Bergy microorganism on the sole basis of the Plant Patent Act. Presumably Judge Miller has disregarded the computer analogy because it failed to adequately support his objection. *See* Parker v. Bergy, 596 F.2d 952, 999-1002 (C.C.P.A. 1979).

112. 519 F.2d 1390 (C.C.P.A. 1975).

113. *Id.* at 1393.

114. 35 U.S.C. § 112 (1976). Section 112 of the Act provides:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

115. Parker v. Bergy, 596 F.2d 952, 993, 994 n.3 (C.C.P.A. 1979) (Baldwin, J., *concurring*) (*citing* Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948)).

116. Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 128 n.1 (1948).

117. Kalo Inoculant Co. v. Funk Bros. Seed Co., 161 F.2d 981, 985-87 (7th Cir. 1947). *See generally* Note, *Patent Law — Patentability as Affected by the Law of Nature Rules — The Kalo Doctrine,* 47 MICH. L. REV. 391 (1949).

rested on the ground that the inoculant employed a living substance. Instead, the inoculant was rejected because the combinations of bacteria used were the "work of nature."[118] The Court reasoned that something predominately the result of a "product of nature" is prior art, not man-made, therefore, not patentable under the then existing patent laws.[119] The Supreme Court did not, however, make any reference as to whether the "life" characteristic of the bacteria excluded it from the enumerated classes of patentable subject matter. For, if the bacteria per se was considered unpatentable because it was living, the Court could have relied on that basis alone for rejection. Hence, there would have been no need for the Court to use the more tenuous "product of nature" argument. In fact, the concurring opinion in *Funk Bros.* strongly intimates that certain living bacteria can be proper statutory subject matter.[120]

Apart from invalidating specific bacterial combinations from patent coverage, the *Funk Bros.* decision is noted for establishing the "product of nature" doctrine.[121] In essence, a "product of nature" is perceived as a naturally occurring element, either animate or inanimate, and as such unpatentable because it is not a man-made discovery.[122] The issue raised by this is whether something is a "product of nature" (unpatentable per se) or a "composition of matter" (patentable if it meets

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118. Of significance is the basis for the Court's product of nature rejection. As stated by Justice Douglas:

> The combination of species produces no new bacteria, no change in the six species of bacteria, and no enlargement of the range of their utility. Each species has the same effect it has always had. The bacteria perform in their natural way . . . [t]hey serve the ends of nature originally provided and act quite independently of any effort of the patentee.

Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130-31 (1948).

One article on this subject has noted that the "prior art" position taken by Justice Douglas may no longer be good law, because 35 U.S.C. § 103 (enacted after the *Funk Bros.* decision) limits the use of prior art and states that an inventor's subject matter should be "viewed as a whole at the time of its creation." Guttag, *The Patentability of Microorganisms: Statutory Subject Matter and Other Living Things,* 13 U. RICH. L. REV. 247, 261 (1979).

119. *Id.* at 132. For a reference to prior art, *see* notes 6, 25-27 and accompanying text *supra.*

120. The concurring opinion of Justice Frankfurter, with which dissenting Justices Burton and Jackson agreed, asserts that living bacterial combinations can be patentable subject matter. The patentee was only claiming a new composite of inoculant bacteria that had never previously existed. Frankfurter posited that this was not a patent for a "law of nature," and concluded by stating: "In finding Bond's patent invalid I have tried to avoid a formulation which, while it would in fact justify Bond's patent, would lay the basis for denying patentability to a large area within existing patent legislation." Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 134-36 (1948) (Frankfurter, J., *concurring;* Burton, J., and Jackson, J., *dissenting*).

121. While *Funk Bros.* is the leading case, prior decisions have also relied upon the "product of nature" doctrine. *See, e.g.,* Parke-Davis & Co. v. H.K. Wolford Co., 189 F. 95 (C.C.S.D.N.Y. 1911), *aff'd in part, rev'd in part,* 196 F. 496 (2d Cir. 1912) (adrenalin extracted from an animal differed in kind, not degree; therefore, unpatentable); *In re* King, 107 F.2d 618 (C.C.P.A. 1939) (difference in degree of purity of lemon juice merely defines product in its purified form; held unpatentable); *In re* Macallum, 102 F.2d 614 (C.C.P.A. 1939) (purified insulin stimulant which did not differ in kind or utility was denied patent coverage).

122. *See generally* Wegner, *Patent Protection for Novel Microorganisms Useful for the Preparation of Known Products,* 5 INT'L REV. INDUS. PROP. & COPYRIGHT L. 285 (1974).

other statutory requirements). Several courts have seemingly denied patents based on the "product of nature" rationale,[123] while many others have held that no "product of nature" doctrine exists.[124] Moreover, confusion arises as to whether or not "living things" should be viewed as "products of nature." For purposes of patent law, however, "products of nature" and "living things" are two distinct and separate categories. For instance, gold is considered a "product of nature" yet it is not living. Thus, patents are rejected on one of two theories: the claim is either a "product of nature" (the older and less frequently used judicial theory), or it is denied because it is a "living thing."

Generally, since the decision in *Funk Bros.*, and with the passage of the 1952 amendments to the Patent Act[125] courts have rejected automatic classification of natural substances under the "product of nature" doctrine. Instead, they have continuously relied upon sections 102[126] and 103[127] which require the claim, when viewed as a whole, to be new, useful, and unobvious. Judicial reluctance to invoke the "product of nature" doctrine is borne out in several recent cases. In *Merck & Co. v. Olin Mathieson Chemical Corp.*,[128] the Court of Appeals reversed a District Court decision and held a vitamin B_{12} product, which was the result of a purification process, to be a new, useful, and unobvious composition of matter. When directly addressing the "product of nature" doctrine, the Court of Appeals stated: "There is nothing in the language of the Patent Act which precludes the issuance of a patent upon a 'product of nature' when it is a 'new and useful composition of matter' and there is compliance with the specified conditions for patentability."[129] In *In re Bergstrom*,[130] the applicant sought to patent two chemical compounds named PGE_2 and PGE_3, which were purified distillations of an animal fluid. The court upheld the patent, stating that the pure materials obtained through the efforts of the inventor were new when compared with their impure state.[131] In their purified form

123. *See* General Electric Co. v. DeForest Radio Co., 28 F.2d 641 (3d Cir. 1928) (purified form of tungsten held to be a product of nature, thus, unpatentable); American Wood-Paper Co. v. Fibre Disintegrating Co., 90 U.S. (23 Wall.) 566 (1874) (purified form of pulp utilized to produce paper held unpatentable); Cochrane v. Badische Anlin & Soda Fabrik, 111 U.S. 293 (1884) (naturally discovered alizarine held unpatentable).

124. *See* note 8 and accompanying text *supra*; notes 128-32 and accompanying text *infra*.

125. *See* Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.* (originally enacted as Act of Dec. 24, 1970, Tit. I, § 1, 84 Stat. 1542).

126. 35 U.S.C. § 102 (1976).

127. 35 U.S.C. § 103 (1976).

128. 152 F. Supp. 690 (W.D. Va. 1957), *rev'd*, 253 F.2d 156 (4th Cir. 1958); *See also* Merck & Co. v. Chase Chemical Co., 273 F. Supp. 68 (D. N.J. 1967) (analogous to a different district holding a B_{12} composition to be "new," therefore, patentable).

129. 253 F.2d 156, 161 (4th Cir. 1958).

130. 427 F.2d 1394 (C.C.P.A. 1970).

131. *Id.* at 1401-02.

these chemical compounds were not "products of nature," for they would not have existed but for the labor of the microbiologist. Indeed, in many other instances purified forms of organisms have been held patentable.[132]

Notwithstanding the majority view that the "product of nature" doctrine is amorphous at best, it was relied upon by the dissent in both *Bergy*[133] and *Chakrabarty*.[134] This position was predicated upon judicial decisions in *Funk Bros.*[135] and *American Fruit Growers Inc. v. Brogdex*.[136] However, *Funk Bros.* and *Brogdex* have subsequently been distinguished by most courts, and in many instances, their respective decisions have been totally abrogated.[137] Thus, as the majority in *Bergy* contended, new forms of subject matter should be entitled to patent coverage regardless of whether they are "living" or "products of nature."[138] Finally, at the very least, denial of patent claims, because they involve living matter, should be less automatic. If a new, useful and unobvious living organism meets all of the statutory requirements,[139] the fact that it is living should not be a bar to patentability. Specifically, since patent law is statutory,[140] patent protection should be granted if the subject matter falls within its ambit — regardless of whether the item sought to be patented is "living" or a "product of nature." As one commentator has stated: "There is nothing in the words of Section 101 which excludes patents for living organisms."[141]

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132. *See In re* Doyle, 327 F.2d 513 (C.C.P.A. 1964) (purified substance produced from penicillin producing molds held patentable); Chas. Pfizer & Co. v. Barry-Martin Pharmaceuticals, 241 F. Supp. 191 (S.D. Fla. 1965) (antibiotic tetracycline extracted from natural Aureomycin held patentable); Sterling Drug, Inc. v. Watson, 135 F. Supp. 173 (D.D.C. 1955) (chemical product utilizing 1-arterenol to treat shock and coronary occlusion held patentable); Kuehmsted v. Farbenfabriken of Elberfeld Co., 179 F. 701 (7th Cir. 1910), *cert. denied,* 220 U.S. 622 (1911) (purified form of aspirin derived from acetyl salcylic acid held to be new patentable subject matter). *See also* note 8 and accompanying text *supra*.

133. *In re* Bergy, 563 F.2d 1031, 1042 (C.C.P.A. 1977) (Baldwin, J., and Miller, J., *dissenting*).

134. *In re* Chakrabarty, 571 F.2d 40, 44-45 (C.C.P.A. 1978) (Baldwin, J., and Miller, J., *dissenting*).

135. Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948).

136. 283 U.S. 1 (1931). In *Brogdex,* the Supreme Court held a borax treated citrus fruit not to be a "manufacture" within the meaning of the patent statutes because the resulting product did not "possess distinctive form, quality or property." *Id.* at 11. This seemingly narrow definition of "manufacture" has been all but disregarded by courts subsequently dealing with purified products. *See* Kayton, *Living Microorganisms,* ADVANCED U.S. PATENT PRACTICE 8 (1978). *See also* notes 8, 132 and accompanying text *supra*.

137. *See* notes 128-32 and accompanying text *supra*.

138. Parker v. Bergy, 596 F.2d 952, 986-87 (C.C.P.A. 1979).

139. 35 U.S.C. §§ 101-03 (1976).

140. *See* A. DELLER, *supra* note 2, at § 14.

141. G. ROSE, 1978 PATENT LAW HANDBOOK § 3.5, at 30-32 (1978). *See* Wegner, *supra* note 122, at 290:

III. PLANT PATENT LEGISLATION

The Solicitor, arguing on behalf of the Patent and Trademark Office (P.T.O.), made it clear that the primary basis for invalidating the patent claims in *Bergy* was the existence of plant patent legislation.[142] Similarly, in both the first[143] and second[144] *Bergy* decisions, the enactment of the Plant Patent Act of 1930[145] was central to the dissents' argument against patenting living organisms. The contention was that the Plant Patent Act, which provides patent protection for inventors and producers of asexual plants, would have been superfluous had living substances been entitled to patentability prior to its enactment.[146]

Judge Rich, speaking for the *Bergy* majority, cited three separate rationales to support the majority's position that the Plant Patent Act was inapplicable to the present case. First, the "fundamental tenets of statutory construction accepted by the commentators and the Supreme Court" indicate the legislation to be inapplicable.[147] Second, "[t]he explicit purpose of the Plant Patent Act was to promote agriculture and horticulture."[148] Third, the legislative history of the Act makes no reference whatsoever to living organisms in general, but only refers to living, asexually reproducing plants.[149] In contrasting this position with that of the minority in *Bergy,* it is essential to review the legislative history of the Plant Patent Act.

Both the House and Senate Committee reports, which accompanied the proposed bill subsequently enacted into law as the Plant Patent Act, state in succinct terms that:

> The purpose of the bill is to afford agriculture, so far as practicable, the same opportunity to participate in the benefits of the patent system as has been given industry, thus assist (sic) in placing agriculture on a basis of economic equality with industry. This bill

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No criterion is raised in 35 U.S.C. § 101 that something must be dead to be patentable. [A] microorganism should not be excluded as a statutory composition of matter any more than the vitamin B_{12} of the Merck cases, merely based on the additional distinction that the microorganism is "alive" and the vitamin B_{12} is dead.

142. Parker v. Bergy, 596 F.2d 952, 978 (C.C.P.A. 1979).

143. *In re* Bergy, 563 F.2d 1031, 1039-41 (C.C.P.A. 1977) (Miller, J., and Baldwin, J., *dissenting*); *In re* Chakrabarty, 571 F.2d 40, 45-46 (C.C.P.A. 1978) (Miller, J., and Baldwin, J., *dissenting*).

144. Parker v. Bergy, 596 F.2d 952, 999 (C.C.P.A. 1979) (Miller, J., *dissenting*).

145. 35 U.S.C. §§ 161-64 (1976).

146. As stated by Judge Miller in his dissent: "The majority emphasizes that the Plant Patent Act was concerned only with plants. This completely misses the point. If section 4886 of the Revised Statutes did, indeed, embrace organisms (and microorganisms), then why would Congress needlessly legislate coverage for organisms known as 'plants?' " Parker v. Bergy, 596 F.2d 952, 1000 (C.C.P.A. 1979) (Miller, J., *dissenting*).

147. *Id.* at 978.

148. *Id.*

149. *Id.*

> will remove the existing discrimination between plant breeders and industrial developers.[150]

The committee reports, later incorporated into the bill itself, make no reference to the fact that Congress was concerned with living things in general.[151] What Congress did do by enacting the Plant Patent Act was to establish protection for developers in the field of agriculture in an attempt to stimulate that industry.[152] Indeed, a review of previously proposed bills similar to the Plant Patent Act indicates that Congress had made several initiatives to stimulate agriculture through this type of patent extension.[153]

The opposing view, propounded by the P.T.O., relies on the testimony of then Secretary of Agriculture Hyde before the Committee. Secretary Hyde stated that it was his "understanding" that the purpose of the bill was to bring plants under the patent umbrella which, "at the . . . time," he understood to cover only inventions or discoveries in the field of *inanimate* nature.[154] Although this statement implies that things animate in nature were excluded from patent protection, the *Bergy* court attributed little weight to the Secretary's "understanding." The court reasoned that the Secretary of Agriculture was not testifying as a patent expert, but was merely asked to testify because the Department of Agriculture was requested to cooperate with the P.T.O. on this

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150. H.R. REP. NO. 1129, 71st Cong., 2d Sess. (1930); S. REP. NO. 315, 71st Cong., 2d Sess. (1930).

151. *See* notes 145 and 150 and accompanying text *supra*. In contrast to the apparent focus of plant patent legislative history, Judge Miller, in his dissenting opinion, states that Congress was aware of the dichotomy between inanimate and animate substances. Hence, Congress enacted the Plant Patent Act because it recognized an extension was needed in light of the animate/inanimate dichotomy. *See* Parker v. Bergy, 596 F.2d 952, 1001 (C.C.P.A. 1979). Although not without merit, this argument may be self-defeating. For, in the same passage cited by Judge Miller, the report states that "[f]urthermore, there is no apparent difference, for instance, between the part played by the plant originator in the development of new plants and the part played by the chemist in the development of new compositions of matter which are patentable under existing law." *Id.* at 1000. This comment indicates that products of the plant developer and the chemist are the result of their respective efforts. Without their intervention a new discovery would not have been realized. Similarly, without the significant intervention of the microbiologists in *Bergy* and *Chakrabarty* their inventions would not have existed.

152. *See* note 150 and accompanying text *supra*. *See also In re* LeGrice, 301 F.2d 932 (C.C.P.A. 1962). In *In re* LeGrice, the court stated that 35 U.S.C. § 161 engrafts the Plant Patent Act onto basic patent law, thereby removing existing discrimination between industrial entrepreneurs and plant developers.

153. *See, e.g.*, H.R. 15423, 71st Cong., 3d Sess. (1931) (a bill to provide for plant and cereal products); H.R. 24010, 61st Cong., 2d Sess. (1910) (a bill to amend the laws of the United States relating to patents in the interest of originators of horticultural products); H.R. 21951, 60th Cong., 1st Sess. (1908) (a bill to amend the laws of the United States relating to patents in the interest of originators of horticultural products).

154. When testifying at the committee hearing, the Commissioner of Patents expressed his doubts solely as to whether plants could be patented under the disclosure requirements for inventions. He did not express any concerns in reference to the patentability of the "life" characteristics of plants. H.R. REP. NO. 1129, 71st Cong., 2d Sess. 6-8 (1930); S. REP. NO. 315, 71st Cong., 2d Sess. 9-10 (1930).

matter.[155] Indeed, it is difficult to ascertain how the Secretary of Agriculture could qualify as an expert in the nuances of patent law.[156] Since this testimony is the primary piece of legislative history upon which the P.T.O. relies, its position that plant patent legislation is the only patent extension for living matter is weak at best.

Another consideration for amending the Patent Act to accommodate plants, was the necessity to modify the rigid requirements for written descriptions of patents.[157] Without the relaxation of these requirements, the Plant Patent Act would have been ineffective. In addition, modification of the description requirements were solely directed to asexually reproducing plants — they were not effectuated for all living organisms. It is noteworthy that no relaxation of description requirements was sought for the living organisms in *Bergy* and *Chakrabarty*.[158] Such a comparison further illustrates that plant patent legislation was solely enacted to meet the particular needs of plant developers and agriculturists.

Subsequent to the initial Act of 1930, Congress enacted the Plant Variety Protection Act of 1970.[159] This legislation extended the coverage of the Plant Patent Act to include *sexually* reproducing plants such as corn, soybeans, and wheat. Again, the 1970 Act, like its predecessor, was solely concerned with plants and on its face did not pertain to any other forms of living organisms. However, the P.T.O. contended that the Plant Variety Protection Act, by covering only sexually reproducing plants, was intended to delimit the patentability of all living organisms.[160]

Nothing in either Act expressly excludes the patenting of living organisms under other sections of the patent laws.[161] In effect, the P.T.O.'s contention with respect to the Plant Patent Act and the Plant Variety Protection Act is tenuous at best.

It is submitted that the P.T.O. interpretations of the Plant Patent Act and the Plant Variety Protection Act are attempts to broaden the applicability of these Acts where no precedent for so doing exists. Moreover, although both microogranisms and plants are living, their

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155. Parker v. Bergy, 596 F.2d 952, 984 (C.C.P.A. 1979).

156. *See* note 145 and accompanying text *supra*.

157. 35 U.S.C. § 162 (1976) states: "No plant shall be declared invalid on the ground of noncompliance with [section 112] if the description is made as complete as is reasonably possible."

158. Parker v. Bergy, 596 F.2d 952, 984 (C.C.P.A. 1979).

159. 7 U.S.C. § 2321 *et seq.* (1976).

160. Parker v. Bergy, 596 F.2d 952, 1000-01 (C.C.P.A. 1979) (Miller, J., *dissenting*).

161. Instead, courts have continuously viewed patent applications as a whole under the tests set forth in sections 102 and 103; tests which require a claim to be new, useful and unobvious. *See, e.g.*, notes 8 and 132 and accompanying text *supra*. Also, for examples of what constitutes patentable "compositions of matter" and/or "manufactures," *see* notes 21-33 and accompanying text *supra*.

inherent characteristics are distinguishable.[162] For instance, in *In re Arzberger,*[163] the C.C.P.A. rejected a patent claim for a bacterium under the Plant Patent Act, holding that the Act only covered plants in the layman's sense, and not the sophisticated types of plant strains such as the bacteria represented in the application.[164] The *Arzberger* decision illustrates that the Plant Patent Act pertains only to plants as they are commonly and ordinarily known. No holding was made in *Arzberger* that living bacterium could not be patented under other sections of the statutes. Nor did the *Arzberger* court base any part of its rejection on the ground that the bacterium was alive.[165]

The legislative history of plant patent legislation indicates that its purpose was to promote growth, development, and innovation in the field of agriculture. Additionally, it seems myopic to advance the argument that the patent laws did not cover living things until the enactment of the Plant Patent Act. In fact, before its enactment, patents had been granted for processes employing living organisms.[166] As noted by Judge Rich in *Bergy,* patentability of microorganisms was probably never considered when Congress enacted the Plant Patent Act.[167] In the final analysis, the arguments concerning plant patent legislation weigh in favor of patenting the claims in *Bergy.* There is simply no language in the legislation specifically excluding living organisms from patentability under other sections of the Patent Act. Nor have case law decisions interpreting the Plant Patent Act indicated that it is the sole patent extension for living things. Considering the lack of express authority to the contrary, perhaps the Supreme Court's pronouncements on statutory construction are best adhered to. As the Court stated: "We should not read into the patent laws limitations and conditions which the legislature has not expressed."[168]

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162. *See* note 165 and accompanying text *infra.*

163. 112 F.2d 834 (C.C.P.A. 1940).

164. *Id.* at 838.

165. *See* McDonald, *The Patentability of Living Organisms Under 35 U.S.C. § 101: In re Bergy,* 47 NEBRASKA L. REV. 303, 325 n.150 (1978) (*citing* von Pechman, *National and International Problems Concerning the Protection of Microbiological Inventions,* 3 INT'L REV. INDUS. PROP. & COPYRIGHT L. 295 (1972).

The author distinguishes the functional properties of plants and microorganisms as follows:

> [A] new microorganism, in contradistinction to a plant, is as a rule only an auxiliary material for the solution of a technical problem. The microorganism or, more specifically, its fermentation system serves as a reagent or catalyst in connection with the biochemical production of new or known substances. Unlike with a plant variety, it will not be possible to see in the vegatative propagation of a microorganism the protectable step which leads directly to the practical development of the salient properties of the product resulting from the culture.

Id. at 300.

166. *See* notes 8 and 132 and accompanying text *supra.*

167. Parker v. Bergy, 596 F.2d 952, 981 (C.C.P.A. 1979).

168. United States v. Dubilier Condenser Corp., 289 U.S. 178, 199 (1933).

IV. PATENTING LIFE: THE EFFECT OF *BERGY* AND *CHAKRABARTY*

In *Bergy,* the court asserted that its sole decision was that the bacteria discovered by Bergy and Chakrabarty were just "compositions of matter" or "manufactures" within the meaning of section 101.[169] Notwithstanding this assertion, there is no indication that this holding could not extend to patenting more complex forms of life.[170] Indeed, when commenting on whether their decision would open up an "enormous range of [living] subject matter to patentability,"[171] the C.C.P.A. stated, "the more the better."[172] This is a strong intimation that the *Bergy* court may be willing to grant patent coverage to more sophisticated forms of genetically engineered organisms. Since no clear limits have been articulated by the *Bergy* court, what then, if any, are the limits on patentable subject matter?[173]

The unsettling question that the *Bergy* holding raises is whether living organisms produced by cloning and recombinant DNA[174] research can be patentable subject matter. The concern lies in the fact that the potential hazards and possible benefits of genetic engineering are not yet fully known.[175] Only recently have federal regulations been relaxed to permit

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169. Parker v. Bergy, 596 F.2d 952, 956-57 (C.C.P.A. 1979).

170. The C.C.P.A. liberally construes section 101 of the Patent Act. In fact, it goes so far as to consider that a "manufacture" (one of the enumerated classes of patentable subject matter) includes "anything under the sun that is made by man." *Id.* at 987.

171. *Id.* at 985.

172. *Id. But see In re* Bergy, 563 F.2d 1031, 1038 (C.C.P.A. 1977). In the first *Bergy* case the court stated that it was not deciding whether all forms of life in general may be patented.

173. In his concurring opinion Judge Baldwin suggests that patentability of living matter is limited. He notes that when a claim encompasses too much of a natural phenomenon it is precluded from patent protection. *Id.* at 997 (Baldwin, J., *concurring*). *See, e.g.,* O'Reilly v. Morse, 56 U.S. (15 How.) 61 (1853). In *Morse,* a claim for the scientific principle of electromagnetism itself was held unpatentable as it preempted a product of nature. However, a separate claim involving the use of electromagnetism to construct the telegraph was held patentable. *See also* Eibel Process Co. v. Minnesota and Ontario Paper Co., 261 U.S. 45 (1923); Mackay Radio & Telegraph Co. v. Radio Corp. of America, 306 U.S. 86 (1939).

174. DNA (deoxyribonucleic acid) is the basic genetic material of living organisms. As used in genetic engineering research, DNA is disassembled and then recombined with different genetic material; hence, the term recombinant. VAN NOSTRAND'S SCIENTIFIC ENCYCLOPEDIA 1894-96 (5th ed. 1976).

175. As evidenced by the following remarks, there is no doubt that DNA research has the attention of Congress. *See* 124 CONG. REC. E4790 (daily ed. Sept. 6, 1978), where Rep. Edwards stated:

> Mr. Speaker, in our atomic age of potential destruction of humanity, the subject of genetic manipulation and its species change is not to be taken lightly. The prospect of curing the human race of both birth defects and environmentally caused diseases is a tempting thought. With our current technological know-how, the possible eradication of impure social elements brings shades of "Dr. Strangelove" close to home. These are the results that could evolve from improperly regulated recombinant DNA research. . . . DNA research has an enormous potential for ecological disruption that all research in the initial stages at least, must proceed slowly and carefully under the auspices of public control. . . . It is essential that recombinant DNA research be subject to public scrutiny . . . [o]ur survival depends on it.

See also S. 621, 95th Cong., 1st Sess., 1235 CONG. REC. 2320 (1977) (a bill to regulate DNA

limited DNA research, and then only under strict laboratory conditions.[176]

As a practical matter, the probable consequence of the *Bergy* decision will be to permit patent coverage for simple forms of genetically created organisms. This conclusion can be drawn from the express statement of the *Bergy* majority that their holding solely interpreted subject matter criteria under section 101.[177] The implication is that even if living organisms meet the subject matter prerequisites of either "composition of matter" or "manufacture," they will still have to meet the subsequent hurdles of novelty,[178] unobviousness[179] and description.[180] As noted by Judge Baldwin in his concurring opinion, patenting higher forms of life may be impossible "because of the inherent difficulties in complying with the [description] provisions of 35 U.S.C. § 112."[181] However, the section 112 obstacle can be surmounted by the Patent Office regulation that a deposit of the organism along with its taxonomic description be placed at the Northern Regional Research Laboratory.[182]

Although a microorganism in purified form such as Bergy's could meet such a taxonomic description, it is doubtful whether more complex, recombined organisms such as Chakrabarty's could do so.[183] Therefore, absent an exception to the description requirements similar to the one granted in the Plant Patent Act,[184] more sophisticated genetically engineered specimens will likely be precluded from patentability on the basis of section 112 alone. Nevertheless, conformance with the statutory description and repository requirements could eventually be achieved. Ultimately, the rapidity of scientific advancement will determine the outcome of this inquiry.

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research, authored by Senator Bumpers of Arkansas); S. 945, 95th Cong., 1st Sess., 123 CONG. REC. 3699 (1977) (a bill to regulate the development of research related to recombinant DNA and to establish a National Commission to study recombinant DNA research and technology, authored by Senator Metzenbaum of Ohio). *See generally* L. KARP, GENETIC ENGINEERING: THREAT OR PROMISE (1st ed. 1976).

176. Boston Globe, Jan. 29, 1980, at 1, col. 4. Washington Post, Feb. 4, 1980, at A24, col. 1. The Washington Post Editorial notes the prevailing view among many scientists that the original fears concerning DNA research and development may have been overblown.

177. Parker v. Bergy, 596 F.2d 952, 985 (C.C.P.A. 1979).

178. 35 U.S.C. § 102 (1976).

179. 35 U.S.C. § 103 (1976).

180. 35 U.S.C. § 112 (1976).

181. Parker v. Bergy, 596 F.2d 952, 997 n.7 (C.C.P.A. 1979) (Baldwin, J., *concurring*). 35 U.S.C. § 112 requires a precise and accurate specification of the subject matter which would enable one skilled in the art to utilize the same. As of yet it is not foreseen how a complex, genetically engineered organism can meet this requirement given that the ramifications of DNA research are not fully known.

182. *See In re* Argoudelis, 434 F.2d 1390 (C.C.P.A. 1970) (depositing the organism itself, along with its taxonomic description was held to meet the requirements of section 112).

183. *See, e.g., In re* Merat, 519 F.2d 1390, 1394 (C.C.P.A. 1975) (a claim for a selectively bred hen was denied a patent for failure to distinctly claim the subject matter under section 112).

184. *See* notes 145 and 157 and accompanying text *supra*.

More importantly, this subject matter controversy has overshadowed a paramount question concerning the desirability of patenting living things. What are the advantages or disadvantages to patenting these products? If the central purpose of the patent laws is to "[p]romote the [p]rogress of [s]cience and the useful [a]rts,"[185] patenting meritorious technological advancements would ostensibly achieve that goal. Indeed, the courts have broadly interpreted patent law to fulfill the spirit of this constitutional mandate.[186] When one considers the commercial utility of microbiological processes in the production of pharmaceuticals and agricultural products, patent coverage may provide the necessary stimulus for continued industrial development of socially beneficial commodities.[187] More importantly, recent research has indicated that DNA gene regulation may be able to control and cure serious diseases, including the gravest malady of all — cancer.[188] In contrast, if living organisms are excluded from patent coverage, the inventor will likely protect his discovery by maintaining it as a trade secret, thereby impeding public access, knowledge, and interest in the product. If the living substance cannot be discovered through the process of reverse engineering,[189] the invention and its accompanying benefits could be

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185. *See* note 1 and accompanying text *supra.*

186. *See* notes 8, 132, and 154 and accompanying text *supra. See, e.g.,* Johnson v. Johnston, 60 F. 618 (C.C.W.D. Pa. 1894) (carbon compressed solely to produce "clean" carbon black was held patentable).

187. S. 1215, 96th Cong., 1st Sess., 125 CONG. REC. S7591 (1979) (remarks of Senator Schmitt citing a response from the Department of Commerce). The following passages underscore the vast commercial benefits to be derived from patent coverage:

> The existence of a patent, which can be relied upon to a high degree as valid, reduces the risks involved in decisions to commercialize inventions and thereby encourages innovation. The patent system is particularly useful to further high risk innovation requiring long term payoff, one of the areas of innovation especially identified as deficient in this country in recent years. . . .
>
> Dr. Edward Land [once stated]: "The only thing that keeps us alive is our brilliance. The only way to protect our brilliance is our patents." In addition . . . American history is replete with examples of the independent inventor . . . successfully penetrating an existing market or creating a new one with patented new technology. Clarence Birdseye — frozen food, Samuel Rueben — batteries, Chester Carlson — xerography, ...

Id. See President's Message to Congress on Industrial Innovation, H. DOC. NO. 96-114, 96th Cong., 1st Sess., *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 3391-92. Similarly, President Carter has recognized the importance of technological innovation as can be evidenced by his following remarks:

> Patents can provide a vital incentive for innovation, but the patent process has become expensive, time-consuming, and unreliable . . . . At my direction, the Patent and Trademark Office, will undertake a major effort to upgrade and modernize its processes in order to restore incentive to patent — and ultimately develop — inventions.

188. Stockton, *On the Brink of Altering Life,* N.Y. Times, Feb. 17, 1980, § 6 (Magazine), at 16, 64, 77, col. 1. This article illuminates the numerous medically valuable uses to which DNA engineering can be put to use. To date, molecular biological research has produced proteins (valuable for treatment of human growth problems), interferon (an antiviral useful for combating infections), insulin, and other naturally scarce manufactures useful for curing diseases.

189. Reverse engineering is a process whereby a product is analyzed on the market to determine its properties and overall construction. In effect, a competitor can build the product through

concealed from the public for an indefinite time.[190] On balance, as the *Bergy* majority contended, patenting new and useful forms of living organisms is probably the most judicious course considering that both public interest and commercial productivity will be better served.[191]

CONCLUSION

The C.C.P.A. decision in *Parker v. Bergy*[192] must be regarded as holding that patent claims for genetically created microorganisms cannot be rejected merely because the organism is alive. Notwithstanding the commercial and public interest benefits to be secured through patent protection of this kind, the potential unknown risk of genetic engineering remains ever present. While the technologically useful microorganisms of Bergy and Chakrabarty constituted patentable statutory subject matter, more paramount problems of policy and ethics prevail regarding patent coverage for more intricate forms of genetically engineered products. Therefore, a solution to the potential boundaries of patentable subject matter can more readily be provided by an act of Congress. Similar to the extension it granted for plants, Congress could articulate specific categories for patenting certain types of genetically constructed products, as well as providing coverage for new and useful forms of microbiological technology. Socially beneficial recombinant DNA products could be included in such a law, while complex forms, whose characteristics are unknown and unstable, could be excluded. In the final analysis, Congress is the proper vehicle for making the eclectic decisions needed to resolve the question of patenting life.[193]

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this reverse formula. Moreover, this is a judicially recognized method for discovering trade secrets. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 482-92 (1974).

190. *See* Wegner, *Patenting Nature's Secrets — Microorganisms,* 7 INT'L REV. INDUS. PROP. & COPYRIGHT L. at 236-38 (1976). The author states that reverse engineering could take years to produce a microorganism necessary to discover a trade secret. In addition, he points out that business, researchers, and the public would not receive the use of the organism after a limited time, whereas use could be obtained after a limited time if the organism were patented.

191. *See* Parker v. Bergy, 596 F.2d 952, 987 (C.C.P.A. 1979).

192. 596 F.2d 952 (C.C.P.A. 1979).

193. Although Congress has yet to pass legislation regulating DNA research and technology, the National Institute of Health has promulgated federal guidelines effecting the same. The National Institute of Health is a subdivision of the Public Health Services branch of the Department of Health and Welfare. *See* N.I.H., *Recombinant DNA: Accelerated Processing of Patent Applications for Inventions,* 42 Fed. Reg. 2712 (1977). *See* note 154 and accompanying text *supra.* Furthermore, there is little doubt that the Supreme Court wishes to preempt Congress' role in this area. For example, the Court recently stated in *Parker v. Flook* that, "[d]ifficult questions of [patent] policy . . . can be answered by Congress on the basis of current empirical data not equally available to this tribunal." Parker v. Flook, 437 U.S. 584, 595 (1978).

United States v. Helstoski: The Speech or Debate Clause in the Criminal Context

On June 18, 1979 the Supreme Court of the United States decided *United States v. Helstoski.*[1] The Court held that the bribery prosecution of a former Congressman could be pursued provided the government offered no evidence showing the performance of or motivation for legislative acts.[2] The admission of such evidence was said to be prohibited by the constitutional protection afforded legislators by the Speech or Debate Clause.[3] The *Helstoski* holding was in accord with the Court's reasoning in the 1972 case of *United States v. Brewster.*[4] In both cases,[5] the Court attempted to strike a balance between two conflicting views regarding the scope of the Speech or Debate Clause in the criminal context. The position of the government has essentially been that bribery prosecutions are a legitimate aspect of the criminal justice system and that the need to hold Congressmen accountable to law outweighs the protective function of the Speech or Debate Clause.[6] Under this view, the pursuit of bribery prosecutions should not be restricted by any evidentiary limitations.[7] The position of legislator/defendants has been that the Speech or Debate Clause represents an absolute allocation of jurisdiction to each House of Congress concerning the discipline of its members for legislative misconduct.[8] According to this interpretation, bribery prosecutions based on accepting compensation for the performance of official duties are inherently unconstitutional and should be dismissed regardless of whether

1. 442 U.S. 477 (1979)

2. *Id.* at 487-94.

3. *Id.* The Speech or Debate Clause (U.S. CONST. art. I, § 6) provides that, "[f]or any Speech or Debate in either House, they [members of Congress] shall not be questioned in any other place." The clause is intended to insulate the legislative process from unwarranted intrusions by the executive and judicial branches. The history of the clause is discussed in notes 25-35 and accompanying text *infra.*

4. 408 U.S. 501 (1972).

5. The Supreme Court first considered the scope of the Speech or Debate Clause in the criminal context in United States v. Johnson, 383 U.S. 169 (1966). The *Johnson* case is discussed in notes 36-45 and accompanying text *infra.*

6. *See, e.g.,* United States v. Johnson, 383 U.S. 169, 182 (1966); United States v. Brewster, 408 U.S. 501, 537 (1972) (Brennan, J., dissenting); Brief of the United States at 67-72, United States v. Helstoski, 442 U.S. 477 (1979) [hereinafter cited as Brief of the United States].

7. *Id.*

8. United States v. Brewster, 408 U.S. 501, 513 (1972). *See also* note 75 and accompanying text *infra.*

formal proof of legislative acts or their underlying motivation is involved.[9] The *Helstoski* holding avoids adopting either of these extreme positions by employing a controversial distinction between "legislative acts" and "promises to perform legislative acts in the future."[10] The Court reasoned that the subject of a bribery prosecution is an illicit promise and that the actual performance of a legislative act need not be proved.[11]

This comment analyzes the conflict between bribery prosecutions and the Speech or Debate Clause and considers *Helstoski's* role in seeking a resolution of that conflict. The facts and holding of *Helstoski* are presented in Section I. The historical development of the Speech or Debate Clause is traced in Section II. Section III considers the development of the rule excluding evidence of legislative acts as enunciated prior to *Helstoski*. Finally, Section IV assesses the question of whether the *Helstoski* holding goes too far or not far enough toward preserving the role played by the Speech or Debate Clause in the constitutional framework of separate, co-equal branches of government.

I. UNITED STATES V. HELSTOSKI

Henry Helstoski served as a member of the United States House of Representatives from 1965 to 1977, representing the Ninth Congressional District of New Jersey.[12] In 1974, the Justice Department commenced investigations of alleged political corruption, including charges that aliens had paid money in exchange for the introduction of private immigration bills to exclude them from the reach of the immigration laws.[13] In June, 1976, then Congressman Helstoski was indicted by a federal grand jury on charges of violating 18 U.S.C. § 201 (c) (1), the federal bribery statute.[14] As the indictment stated, Congressman

9. *See* Brief for Henry Helstoski at 35, United States v. Helstoski, 442 U.S. 477 (1979) [hereinafter cited as Brief for Helstoski].

10. United States v. Helstoski, 442 U.S. 477, 489 (1979)

11. *Id.*

12. Brief for Helstoski, *supra* note 9, at 9.

13. United States v. Helstoski, 442 U.S. 477, 479 (1979). Bills introduced during a session of Congress are designated as either "public" or "private." "[T]he use of the term private bills is one of legislative nomenclature which distinguishes bills for the relief of one or more specified persons, corporations, or institutions from bills which deal with individuals only by classes." Brief of The Honorable Thomas P. O'Neill, Jr., Speaker; The Honorable Frank Thompson, Jr., Chairman; and The Honorable William L. Dickinson, Committee On House Administration of The United States House of Representatives, As Amici Curiae at 54, United States v. Helstoski, 442 U.S. 477 (1979) [hereinafter cited as Brief of Amici Curiae]. *See also* A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3285, at 247 (1907).

14. Brief of the United States, *supra* note 6, at 5. 18 U.S.C. § 201 (c) (1962) provides:

> Whoever, being a public official ... directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for;
>
> (1) being influenced in his performance of any official act; or

Helstoski was accused of accepting money in return for "being influenced in the performance of official acts, to wit; the introduction of private bills. . . ."[15]

Congressman Helstoski moved the United States District Court for the District of New Jersey to dismiss the indictment, contending, *inter alia,* that it violated the Speech or Debate Clause.[16] The district court denied the motion, but also ruled that the government would not be allowed to introduce any evidence at trial showing the performance of legislative acts.[17] In so ruling, the district court declined to make

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(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud or make opportunity for the commission of any fraud on the United States [shall be . . . guilty of an offense].

"Public official" and "official act" are defined in 18 U.S.C. § 201 (1962) as follows: "(a) for the purpose of this section; 'public official' means Member of Congress . . .; and . . . 'official act' means any decision or action on any question which may at any time be pending before any public official, in his official capacity, or in his place of trust or profit." Section 201 was enacted in 1962. Act of October 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119. The 1962 act did not substantially alter the original bribery statute passed by Congress in 1862. Act of July 16, 1862, ch. 180, 12 Stat. 577 (1862) (current version at 18 U.S.C. § 201 (1962)). The legislative history of the original act indicates no consideration of the Speech or Debate Clause in the Congressional debates. *See* CONG. GLOBE, 37th Cong., 2d. Sess. 3260 (1862). As explained in the House Report, the 1962 act was intended to "render uniform the law describing a bribe and prescribing the intent or purpose which makes its transfer unlawful." H.R. REP. No. 748, 87th Cong., 1st Sess. 15 (1961). According to the Senate Report, the act's purpose was the "substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery. This consolidation would make no significant changes of substance and, more particularly, would not restrict the broad scope of the present bribery statutes as construed by the courts." S. REP. NO. 2213, 87th Cong., 2d. Sess. 4 (1962).

15. Brief for Helstoski, *supra* note 9, at 2. Prior to his indictment, Congressman Helstoski had testified voluntarily before federal grand juries on ten occasions between April, 1974 and May, 1976. United States v. Helstoski, 442 U.S. 477, 480 (1979). These appearances were ostensibly premised on the Congressman's belief that the target of the investigation was one of his former aides rather than himself. Brief for Helstoski, *supra* note 9, at 10. In addition to testifyng about the procedures employed by his office relative to the introduction of private immigration bills, Helstoski provided copies of 169 such bills. United States v. Helstoski, 442 U.S. 477, 481 (1979). Helstoski suggested that the number 169 should not cause suspicion in and of itself since his multi-ethnic district was populated with many recent immigrants. Brief for Helstoski, *supra* note 9, at 9.

16. *See* United States v. Helstoski, 442 U.S. 477, 484 (1979). Helstoski argued that the Speech or Debate Clause involves more than a mere personal privilege and is not subject to waiver by individual Congressmen. He contended that the primary function of the clause is to grant exclusive jurisdiction to Congress over matters involving legislative misconduct. Helstoski urged that this reading of the clause is mandated if it is to be properly interpreted in conjunction with the Punishment Clause (U.S. CONST. art. I, § 5), which gives each House the authority to discipline its members. Brief for Helstoski, *supra* note 9, at 64. (The propriety of the House's actions in pursuing its powers under the Punishment Clause in not, however, an entirely in-house matter. It is subject to judicial review, and its exercise has been successfully challenged. *See* Powell v. McCormick, 395 U.S. 486 (1969), where the Supreme Court held that the House has no power to exclude a Member-elect who meets the House membership requirements.) Helstoski contended that by reserving exclusive disciplinary authority in the House, the Speech or Debate Clause constitutes an express exception to the jurisdiction conferred on the judiciary in Article III of the United States Constitution. (The federal judicial power extends to "all Cases, in Law and Equity, arising under this Constitution, or the laws of the United States." U.S. CONST. art. III, § 3.)

17. *See* United States v. Helstoski, 442 U.S. 477, 484 (1979).

separate rulings on twenty-three categories of evidence offered by the government in an effort to preclude the possibility of a mistrial.[18]

The government appealed the evidentiary ruling, contending that evidence showing the performance of legislative acts could be introduced to show Helstoski's motive in accepting money.[19] This position was rejected by the United States Court of Appeals for the Third Circuit. That court held that the introduction of evidence showing the performance of legislative acts would violate the Speech or Debate Clause.[20] The court of appeals also rejected the government's argument that Helstoski had waived the protection of the clause by voluntarily testifying before the grand juries.[21] The court held, assuming *arguendo* the possibility of waiver, that no waiver could be found absent an express statement to that effect by the Congressman. Such statement would have to have been made with reference to "the specific purpose for which the evidence of legislative acts is sought to be used against the member."[22]

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18. *Id.* The evidence proffered by the government included the expected oral testimony of certain witnesses and the contents of Helstoski's legislative files. Brief of the United States, *supra* note 6, at 8.

19. *See* United States v. Helstoski, 442 U.S. 477, 485 (1979).

20. The Court of Appeals held that:

> Legislative acts may not be shown in evidence for any purpose in this prosecution. . . . Nor may the Government circumvent this clear requirement by introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts of the defendant. . . . The Government would be able to prove any legislative act simply by producing non-privileged evidence containing some reference to that act. To allow proof of legislative acts in such a manner would reduce drastically the effectiveness of the Speech or Debate provision, and would discourage the dissemination to the public of information about legislative activities.

United States v Helstoski, 576 F.2d 511, 522 (3d Cir. 1978).

21. *Id.* at 523-24.

22. *Id.* Helstoski urged the Supreme Court to hold the concept of waiver wholly inapplicable to the Speech or Debate Clause, contending that, "both its institutional nature and its jurisdictional function bar any such concept." Brief for Helstoski, *supra* note 9, at 64. *See also* Brief of Amici Curiae, *supra* note 13, at 58. While the Supreme Court recognized its potential importance, it was able to avoid deciding the waiver issue as not squarely presented by the *Helstoski* case. The Court stated, "On the record before us, Helstoski's words and conduct cannot be seen as an explicit and unequivocal waiver of his immunity from prosecution for legislative acts — assuming such a waiver can be made." United States v. Helstoski, 442 U.S. 477, 492 (1979).

The Supreme Court also rejected the government's argument that 18 U.S.C. § 201 (1962) was a valid statutory delegation of Congress's disciplinary powers to the executive and the courts. The Court stated:

> According to the Government, § 201 represents a collective decision to enlist the aid of the Executive Branch and the courts in the exercise of Congress's powers under Article I, § 5 to discipline its Members. This Court has twice declined to decide whether a Congressman could, consistent with the Clause, be prosecuted for a legislative act as such, provided the prosecution were "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members. . . ." We see no occasion to resolve that important question. We hold only that § 201 does not amount to a congressional waiver of the protection of the Clause for individual Members.

Id. The Court went on to suggest that the concept of "congressional waiver" might well be unconstitutional by declaring:

The United States Supreme Court affirmed the district and circuit courts on the evidentiary ruling.[23] It disposed of Helstoski's challenge to the indictment without relying on the Speech or Debate Clause, holding that Helstoski had resorted to the wrong procedure by seeking mandamus in the circuit court rather than bringing an interlocutory appeal.[24]

> We recognize that an argument can be made from precedent and history that Congress, as a body, should not be free to strip individual Members of the protection guaranteed by the Clause from being "questioned" by the executive in the courts. The controversy over the Alien and Sedition Acts reminds us how one political party in control of both the Legislature and Executive Branches sought to use the courts to destroy political opponents.

Id. at 492-93.

The Alien and Sedition Acts, passed by Congress in 1798, were directed against political enemies of the Federalists. The acts placed limits on the freedoms of speech and press and hindered the liberties of foreigners. The acts were sponsored by the Federalist leaders of Congress. The Federalist administration brought fifteen indictments under the acts, mostly against leading Republican newspapers and their editors. *See* J. MILLER, THE FEDERALIST ERA, 1789-1801 229-37 (1960).

The Third Circuit Court of Appeals also rejected Helstoski's petition for a writ of mandamus ordering the district court to dismiss the indictment. The court of appeals stated, "Since the allegations of the indictment charge a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause, defendant has not made sufficient showing to justify issuance of the writ he seeks on Speech or Debate grounds." United States v. Helstoski, 576 F. 2d. 511, 517 (3d Cir. 1978).

Writs of mandamus are used to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). The Supreme Court has stated that, "only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." Kerr v. United States District Court, 426 U.S. 394, 402 (1976).

Both the government and Helstoski petitioned the United States Supreme Court for writs of certiorari. The petitions were granted, and the cases consolidated on December 11, 1978. 440 U.S. 904, 954 (1978). United States v. Helstoski, 442 U.S. 477 (1979), dealt with the evidentiary question. The mandamus issue was considered in Helstoski v. Meanor, 442 U.S. 500 (1979).

23. The Court held:

> Revealing information as to a legislative act — speaking or debating — to a jury would subject a Member to being "questioned" in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause. . . . As to what restrictions the Clause places on the admission of evidence . . . our concern is whether there is mention of a legislative act.

United States v. Helstoski, 442 U.S. 477, 490 (1979).

Some confusion stems from the fact that while the Supreme Court expressly excluded only evidence which mentions a legislative act, the district court went further. At a pretrial conference following the Third Circuit Court's decision, the district court ruled that it "would exclude any item of evidence that . . . would afford any basis for inferring the performance of a past legislative act . . . [including] . . . evidence of payments of money to [Helstoski] subsequent to any legislative act [because] the jury might infer . . . that [Helstoski] had fulfilled his part of the alleged bargain by performing legislative acts." Petitioner's Brief For Certiorari at 9, United States v. Helstoski, 442 U.S. 477 (1979). *See also* Note, *Evidentiary Implications of the Speech or Debate Clause,* 88 YALE L.J. 1280 n.3 (1979).

It is difficult to conceive why evidence of payments made *prior* to performance of legislative acts is apparently admissible in the district court's view while similar evidence of payments made *after* the performance of legislative acts must be excluded. Proof of payments made at either time would seem to equally provide a basis for the prohibited inference. Since the Supreme Court confined its own enunciation of the exclusionary rule to the banning of evidence "mentioning" legislative acts, the ultimate validity of the district court's formulation remains uncertain.

24. The Court cited *Ex Parte* Rowland, 104 U.S. 604 (1882), for the proposition that man-

II. THE HISTORY OF THE SPEECH OR DEBATE CLAUSE

The Speech or Debate Clause is of fundamental importance to the constitutional scheme of separation of powers. The clause is designed to protect Congress from executive and judicial "threats to its deliberative autonomy."[25] The clause effectuates this purpose by insuring "that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[26]

The forerunner of the American Speech or Debate Clause is found in the English Bill of Rights of 1689.[27] The matter of establishing the

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damus should be avoided whenever there is an alternative. Helstoski v. Meanor, 442 U.S. 500, 505 (1979).

In Abney v. United States, 431 U.S. 651 (1977), the Supreme Court held that "pretrial orders rejecting claims of former jeopardy ... constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of [28 U.S.C.] § 1291 [which sets the governing standards for the hearing of interlocutory appeals.]" *Id.* at 662. The *Helstoski* Court reasoned that *Abney* could be logically extended to the district court's refusal to dismiss Helstoski's indictment. Justice Brennan dissented, contending that the majority was implying that Helstoski should have been able to predict the extension of *Abney* so as to allow resort to interlocutory appeal as a means of challenging the district court's refusal to dismiss the indictment. Helstoski v. Meanor, 442 U.S. 500, 509 (1979) (Brennan, J., dissenting).

The Court's reliance on the law of mandamus does not obsure the real basis for its decision regarding the constitutionality of the indictment. If the Court really believed that the indictment violated the Speech of Debate Clause, it would certainly not have permitted the denigration of a constitutional provision involving the separation of powers based on a comparatively trivial procedural technicality. The *de facto* basis of the Court's decision to let Helstoski's indictment stand is found in dicta contained in United States v. Helstoski, 442 U.S. 477 (1979), the opinion which ostensibly dealt only with the evidentiary issue. The Court stated, "it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a *promise* to introduce a bill is not a legislative act." United States v. Helstoski, 442 U.S. 477, 490 (1979) (emphasis in the original). The distinction between "promises" and "acts" was first articulated in United States v. Brewster, 408 U.S. 501 (1972), discussed in notes 46-60 and accompanying text *infra*.

25. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-18, at 291 (1978).

26. Powell v. McCormick, 395 U.S. 486, 505 (1969).

27. The language of the English Bill of Rights of 1689 read, "That the Freedom of Speech, and Debate or Proceedings in Parliament, ought not to be impeached or questioned, in any Court or Place out of Parliament." 1 W. & M., c.2 (1689). With the incorporation of this provision, Parliament emerged victorious after a long struggle with the Tudor and Stuart monarchies which sought to suppress Parliament's efforts to establish its supremacy by employing civil and criminal sanctions against outspoken legislators critical of the Crown. *See* Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate, Its Past, Present, And Future As A Bar To Criminal Prosecutions In The Courts*, 2 SUFF. L. REV. 1, 4-5 (1968). The Supreme Court has noted that:

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three coequal branches of government.

United States v. Brewster, 408 U.S. 501, 508 (1972). Accordingly, the details of the English history

Speech or Debate privilege for Congress received very little attention at the Constitutional Convention of 1787. The clause was inserted in Article I accompanied by virtually no discussion of its scope. It has been observed elsewhere that "William Pinckney proposed that it should be provided that each House should be the sole judge of the extent of the privilege granted. . . . James Madison advocated that the extent of the privilege should be delineated."[28] Other commentators have suggested that the failure of the Convention to adopt these suggestions can be explained as a heeding of Blackstone's warning that if "no privilege [were] to be allowed but for what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretense thereof to ... violate the freedom of Parliament."[29] Thus, the Article I language establishing the Speech or Debate privilege for Congress was cast in absolute terms, leaving the scope of its prohibition to subsequent judicial interpretation. The predominant concern of the judiciary in that regard has been with the problem of defining speech or debate, or the synonymous phrase, legislative acts. This definition would serve to determine the scope of the substantive immunity conferred.

The Supreme Court did not have occasion to consider the scope of the Speech or Debate Clause until 1881, when it decided *Kilbourn v. Thompson.*[30] Kilbourn (who had been arrested and imprisoned for contempt of the House of Representatives) brought suit for false imprisonment against the Speaker and several representatives. While holding that the House did not have the authority to imprison an individual found in contempt, the Supreme Court also held that members of the House who had voted for the resolution ordering Kilbourn's arrest and imprisonment could not be subjected to civil suit for their legislative acts. The Court asserted that the immunity conferred by the Speech or Debate Clause extended to "all things generally done in a session of

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of the speech or debate privilege are omitted here. For an indepth treatment of the subject, *see generally* Cella, *supra;* C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1970); T. TASWELL-LONGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TUTONIC CONQUEST TO THE PRESENT TIME (11th ed. 1960); T. MAY, TREATISE ON THE LAW, PRIVILEGE, PROCEEDINGS, AND USAGE OF PARLIAMENT (16th ed. 1957); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th ed. 1956); Neal, *The Commons Privilege of Free Speech in Parliament* in TUDOR STUDIES (Seaton-Watson ed. 1924); Reinstein & Silverglate, *Legislative Privilege And The Separation of Powers,* 86 HARV. L. REV. 1113 (1973).

Much the same tensions that characterized the adversary relationship between Crown and Parliament developed in the American colonies as colonial legislatures sought to enhance their authority at the expense of the royal governors. The Articles of Confederation of 1777 and the early state constitutions asserted the existence of the speech or debate privilege in terms nearly identical to the language of the English Bill of Rights. Cella, *supra,* at 13-14.

28. Cella, *supra* note 27, at 14-15.

29. Reinstein & Silverglate, *supra* note 27, at 1140, quoting 1 W. Blackstone's Commentaries 164 (1765).

30. 103 U.S. 168 (1881).

[Congress] by one of its members in relation to the business before it."[31]

In recent years, the Supreme Court has had increasing opportunity to reiterate its expansive view of the Speech or Debate Clause, extending its protection to shield Congressmen (and sometimes, Congressional aides) from liability in a variety of civil cases.[32] In *Gravel v. United*

31. *Id.* at 204. While *Kilbourn* is the earliest interpretation of the Speech or Debate privilege by the United States Supreme Court, other courts and commentators frequently make reference to the Massachusetts Supreme Judicial Court's decision in Coffin v. Coffin, 4 Mass. 1 (1808), because of the closeness in time of that case to the era of the Founding Fathers. *Coffin* involved a slander suit brought by William Coffin against Micajah Coffin. Both men were members of the Massachusetts House of Representatives. The suit was provoked by Micajah's remarks on the floor of the House to the effect that William was a convict despite the fact that he had been acquitted in a criminal proceeding. Chief Justice Parsons liberally construed the scope of the Massachusetts version of the privilege, holding that it was not strictly confined to making speeches or debating, but should extend to:

> the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution of the office; and ... [to] define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. . . .

Id. at 27. Ironically, the *Coffin* court allowed the suit to proceed, holding that the privilege did not apply to conduct which is not "in the character of a representative." *Id.* at 30. This qualification in *Coffin* remains the source of disagreement between those who advance a limited interpretation of the Speech or Debate Clause and those who advocate an expansive one. In a compelling critique of the *Coffin* court's reasoning, Professor Cella (a member of the latter school) observed:

> In its specific application of the doctrine of legislative privilege, the reasoning of the court was faulty, ill-conceived, and regrettably unfortunate. There appears to be no valid and convincing reason for denying to Micajah Coffin the claim of privilege to which he was entitled. Every one of the court's specific conclusions with respect to Micajah Coffin's language and conduct was open to serious question.

Cella, *supra* note 27, at 29. The Cella critique notwithstanding, the refusal of the *Coffin* court to afford the privilege to the defendant in that case was certainly a precursor of the eventual recognition by the United States Supreme Court of a need to place some restriction on the scope of protected legislative activity.

At least one federal appeals court decision followed the *Coffin* court's broad interpretation of the privilege and held it applicable to a case substantially similar to *Coffin*. *See* Cochran v. Couzens, 42 F.2d. 783 (D.C. Cir. 1930). In *Cochran*, the District of Columbia Circuit Court held that a Senator could not be sued for slander based on remarks contained in a speech delivered on the Senate floor even if the speech did not concern any matter then before the Senate. *Compare Coffin*, where the Massachusetts Supreme Judicial Court's conclusion that the privilege did not apply stemmed from its finding that defendant Coffin's remarks were made pursuant to debate on a resolution which had already been passed and was, therefore, no longer under consideration by the House. Coffin v. Coffin, 4 Mass. 1, 29 (1808).

32. The Supreme Court did not have occasion to consider the scope of the Speech or Debate privilege again until Tenney v. Brandehove, 341 U.S. 367 (1951), a case involving a civil rights action brought against a state legislator. Plaintiff alleged that defendant had used his official position to intimidate him and deter his exercise of free speech. *Id.* at 371. The Supreme Court dismissed the action, relying on the expansive language of Kilbourn v. Thompson, 103 U.S. 168 (1881).

More recently, the case of Dombrowski v. Eastland, 387 U.S. 82 (1967), involved an action brought against the chairman and counsel of a Senate subcommittee for an alleged tortious conspiracy entered into with Louisiana officials for the purpose of depriving plaintiff of his rights to be free from unreasonable search and seizure of his property as guaranteed by the Fourth Amendment. The Supreme Court held that the Speech or Debate Clause required the dismissal of the suit against Senator Eastland, reasoning that the take over of plaintiff's property after it was unlawfully seized by state officials was within the jurisdiction of the committee. But the Court refused to extend the clause's protection to the committee counsel, permitting the suit to proceed as to him.

States, [33] the Supreme Court held that a legislative act is "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[34]

The scope of protected legislative activity continues to draw the Supreme Court's attention, as evidenced by its decision in *Hutchinson v. Proxmire.*[35] Whatever the limits may be on the definition of legislative acts which may not be questioned in court, it has never been

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The Court said that the privilege "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." *Id.* at 85.

In Powell v. McCormick, 395 U.S. 486 (1969), a former Congressman brought suit to challenge his exclusion from the House of Representatives. The Supreme Court held that members who had participated in the decision to exclude Powell were immune from suit based on the Speech or Debate Clause. *Id.* at 506. But the Court permitted the suit to proceed against the Clerk of the House and the Sergeant at Arms for refusing to perform services for Powell in accordance with the unconstitutional exclusion of the Congressman. *See* note 16 *supra.*

In Doe v. McMillan, 412 U.S. 306 (1973), parents of children in the Washington, D.C. school system brought an action for invasion of privacy allegedly caused by the dissemination of a Congressional report. In this case, the Supreme Court held that not only were members of the House committee which prepared the report immune from suit, but that the immunity extended to cover employees of the committee who had assisted the members. In holding that the report did not lose its protection as speech or debate once released to the public, the Court said, "[D]oubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by members of Congress. . . ." *Id.* at 312.

In Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), plaintiff/organization brought suit against members of a Senate committee which had subpoenaed its bank records pursuant to an investigation. The Supreme Court held that the issuance of the subpoena was within the sphere of legitimate legislative activity and therefore protected under the Speech or Debate Clause. *Id.*at 501-07.

33, 408 U.S. 606 (1972).

34. *Id.* at 625. Senator Mike Gravel had read excerpts from classified documents (the "Pentagon Papers") to a Senate subcommittee. He then placed the documents in the public record. Following press reports that the Senator had arranged for private publication of the papers, a federal grand jury subpoenaed a Gravel aide to testify pursuant to its criminal investigation. The Senator intervened to quash the subpoena on Speech or Debate grounds. The motion to quash was denied by the United States District Court for the District of Massachusetts, which held that questioning of the aide could proceed on a limited basis. In affirming, the United States Court of Appeals for the First Circuit held that the aide could not be questioned about either legislative acts or the private publication of the papers. The Supreme Court affirmed and modified, holding that the privilege extended to the aide over all matters that "would be immune legislative conduct if performed by the Senator himself." *Id.* at 622. But the Court also held that the protection of the clause did not extend so far as to preclude questioning of the aide concerning republication of the papers. *Id.* at 627. Thus, the *Gravel* decision can be seen as a two-edged sword: liberally construing the scope of the clause so as to include Congressional aides but restricting the range of protected activities so as to exclude the effort to assist private republication of the papers.

35. __ U.S. __, 99 S. Ct. 2675 (1979). On April 18, 1975, Senator William Proxmire delivered a speech on the Senate floor concerning government contracts awarded to a Michigan research scientist, Dr. Ronald Hutchinson. Quotations from the speech were published in a press release. Hutchinson brought a $6 million libel and slander action against Proxmire and an aide, alleging interference with valid contractual relationships. The complaint was based on the press release, telephone conversations with officials of federal agencies initiated by the aide, and statements made by Proxmire on a television program (which did not expressly mention Dr. Hutchinson). The

argued that such definition extends so far as to include the acceptance of private compensation for the performance of official duties. Yet, because the facts underlying allegations of bribery committed by legislators are usually intimately connected with the performance of official acts, the Supreme Court has found it necessary to add an evidentiary caveat to its holdings permitting the government to go forward with bribery prosecutions. The development of the rule excluding evidence showing the performance of constitutionally protected legislative acts is traced in the following section.

III. THE DEVELOPMENT OF THE RULE EXCLUDING EVIDENCE OF LEGISLATIVE ACTS

The rule excluding evidence of legislative acts was established in the 1966 case of *United States v. Johnson.*[36] While the rule was reiterated by the Supreme Court in *United States v. Brewster*[37] in 1972, and again in *United States v. Helstoski,*[38] its development since the *Johnson* case has been marked by the emergence of conflicting views within the Court itself as to the extent of the evidentiary proscription. This conflict is apparent when the *Johnson* and *Brewster* cases are compared.

A. United States v. Johnson

The *Johnson* case involved the prosection of a former Congressman for violation of the conflict of interest statute[39] and conspiracy to

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United States District Court for the District of Wisconsin granted Proxmire's motion to dismiss based on the Speech or Debate Clause. In what may be a revolutionary decision, the Supreme Court held that the publication of newsletters and press releases is not protected legislative activity. *Id.* at 2687. Nor were remarks made by the aide in his telephone discussions immune from suit under the clause. *Id.* 2681 n.10. Criticism of the Court's decision as contrary to the history of the Speech or Debate privilege can be expected.

The *Gravel* and *Proxmire* decisions illustrate the Supreme Court's recognition of the need to establish some limits on the substantive immunity conferred by the Speech or Debate Clause. While the clause must be liberally construed so as to cover all acts within the legitimate sphere of legislative activity, purely political acts are to be excluded from its protection. Professor Tribe has suggested a general definition of the types of activity which will or will not fall within the protection of the clause:

> Thus, in addition to literally speaking or debating, a range of other acts — voting, preparing committee reports, and conducting committee hearings, for example — are clearly protected. . . . Unprotected political matters include providing constituent services, aiding individuals seeking government contracts and arranging appointments with government agencies, as well as communicating directly with the public through such media as constituent newsletters, press releases, speeches delivered outside of Congress, and book publishing.

L. TRIBE, *supra* note 25, at 293.

36. 383 U.S. 169 (1966).

37. 408 U.S. 501 (1972).

38. 442 U.S. 477 (1979).

39. 18 U.S.C. § 281 (1948) (repealed 1962, supplanted by 18 U.S.C. § 203 (1962)) provides: "Whoever, being a Member of or Delegate to Congress . . . directly or indirectly receives or agrees to receive any compensation for any services rendered . . . in relation to any proceeding, contract,

defraud the United States.[40] Allegedly, Congressman Thomas F. Johnson had endeavored to influence the Justice Department to dismiss mail fraud indictments against savings and loan companies.[41] The government offered evidence of a speech made by Johnson on the floor of the House in support of savings and loan companies, contending that the speech was made in exchange for payment and that it was impossible to interpret it as a legitimate legislative act.[42]

Johnson's conviction on the conspiracy count was set aside by the United States Court of Appeals for the Fourth Circuit on the ground that the evidence of the speech was admitted in violation of the Speech or Debate Clause.[43] The United States Supreme Court affirmed, holding that a member of Congress could be prosecuted for criminal acts, provided the government's proof entailed no showing of "the legislative acts of the defendant ... or his motives for performing them."[44] The Court declined to dismiss the indictment, holding that the conspiracy count could be retried "wholly purged of elements offensive to the Speech or Debate Clause."[45]

B. United States v. Brewster

The *Johnson* decision included dicta suggesting that the evidentiary ban might be limited to the facts of that case.[46] The government sought to capitalize on this qualifying language in *United States v. Brewster.*[47]

Former Senator Daniel Brewster was charged with soliciting and accepting bribes in violation of 18 U.S.C. § 201 (c) (1).[48] Prior to trial, Brewster successfully moved the United States District Court for the District of Columbia to dismiss his indictment as violative of the Speech

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claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested [shall be guilty of an offense]."

40. 18 U.S.C. § 371 (1948) provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of an offense]."

41. United States v. Johnson, 383 U.S. 169, 171 (1966).

42. *Id.* at 175 n.6.

43. *See* United States v. Johnson, 337 F.2d. 180 (4th Cir. 1964).

44. United States v. Johnson, 383 U.S. 169, 185 (1966).

45. *Id.*

46. The Court stated:

> We emphasize that our holding is limited to prosecutions involving circumstances such as those in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, *does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.* And, without intimating any view thereon, we *expressly leave open for consideration when the case arises a prosecution which, though entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.*

Id. at 185 (emphasis added).

47. 408 U.S. 501 (1972).

48. For the text of 18 U.S.C. § 201 (c) (1962), *see* note 14 *supra.*

or Debate Clause.[49] On review, the Supreme Court reversed, holding that Brewster's indictment was constitutionally permissible.[50]

While the *Brewster* Court reaffirmed the holding in *Johnson* that members of Congress could not be subjected to judicial inquiry into the motivation for or performance of legislative acts,[51] it viewed the issue presented as different from that in *Johnson*. The Court phrased the question as "whether a Member of Congress may be prosecuted . . . for accepting a bribe in exchange for a *promise relating* to an official act."[52] This distinction between a *legislative act* and a *promise to perform an act in the future* received substantial emphasis in the Court's opinion and appears to have been critical to the outcome of the case.[53] The Court held that the goal of preventing intrusion into the legislative process did not require the conclusion that the executive and judicial branches were barred from making inquiry into "all conduct *relating* to the legislative process."[54] The Court expressed doubts about the capacity of Congress to effectively use its own disciplinary powers under the Punishment Clause.[55]

Submitting a strong dissent, Justices Brennan and Douglas contended that the majority had abandoned *Johnson*.[56] The dissenting Justices observed that in its argument before the district court, the government had *admitted* that its inquiry was into legislative acts but had urged that 18 U.S.C. § 201 was a proper statutory delegation of authority to the courts, raising the question left open in *Johnson* of whether the evidentiary ban would be extended to cover cases where

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49. *See* United States v. Brewster, 408 U.S. 501, 504 (1972). The indictment charged that the bribes were received "for and because of . . . his action, vote, and decision on postage rate legislation." *Id.* at 503.

50. The Court stated:

> An examination of the indictment brought against appellee . . . reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the government to make out a prima facie case. . . . The illegal conduct is taking or agreeing to take money *for a promise to act in a certain way*. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise. . . . [I]nquiry into the purpose of a bribe "does not draw in question the legislative acts of the defendant member of Congress or his motivations for performing them."

Id. at 525-26 (emphasis added).

51. *Id.* at 512.

52. *Id.* at 502 (emphasis added).

53. *See* note 50 *supra*.

54. United States v. Brewster, 408 U.S. 501, 515 (1972) (emphasis in the original).

55. *See* note 16 *supra*. The Court's doubt was based on the view that the House was ill-equipped to conduct a thorough investigation free of political considerations. United States v. Brewster, 408 U.S. 501, 518-19 (1972). The option of leaving the investigation and trial of bribery to the Congress itself is considered in notes 71 and 76 and accompanying text *infra*.

56. The dissenting Justices declared, "[I]f the indictment did not call into question the speeches or debates of the Senator, it certainly laid open to scrutiny the motives for his legislative acts; and these motives . . . were no more subject to executive and judicial inquiry than the acts themselves, unless of course, the Congress could delegate such inquiry to the other branches." United States v. Brewster, 408 U.S. 501, 530 (1972) (Brennan, J., dissenting).

prosecution was based on a "narrowly drawn statute."[57] Instead of addressing this issue, the Court grounded its decision on the dubious distinction between legislative acts and promises to act in the future.

The dissenting Justices in *Brewster* sharply differed with the majority's characterization of the charges as not drawing into question the Senator's performance of the alleged illicit promise, asserting that "[The] Count calls into question both the performance of official acts by the Senator and his reasons for voting as he did. Either inquiry violates the Speech or Debate Clause."[58]

Justice White also dissented, contending that the majority's distinction between a promise and an act was unpersuasive and that a prosecution based on the former would necessitate the same type of prohibited inquiry as would occur if the prosecution were for the performance of the act itself.[59] Under the views presented by all three dissenting Justices, the indictment could not constitutionally stand.

In calling for the dismissal of the indictment, the dissenting Justices purported to be strictly following *Johnson*.[60] The majority opinion also purported to follow *Johnson* but rendered its meaning ambiguous by employing the controversial distinction between acts and promises. It is against this background that the issues in *Helstoski* found their way to the Supreme Court.

IV. UNITED STATES V. HELSTOSKI: TOO FAR OR NOT FAR ENOUGH?

As it had in *Brewster*,[61] the Supreme Court held in *Helstoski*[62] that the government could proceed with its prosecution provided that no evidence be admitted for the purpose of proving the performance of or motivation for legislative acts.[63] The central question raised by the *Helstoski* decision is whether the Court's holding went too far or not far enough toward the preservation of the role played by the Speech or Debate Clause in the constitutional scheme.

At the outset, it bears repeating that despite the *Helstoski* Court's reliance on the law of mandamus,[64] it is clear that its refusal to dismiss the indictment was based on the distinction between legislative acts and promises to perform legislative acts in the future.[65] The validity of this

57. *Id.*

58. *Id.* at 536.

59. *Id.* at 557-63.

60. *Id.* at 530, 553. The reasoning of the dissenting opinions seems to suggest that Johnson's indictment would have been dismissed if the acts he had performed had been confined solely to the making of the speech. Only Johnson's efforts to influence the Justice Department (which were not protected legislative acts) saved his indictment from constitutional infirmity.

61. 408 U.S. 501 (1972).

62. 442 U.S. 477 (1979).

63. *See* note 2 and accompanying text *supra*.

64. *See* note 24 and accompanying text *supra*.

65. *Id.*

distinction is open to serious question. It is difficult to accept the Court's theory that proof of the promise does not implicitly draw in question the performance of the promised act or the motives underlying it. It has been persuasively argued that the promise itself is part and parcel of the actual performance of the act.[66] By grounding its decision on the dubious promise versus act distinction, the Court appears to have attempted to strike a balance between two extremes (*i.e.*, dismissal of the indictment altogether as urged by Helstoski or the elimination of all evidentiary restrictions as advanced by the government.) But the Court's reasoning must inevitably be seen as avoiding any clear resolution rather than as a balancing of the diametrically opposite positions of the government and Helstoski. The difference in these positions can be traced to two conflicting constitutional interpretations regarding the scope of the Speech or Debate Clause. The Court's approach neither resolved this conflict by way of synthesis nor by positing an alternative constitutional theory. The issues alluded to in the *Johnson*[67] dicta

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66. Responding to the Court's original application of the distinction in United States v. Brewster, 408 U.S. 501 (1972), Reinstein and Silvergate observed:

> If a congressman decides to give a speech or vote in a certain way and he is indicted for having done so corruptly — as a result of a bribe — his motivation for the legislative activity is being called into question by the charge. Nor would it matter that he did not even speak or vote. The decisionmaking process by which a congressman decides to speak or vote, or to remain silent or abstain, would seem to be as much a legislative act as a speech or vote itself. An indictment for exercising that decision improperly directly challenges this decisionmaking process.

Reinstein & Silverglate, *Legislative Privilege And the Separation of Powers,* 86 HARV. L. REV. 1113, 1162 (1972).

The dissenting Justices in *Brewster* and United States v. Helstoski, 442 U.S. 447 (1979), forcefully argued that "proof of an agreement to be 'influenced' in the performance of legislative acts is by definition an inquiry into their motives, whether or not the acts themselves or the circumstances surrounding them are questioned at trial." United States v. Brewster, 408 U.S. 501, 536 (1972) (Brennan, J., dissenting). Justice Brennan reiterated this observation in United States v. Helstoski, 442 U.S. 477, 498-99 (1979) (Brennan, J., dissenting).

In a separate opinion in *Helstoski,* Justice Stevens, joined by Justice Stewart (concurring in part, dissenting in part) said, "To be sure, such statements mentioning legislative acts may reveal some information about the performance of legislative acts and the legislator's motivation in conducting official duties. *But that is also true of other evidence . . . dealing only with promises of future performance. . . .*" *Id.* at 496 (emphasis added).

Justice White, in his *Brewster* dissent, remarked, "This distinction between a promise and an act will not withstand scrutiny in terms of the values that the Speech or Debate Clause was intended to secure. . . ." United States v. Brewster, 408 U.S. 501, 552 (1972) (White, J., dissenting).

Finally, even the government itself recognized the problem with the promise versus act distinction in its brief in *Helstoski.* The government urged:

> [S]tatements, and agreements preliminary to the performance of such an act should be just as objectionable as evidence that the act has . . . occurred. While the statement "I will introduce your bill tomorrow" may be somewhat less probative of the fact of introduction of the bill than the statement "I introduced your bill yesterday," *both statements tend to prove the performance of a legislative act.* . . . In either case the jury is presented with some indication that a Member of Congress did in fact engage in conduct, inquiry into which is barred by the Speech or Debate Clause.

Brief of the United States, *supra* note 6, at 60-61 (emphasis added).

67. 383 U.S. 169 (1966).

(regarding individual waiver or Congressional waiver by statutory delegation)[68] were squarely presented in *Helstoski*. The statutory delegation question was also ripe for decision in *Brewster*, where the prosecution was also based on the federal bribery statute. Once it is understood that the Court's reasoning did not settle the inherent conflict between bribery prosecutions based on accepting payment for performing legislative acts and the Speech or Debate Clause, the practical impact of the Court's holding may be assessed in light of that conflict.

Powerful arguments can be marshalled to claim either that the practical impact of *Helstoski* goes too far or not far enough. The argument that *Helstoski* goes too far may be stated as follows. Congressmen should not be obstructed in the pursuit of legitimate legislative acts by unwarranted executive or judicial intrusions. However, the acceptance of bribes is not legitimate legislative activity. Rather, participation by Congressmen in bribery schemes denigrates the electorate's interest in honest representation and affronts the integrity of Congress as a whole. Since successful bribery prosecutions serve to vindicate the institutional integrity of Congress, they do not contradict the values implicit in the Speech or Debate Clause, but serve to re-enforce them and contribute to the maintenance of an effective legislature. It follows then, that bribery prosecutions should be encouraged (even by Congress itself) and that all available evidence, including proof of legislative acts or their underlying motivations, should be admissible.[69] By restricting ad-

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68. *See* note 46 *supra*.

69. In *Helstoski*, Justice Stevens urged that evidence of legislative acts should be admissible for the purpose of proving the Congressman's motivation in accepting money, by arguing that the Court's decision "affords greater protection than is necessary to fulfill the mission of the Speech or Debate Clause" and that, "[t]he Constitution mandates that legislative acts 'shall not be questioned'; it does not say they shall not be mentioned." United States v. Helstoski, 442 U.S. 477, 498 (1979) (Stevens, J., concurring in part, dissenting in part).

Similar sentiments were expressed during the interval between the decision of the Third Circuit Court and the announcement of the Supreme Court's decision in *Helstoski*. Referring to the Third Circuit Court's decision, the author observed, "The *Helstoski* decision . . . fails to recognize that an accommodation with the federal bribery statute enhances the values served by the speech or debate clause." Note, *Evidentiary Implications of The Speech or Debate Clause*, 88 YALE L.J. 1280, 1295 (1979). The author urged that evidence barred by *Helstoski* should be admissible "not as 'secondary evidence' of protected legislative acts, but as primary evidence of the defendant's purpose in accepting the bribe." *Id.* at 1296. The adoption of this view would, of course, require that the *Johnson*, *Brewster*, and *Helstoski* cases be overruled.

An alternative to permitting the government to introduce evidence of legislative acts as part of its case in chief would be to allow the use of such evidence to impeach the defendant Congressman on the witness stand. This approach would be consistent with that taken by the Supreme Court in Harris v. New York, 401 U.S. 222 (1971), where the Court held that statements made to the police by a criminal defendant while in custody may be used by the prosecution at trial to impeach the defendant's credibility on the witness stand. (The Court held that such self-incriminating statements could not be used as part of the prosecution's case in chief in Miranda v. Arizona, 384 U.S. 436 (1966)). If an ordinary defendant's privilege against self-incrimination can be limited by using evidence inadmissible as proof of culpability for impeachment purposes, it can be forcefully argued that this should also be true regarding the scope of a legislator's speech or debate privilege.

missible evidence to proof of agreements made prior to the performance of legislative acts, the Court in effect recognized the legitimacy of bribery prosecutions yet rendered the chances for successful prosecution virtually nonexistent.[70]

Beyond its crippling effect on successful prosecution, the *Helstoski* decision may actually undermine the Speech or Debate Clause. While the decision renders successful prosecution impossible in most cases, it does nothing to foreclose the successful pursuit of indictments. A scenario can be envisioned wherein the government might use indictments as a political weapon against certain legislators even though it could later choose not to proceed to trial for lack of admissible evidence. Political death is likely to result from the very fact of indictment itself, and the accused would not even be afforded the opportunity to defend himself in open court.

Finally, the alternative of leaving the problem of investigating and trying Congressmen to the legislature itself would be inefficient and would defeat the goal of ensuring an effective Congress by hindering its operation with functions that are better entrusted to the executive and judicial branches.[71]

Of the arguments presented above, at least the first two are easily refuted. As to the view that the goals of the Speech or Debate Clause

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70. The government urged that the prohibition banning evidence of legislative acts "effectively foreclose[s] the possibility of proving a bribery charge in the vast majority of cases. . . ." Brief of the United States, *supra* note 6, at 42. Peter Buscemi, a Justice Department attorney who was involved in the *Helstoski* case, has observed:

> It is at least conceivable that, after *Helstoski,* the only permissable way in which to prove that a Congressman solicited or received a bribe in exchange for a legislative act is to introduce evidence from the period *before* the performance of any such act that tends to show that payment was sought or made in anticipation of future legislative conduct. Such evidence will nearly always be extremely difficult to obtain and in some cases will simply be nonexistent. In the latter instances, at least, I think it plausible to predict that *Helstoski* will preclude a successful prosecution.

Letter from Peter Buscemi, Assistant to the Solicitor General of the United States to Stephen J. King (November 27, 1979). In a telephone interview conducted on February 6, 1980, Mr. Buscemi explained that in many instances, the bribe will have been prearranged through a subordinate and that the Congressman himself will not become directly involved until he receives a payment following the performance of a legislative act. In such a case, the *Helstoski* decision would absolutely preclude successful prosecution.

Another critic of the decision has remarked that:

> By excluding references to "past legislative acts," the *Helstoski* rule makes the possibility of a successful bribery prosecution turn on the luck or conivance of the defendant in timing his illicit conversations, correspondence, and compensation, and on the government's success in procuring evidence of corrupt transactions and agreements occurring before, rather than after, the performance of legislative acts.

Note, *Evidentiary Implications of The Speech or Debate Clause,* 88 YALE L.J. 1280, 1294 n.76 (1979).

71. In United States v. Helstoski, 442 U.S. 477 (1979), the government argued:

> By undertaking disciplinary measures against its own Members, Congress unavoidably would divert its attention from the lawmaking activities that are its primary function. In addition, it is not clear that congressional jurisdiction is adequate to the task. In a case like the present one, Congress might well be unable to reach and punish misconduct performed by a legislator while a Member of the House or Senate but not discovered or fully

are somehow enhanced by successful bribery prosecutions, it is worth noting that the history of the clause indicates that its concern is not with legislative *integrity* per se, but with integrity achieved through legislative *independence.*[72] Further, while it is true that the bringing of indictments which the government does not intend to bring to trial can be used as a political weapon, the same can be said of the selective enforcement of the bribery statute against individual legislators.[73] With these considerations in mind, it would perhaps be better to first preserve legislative in-

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investigated until after he has left office. And a substantial question may exist about the ability of a particular Congress to impose sanctions that extend beyond the life of that Congress.

Brief of the United States, *supra* note 6, at 73.

The prospect of effective investigation and discipline by Congress of its own members has been viewed with understandable skepticism. Fears have been expressed that cronyism would forestall disciplinary efforts in most cases and that investigation and trial would proceed only when there is great public outcry. Even then, the disciplinary process might well be politically tainted. *See generally* Sisitsky, *The Bribed Congressman's Immunity From Prosecution,* 75 YALE L.J. 335 (1965-66); 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 536-37 (8th ed. 1927).

Because the Supreme Court itself expressed serious doubts concerning the question of congressional self-discipline in *Brewster (see* notes 16 and 55 *supra),* considerable attention was devoted to dispelling the Court's concerns by amici curiae in *Helstoski.* The amicus brief described the extensive efforts of the House of Representatives in its 1977 investigation of charges that Congressmen had accepted gifts from agents of the South Korean government made for the purpose of influencing American policy toward that country. The investigation (which entailed the holding of numerous hearings, the taking of 335 depositions, and the examination of over 40,000 documents) resulted in the filing of statements of alleged violation against four members of the House. *See* Brief of Amici Curiae, *supra* note 13, at 16-19. The House officially reprimanded Congressmen Charles H. Wilson, John M. McFall, and Edward R. Roybal for their role in the affair. *See* N.Y. Times, Feb. 5, 1980, § 3, at 8, col. 1.

At this writing, another scandal has recently been revealed, again raising issues regarding congressional self-discipline and the role of the executive and judicial branches. On February 3, 1980, law enforcement authorities divulged that five members of the House and one senator were the subjects of a bribery investigation by the FBI. Allegedly, the legislators had accepted payments from bureau agents posing as businessmen and Arab sheiks. N.Y. Times, Feb. 3, 1980, § A, at 1, col. 1. (Ironically, one of the five House members named was Congressman Frank Thompson, Jr., one of the amici curiae in the *Helstoski* case. Mr. Thompson denied any wrongdoing on his part. N.Y. Times, Feb. 3, 1980, § A, at 26, col. 2). Congress immediately set out to conduct its own investigation. Congressman Charles E. Bennett, chairman of the House Ethics Committee, announced that the committee had been investigating bribery allegations against some of the named legislators independently of the FBI and would broaden its inquiry to include the other subjects as well. N.Y. Times, February 4, 1980, § A, at 1, col. 45. Senate Ethics Committee Chairman Howell Heflin and Congressman Bennett met with federal law enforcement officials, seeking to obtain the evidence developed by the FBI. *See* N.Y. Times, February 4, 1980, § A, at 1, col. 6. Senator Heflin commented that Attorney General Benjamin R. Civiletti and FBI Director William H. Webster wanted "to think about the relationship" between Congress and the executive branch and were concerned about problems which simultaneous investigation might entail (including the question of whether evidence being used as part of an ongoing criminal investigation could be released to the congressional ethics committees). N.Y. Times, February 5, 1980, § B, at 8, col. 2. As Congress and the Justice Department proceed with their separate investigations and disciplinary sanctions, the panoply of problems inherent in the exercise of the investigative and adjudicative processes of each will undoubtedly compel attention and arouse debate.

72. In *Helstoski,* the Supreme Court observed that the purpose of the Speech or Debate Clause was to "preserve the constitutional structure of separate, coequal, and independent branches of government." United States v. Helstoski, 442 U.S. 477, 491 (1979).

73. The selective enforcement problem is raised by the FBI's investigatory procedures

dependence and leave the matter of preserving legislative integrity to Congress itself, the electorate, and the efforts of a diligent free press.

The core of the "*Helstoski* goes too far" argument is the understandable aversion to letting Congressmen get away with it when the rest of us can get caught. The crux of the problem, therefore, is balancing society's desire to catch corrupt Congressmen against the wisdom of a constitutional framework that ensures legislative independence to the possible detriment of criminal law enforcement. It is the emphasis on the Speech or Debate Clause's separation of powers function that underlies the argument that *Helstoski* does not go far enough.

The "too far" position suffers from two erroneous assumptions. The first is that the Speech or Debate Clause is primarily concerned with legislative integrity rather than independence. The second is that this position views the Speech or Debate Clause merely as conferring a *personal privilege* (subject to limitation) rather than as a fundamental ingredient of the structure of government based on the separation of powers.[74] A compelling argument may be advanced that the clause's separation of powers function overrides and circumscribes the significance of the individual privilege conferred. The *privilege,* in other words, is a byproduct of congressional *jurisdiction.* It was argued by amici curiae in *Helstoski* that, "Operating to compliment each other, the Speech or Debate Clause and the Punishment Clause deprive the Executive and Judicial Branches of jurisdiction to question, charge, try or punish a Member for legislative misconduct within the House."[75] Professor Cella has expressed the view that recognition of exclusive

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employed in the "Abscam" affair . *See* note 71 *supra.* By posing as Arab Sheiks and initiating contact with the legislators involved, the FBI agents were acting to *create* illicit schemes and *induce* criminal violations. They were not acting to *uncover* prior violations. One may inquire as to the basis employed by the FBI in deciding why only select legislators should be approached. Although there is no apparent reason to suspect political motives as underlying such decisions, that possibility (in this case or in future ones) cannot be considered foreclosed.

74. In its *Helstoski* brief, the government urged that the extent of a legislator's speech or debate privilege should be circumscribed by considerations regarding a balancing of "the importance of the privilege to the effective performance of official responsibilities against the specific need for relevant evidence in the fair adjudication of a criminal case." Brief of the United States, *supra* note 6, at 69. The government noted that such an approach was applied by the Court concerning the boundaries of the president's executive privilege in United States v. Nixon, 418 U.S. 683 (1974). The analogy to the *Nixon* tapes case, however, fails to hold up when it is observed that executive privilege, unlike that conferred by the Speech or Debate Clause, is not textually grounded in the Constitution itself. Further, the precedential value of the *Nixon* case is doubtful even as it relates to executive privilege itself in view of the extremely unique and volatile constitutional crisis which probably compelled the Court to find some basis for ordering production of the Nixon tapes. For a series of articles on the *Nixon* case, *see generally* 22 U.C.L.A. L. REV. (1974-75).

75. Brief of Amici Curiae, *supra* note 13, at 14. If one accepts this view of the Speech or Debate Clause as a vesting of absolute jurisdiction in Congress itself over official legislative misconduct, it naturally follows that the protection of the clause can neither be waived by an individual member nor by Congress as a whole in the form of a statutory delegation to the executive

jurisdiction in Congress would be an effective prerequisite to the development of efficient procedures pursuant to the exercise of that jurisdiction.[76]

The "not far enough" argument is constitutionally persuasive and is logically derived from the plain language of the Constitution itself. It comports with the expansive reading of the Speech or Debate Clause consistently articulated by the Supreme Court. Nevertheless, a myriad of practical problems would ensue were this absolute view to be adopted. First, the Supreme Court would be compelled to declare bribery prosecutions based on circumstances involving the performance of legislative acts constitutionally impermissible, overruling *Brewster* and *Helstoski* in the process. To the extent that 18 U.S.C. § 201 defines bribery as accepting compensation in return for performing *"official acts,"*[77] the constitutionality of that statute itself would be subject to serious question. The discarding of recent judicial precedents and possible invalidation of the bribery statute itself would give rise to much criticism in both political and scholarly circles. The unfavorable political ramifications flowing from a decision which might be interpreted as giving a break to corrupt legislators may have been the underlying reason for the Court's invention of the promise versus act ground of decision as a means of avoiding a full consideration of the constitutional issues raised in *Helstoski*. Second, despite the assurances

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and judiciary branches. As Helstoski argued, "Once it understood [sic] that *only* Congress has jurisdiction over the legislative misconduct of its Members, it is clear that such jurisdiction may no more be yielded by an individual member than can the jurisdiction of this Court be given up by the will of one Justice." Brief for Helstoski, *supra* note 9, at 64. Helstoski also observed that, "If Congress may not share with the judiciary its power to override a presidential veto, how can it share its power to discipline its own Members? And if the judiciary may not share with another branch its judicial power under Article III, how can Congress share *its* judicial power under the Punishment Clause?" Reply Brief for Henry Helstoski at 56, United States v. Helstoski, 442 U.S. 477 (1979) (emphasis in the original). These are strong constitutional arguments. But it should be recalled that the exercise by Congress of its powers under the Punishment Clause is subject to judicial review as evidenced by Powell v. McCormick, 395 U.S. 486 (1969). (*See* notes 16 and 32 *supra*). Thus, the jurisdiction of Congress is not entirely its own affair and is, therefore, not completely analogous to the jurisdiction of the courts. Nevertheless, it remains true that judicial review of Congress's exercise of Punishment Clause jurisdiction is probably limited in scope to evaluation of the propriety of the specific disciplinary action chosen and should not reach the question of whether disciplinary action in general is called for. Further, the fact that the Court's review in *Powell* was based on assessing the conduct of the House Sergeant At Arms (after finding that the legislator/defendants were immune from suit based on the Speech or Debate Clause) leaves the whole question of judicial review in this area somewhat wanting for lack of a clear standard for future application.

76. Professor Cella argued:

> Undoubtedly, the widespread acceptance of the legislature as the exclusive tribunal for the trial of legislative members for criminal misbehavior and misconduct will greatly assist in overcoming many, if not all of the inherent difficulties in legislative trials. . . . [P]erhaps only then, will the pressure to develop Congress's techniques, procedures, and resources for conducting legislative trials produce meaningful legislative results.

Cella, *supra* note 27, at 41.

77. For the text of the federal bribery statute, *see* note 14 *supra*.

of those who support the absolutist view of the clause as a grant of exclusive jurisdiction to Congress, serious doubts must remain about the capacity of that body to discover and punish the corruption of its own members. It may be observed that both the executive and judicial branches are subject to Congressional oversight in the form of appropriations, investigations, and possible impeachment proceedings. The chance that such Congressional oversight activities might be politically tainted is arguably greater than that entailed by executive and judicial oversight of Congress. The latter involves the independent functioning of two coordinate branches according to well-established investigatory and adjudicative procedures. The propriety of the exercise of that process in any given case must ultimately be determined by appellate courts and such determinations must be accompanied by legally cognizable explanations. These procedural safeguards, combined with the continuous scrutiny of a modern press, tend to minimize the possibility of using the criminal justice process for purely political ends.[78]

CONCLUSION

The pragmatism of the "too far" view of *United States v. Helstoski*[79] and the constitutional purism of the "not far enough" position are diametrically opposite. Each side of the argument has its strengths and weaknesses. Between these extremes, there is the equivocal position of a Supreme Court which seems to have found itself constrained by prudential considerations to avoid any definitive resolution of the conflict. After *Helstoski,* it seems reasonable to conclude that as far as judicial involvement is concerned, the conflict between the Speech or Debate Clause and federal bribery prosecutions remains stalemated. Perhaps this stalemate contains the seeds of the best solution. If the Justice Department can continue to investigate and obtain indictments, but is precluded from successful prosecution in the courts, it may well find itself compelled to work with Congress toward the establishment of an effective inter-branch system of investigating and punishing political corruption in Congress. If this occurs, the Supreme Court's reasoning in *Helstoski* will be vindicated as a wise display of judicial restraint, providing the impetus for a practical albeit extra-constitutional solution. If inter-branch efforts at cooperation fail, the Court's decision must still be viewed as essentially dodging the full resolution of the scope of the Speech or Debate Clause in the criminal context.

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78. On the other hand, this possibility cannot be considered completely foreclosed. The lingering spectre of the Alien and Sedition Acts (*see* note 22 *supra*) and the questions of selective enforcement raised by the FBI's "Abscam" investigation (*see* notes 71 and 73 *supra*) remind us that the issue of executive misuse of the criminal justice system is not a wholly illusory one.

79. 442 U.S. 477 (1979).

BOOK REVIEW

ESTATE PLANNING (4th ed.)
By A. James Casner. Boston: Little, Brown & Company
1979. Pp. xxiii, 1087. $25.00. Clothbound.

In the fourth edition of *Estate Planning,* Professor A. James Casner updates this well-known treatise from the third edition which was published in 1961 and kept current since that date by a cumulative annual supplement. This latest edition substantially follows the format of prior editions, with the exception that a number of appendices have been eliminated. The sixteen chapters of the treatise examine the many aspects of estate planning. The single volume work is both a convenient reference work to the practicing attorney and an excellent text for class discussion.

In the Introduction, Professor Casner gives a concise overview of the aspects of federal taxation which are necessary in order to have at least a basic understanding of estate planning problems. This summary includes a good explanation of the computation of the federal estate tax under the unified rate schedule adopted by the Tax Reform Act of 1976.

The thirteen chapters of the work follow the same organization as the previous edition. Throughout each chapter, there are very detailed footnotes which refer to applicable provisions of the Internal Revenue Code, Revenue Rulings and Regulations, as well as applicable case law. At the end of each section of a chapter, Professor Casner poses a series of problems with appropriate citations for class discussion. In addition, leading cases are reported where helpful to illustrate an application of the subject matter under discussion. Massachusetts statutory and case law is generally used as a reference.

In chapter two, Professor Casner reviews the "Estate Plan Created by Operation of Law." Considered are the rights of intestate succession and other statutory rights which are afforded to the surviving spouse and issue of a decedent. The chapter also summarizes the available elections of the personal representatives in post-death estate planning. This topic is not, however, fully developed in the text.

Chapters three, five and six address the use of the will and trust in estate planning. Federal tax considerations in the use of these instruments are reviewed under the Tax Reform Act of 1976 and the Revenue Act of 1978. Federal income tax consequences are also ex-

amined. These chapters will answer many of the questions that frequently arise in preparing the usual estate plan.

Chapter four considers the problem of the estate being treated as a separate entity for income tax purposes. This chapter deals with the circumstances where the estate income is deemed to have been distributed to an estate beneficiary with the resulting tax impact to the beneficiary and not the estate. The chapter clearly indicates the importance of carefully considering this income tax problem which is often overlooked by the estate planner.

In chapter seven the choice between a trust gift and a non-trust gift is discussed. The chapter reviews the considerations which should be made in making the gift intervivos or outright by will. The text points out the importance of meeting the formal requirements imposed by local law in making an intervivos gift. The chapter also examines some of the problems which might arise when a gift by will takes the form of a pecuniary legacy or a specific bequest or devise.

Chapter eight examines the federal tax consequences of life insurance. Particular emphasis is placed upon income tax considerations. This is an appropriate emphasis since all too often the estate planner's consideration is limited to the death tax consequences of life insurance. In chapter nine, Professor Casner gives a concise summary of "Employee's Benefits, Income in Respect of Decedents and Social Security." The chapter analyzes both the qualified and non-qualified deferred compensation plans and their federal tax consequences.

Chapter ten is devoted to both tax and non-tax considerations of jointly held property. A good summary is given of the application of the "qualified joint interest" rule which was adopted under the Tax Reform Act of 1976. Chapter ten also reviews estate planning considerations where the estate consists of community property. A clear example is given of the determination of an adjusted gross estate of a deceased spouse where community property is involved. Special problems of life insurance in community property states are also reviewed in this chapter.

One of the more complex provisions of the Tax Reform Act of 1976 was the adoption of the generation skipping tax. Chapter eleven analyzes the impact of this tax and how it can be avoided with proper estate planning. This difficult topic is explained through a careful analysis of the relevant provisions of the Internal Revenue Code. Non-tax considerations in relation to the creation of future interests in estate planning are also discussed.

In chapter twelve Professor Casner discusses the power of appointment as an effective tool in estate planning. The chapter reviews the considerations which should be given to both the creation and the exercise of a power of appointment. In addition, drafting techniques of the power of appointment are examined.

A careful analysis of the marital deductions and the orphan's deduction is made in chapter thirteen. Gifts which qualify for the marital deduction as well as methods used in obtaining this deduction are reviewed. The federal income tax consequences of the distribution of a formula and non-formula gift in kind are carefully explained. The orphan's deduction gift for a minor child under the Tax Reform Act of 1976 as amended by the Revenue Act of 1978 is also discussed and an example is given of the provisions of a separate estate trust that might be used to establish the deduction.

The remaining three chapters of the book study the use of the charitable deductions, the planning for payment of death costs, and the problems of estate plans which cross state or national borders. The discussion of the methods of planning for the payment of death costs is an excellent summary of both advance and post-death planning that is available to meet these obligations.

The book is not intended for use as a comprehensive study of estate planning. The scope of such a broad subject matter in a single text prohibits such an objective. The book, however, will be particularly useful as a teaching text, which is its primary purpose. The problems posed following the discussion of each topic are well drafted and are useful in further developing the text material. In addition, the detailed references to case law and applicable tax provisions are valuable aids for further research. What is perhaps the most impressive aspect of the book is its comprehensive detail. This is evident in both the text itself and the extensive footnotes which appear throughout the volume. As both a reference work and a teaching text, *Estate Planning* is a valuable source to a better understanding of a complex subject.

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BOOKS RECEIVED

NUCLEAR LITIGATION. Chairman Thomas W. Evans. New York, N.Y.: Practising Law Institute. 1979. Pp. 277. $20.00. Paperbound. PLI course handbooks such as *Nuclear Litigation* are prepared to supplement PLI lectures of the same names. Nuclear litigation involves controversies over nuclear generating facilities, their components, or their fuel. Much attention has been drawn to nuclear litigation since the accident which occurred at the Three Mile Island reactor on March 28, 1979. A jury awarded in excess of ten million dollars to Karen Silkwood for personal injury which resulted from the escape of plutonium from the defendant's facility, also bringing attention to nuclear litigation. The nature of substantive nuclear law is undergoing dramatic changes as a result of these and other developments. This handbook on nuclear litigation reviews basic statutes, regulations and case law and investigates the application of statutory and regulatory standards as the basis for civil litigation. Litigation is reviewed involving nuclear waste and spent fuel, uranium, and nuclear accidents. The handbook also takes a look at litigation from the perspective of the supplier, construction litigation, and the role of the technical consultant in these cases. *Nuclear Litigation* is composed of sections written by lecture panelists actively involved in the litigation which they discussed at lectures held by PLI in September, 1979. One statute considered is the Price-Anderson Act. The impetus for the Act came from the congressional decision in 1954 to open atomic energy to private industry. Congress had determined that maximum progress toward development of electrical power by nuclear means would not be achieved without the participation of private industry using its own funds. A major obstacle to such participation was the possible liability for a catastrophic accident which might cause damage far beyond the level of insurance available. The Act had two objectives: protecting the public by assuring availability of compensation, and, encouraging development of the atomic energy industry by protecting it by limiting its liability. The handbook discusses the

basic provisions of the Price-Anderson Act and amendments to it, and the resulting rule of strict liability. The book points out many questions left unanswered by the Act. The handbook goes on to discuss the Nuclear Regulatory Commission's approach to Intervention. The statutory basis for Intervention is found in the Atomic Energy Act and is implemented by the Commission's Rules of Practice for Domestic Licensing Proceedings. The requirements of a petition to intervene are discussed, including the judicial concept of standing, timely and untimely petitions and the hearing rights of Intervenors. A chapter on representing states and citizens in litigation involving nuclear waste includes model pleadings such as a state and a citizen petition for leave to intervene, a state circuit court and federal district court injunction, and declaratory judgment complaints. A further chapter delves into aspects of uranium litigation, such as the failure to supply uranium contracted for and The Uranium ("Yellowcake") Cartel cases. Chapter 6, Defense of Public Liability Litigation Arising Out of Nuclear Accidents again discusses the Price-Anderson Act as well as theories of liability and legally cognizable damages. While the primary function of a PLI course handbook is to serve as an educational supplement to each program, it may also be used as a reference manual by attorneys and related professionals.

THE LAW OFFICER'S POCKET MANUAL, 1979-80 Edition. By John G. Miles, Jr., David B. Richardson, and Anthony Scudellari. Washington, D.C.: The Bureau of National Affairs, Inc. 1979. Pp. 1:1-11:1. $3.00. Vinylbound. The stated purpose of the latest edition of *The Law Officer's Pocket Manual* is to provide law enforcement officers with an operational knowledge of the impact of current constitutional law on police practice. The *Manual* is written and updated annually by lawyer-editors with experience as law enforcement instructors at the federal, state and local levels. The *Manual* features concise statements of the constitutional do's and don'ts governing such police activities as stop and frisk, search and seizure, surveillance, interrogation, and identification procedures. Past editions have been criticized for containing over-simplified statements concerning those police actions which are within the constitutional guidelines set by the major Supreme Court holdings. The problem of over-simplification may be considered to have been corrected in Chapter Two, Purpose and Use of this Manual, where it states that the *Manual* and cases cited do not necessarily represent the only course of action permissible and may differ in detail from practices instituted by local enforcement officials.

Therefore, officers should supplement the *Manual* by learning whether local implementation differs in practical detail from the court-based dictates of the *Manual.*

PHILOSOPHICAL LAW: AUTHORITY, EQUALITY, ADJUDICATION, PRIVACY. Edited by Richard Bronaugh. Westport, Connecticut. Greenwood Press. 1978. Pp. x, 208. $25.00. Clothbound. *Philosophical Law* consists of a series of essays divided into four legal topics which describe several of the ways in which human beings relate to one another. Each of these, authority, equality, adjudication and privacy, comprise a separate section of the book. Prior to the essays of each section of the book, a brief introduction is presented by the editor. Part One includes two essays in which the authors present diverse views on the definition of legitimate authority. Author John Ray attempts to analyze the concept of authority and to explain why the paradoxes of authority are powerfully persuasive while ultimately illusory. Author P. H. Norwell-Smith replies to Ray in his essay by criticizing Ray's analysis of the concept of authority. In Part Two, three essays provide various perspectives on the issue of "reverse discrimination." The first essay, by Ronald M. Dworkin, considers the cases of *Sweatt v. Painter* and *DeFunis v. Odgaard.* Both cases involved refusal of admission to universities; and claims were made involving discrimination and reverse discrimination respectively. The essays following Dworkin's essay criticize his analysis of the two cases. Part Three on adjudication also includes three essays. The adversary system is used by each author to analyze whether the adjudicatory process is the best means of settling disputes. The final part, Part Four, consists of two essays which provide contrary views regarding the need for recognizing a right to privacy, and one essay which advocates the privacy rights of children.

IN HONOR OF JUSTICE DOUGLAS: A SYMPOSIUM ON INDIVIDUAL FREEDOM AND THE GOVERNMENT. Edited by Robert H. Keller, Jr. Westport, Connecticut: Greenwood Press, Inc. 1979. Pp. xxvi, 231, $22.50. Clothbound. The essays collected in this book are the result of a symposium held at Washington's Fairhaven College to honor Justice William O. Douglas and his thirty-six year Supreme Court career. During the course of the symposium legal scholars analyzed contemporary issues of civil rights or civil liberties. Some based their presentations on the opinions of Justice Douglas; others disagreed vehemently with his legal philosophies. One of the essays

develops a constitutional case for curtailing the government's right to classify information. Another is a constitutional argument in favor of press autonomy as a check on government abuses. A third is critical of the role of Douglas and the Supreme Court in mandating school desegregation. Citizen access to the courts and judicial sex discrimination are also the subjects of essays. In addition to the essays, there are transcripts of two debates among the symposium participants. One debate concerns the Equal Rights Amendment; the other, the ultimate source of legal authority. The remaining portions of the book include an interview with Justice Douglas conducted by Eric Sevareid, and an extensive bibliography on the man and his work.

HOUSING JUSTICE IN SMALL CLAIMS COURTS. By John C. Ruhnka. National Center for State Courts. 1979. Pp. xxviii, 140. $6.00. Paperbound. This study was commissioned by the Special Committee on Housing and Urban Development of the American Bar Association as part of the ABA's National Housing Justice and Field Assistance Program, a comprehensive project designed to achieve rapid, inexpensive and equitable resolution of housing-related disputes. The focus of Mr. Ruhnka's work centers on an empirical examination of landlord-tenant justice in fifteen court systems. The initial chapters provide an overview of the various small claims procedures employed in landlord-tenant disputes. His analysis reveals a system characterized by fragmented claim resolution and extremely high costs. The following sections present an informative profile of claimants, issues and dispositions in non-corporate party suits, housing-related cases, as well as an interesting examination of pre-trial and post-trial activity. The concluding chapters deal with litigational problem areas and make specific proposals for improving the system of housing-connected disputes in the small claims setting. While the data for Mr. Ruhnka's study is of necessity limited, the diversity of jurisdictions examined and the variety of procedures employed in resolving sundry housing-related cases make *Housing Justice in Small Claims Courts* a useful point of departure for reform-minded draftsmen of landlord-tenant dispute resolution systems.

The Sale, Rental, and Reproduction of Motion Picture Videocassettes: Piracy or Privilege?

Joseph J. Beard†*

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[L]iterary property . . . is especially liable to piratical depredation . . . [C]ongress has provided, as a convoy for it, a fleet of rights and remedies particularly adapted for defense against pirates.[1]

[C]opyright law is a compromise between competing social policies . . . [and] it is in keeping with the policy of the act . . . not to chill dealing in creative works, when that conduct approaches, but does not cross, the borderline of infringement.[2]

For many years motion pictures have been sold, rented, reproduced and swapped by film buffs and those who serve their needs.[3] With the introduction of the videocassette and video tape machine, that market has expanded from the subculture of the film enthusiast to a broader spectrum of society. Such specialized television services as Home Box Office attest to the fact that America is interested in armchair viewing of films uninterrupted by advertising. However, even though the home viewer can see films free of commercials, he is, as is true with network TV, limited to viewing the films selected by the service. The answer to selectivity has been provided by entrepreneurs who sell or rent video-

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* The author wishes to thank his colleague Professor Daniel Ticcioni for his constructive review of the section of this article devoted to burden of proof.

1. Henry Bill Publishing Co. v. Smythe, 27 F. 914, 927 (C.C. S.D. Ohio 1886).

2. United States v. Bily, 406 F. Supp. 726, 730 (E.D. Pa. 1975).

3. In American International Pictures, Inc. v. Foreman, 400 F. Supp. 928 (S.D. Ala. 1975), evidence in the case indicated there were some 6,000 collectors in the country at that time, and the judge estimated that the number of 16 mm prints in circulation "may conservatively be placed in the thousands." *Id.* at 930.

cassettes not only of film classics but of current box office hits as well. In many, if not most, instances, these entrepreneurs are not specifically licensed by the motion picture producers to sell or rent their films. Sensing the profit to be made in satisfying this new market, major producers such as Paramount, Warner Brothers and Columbia have now begun marketing videocassettes through outright sale and, in some instances, through rental. Just as television created a new market for motion pictures, the high-quality, relatively inexpensive videocassette has opened a whole new vista for profit. But with new marketing possibilities comes increased focus on the use of the copyright to prevent undesired competition, particularly from individual entrepreneurs not licensed by the producers. When old films found new markets, filmdom looked to its copyrights.[4] With the advent of the videocassette, increased emphasis on copyright to prevent reproduction, sale and rental is likely to follow.

There are, to be sure, out-and-out pirates who make unauthorized duplications of films currently under copyright; such piracy is certainly subject to both civil and criminal procedures under the Copyright Act. This article will not deal with such activity except as it is incidental to the discussion of the burden of proof of "first sale" in criminal prosecutions and civil suits under the Copyright Act. There are, however, other activities which the film industry claims are piratical, or at least an infringement of copyright, such as the unlicensed reproduction of so-called "public domain" films and the rental and sale of motion picture videocassettes in violation of their restrictive legends. But is the film industry correct in its claim that these activities are copyright infringements? It is the purpose of this article to evaluate the film industry's assertions that these activities constitute copyright infringements. To that end, this article will address: (1) the rights of individuals not licensed by the owner of copyright to reproduce copies of so-called public domain films; and, (2) the rights of individuals not licensed by the owner of copyright to sell or rent copies of a motion picture.

The piracy/privilege issues with respect to the reproduction of so-called "public domain" films will be examined in the light of several possible situations:

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4. For example, in Hampton v. Paramount Pictures Corp., 279 F.2d 100 (9th Cir. 1960), Paramount sought and received injunctive relief on the silent motion picture "Covered Wagon" that was produced in 1923. The court noted that "[a]bout 1930 silent films were considered obsolete. . . ." *Id.* at 102. Nonetheless, in 1954, Paramount warned Hampton not to continue to publicly exhibit "Covered Wagon" though Hampton had been showing the film since 1938 without complaint from Paramount. "It was not until the advent of television that Paramount attempted to enforce its copyright." *Id.* at 104. Other old films received new interest on the part of the copyright owners when T.V. developed as a new market: the silent motion picture "Son of the Sheik" produced in 1926, Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir. 1977); "Hopalong Cassidy" films, Filmvideo Releasing Corp. v. Hastings, 426 F. Supp. 690 (S.D. N.Y. 1976); "Pygmalion" produced in 1938, American International Pictures, Inc. v. Foreman, 400 F. Supp. 928 (S.D. Ala. 1975), *rev'd,* 576 F.2d 661 (5th Cir. 1978).

1. The motion picture is based on an *unpublished* work; and,
   a. The statutory copyright on the motion picture terminated prior to January 1, 1978; or
   b. The statutory copyright on the motion picture terminates after December 31, 1977.
2. The statutory copyright on the motion picture is terminated but the film is based on a *published* work that is still under copyright protection.

The discussion of the right to sell or rent motion pictures, particularly in videocassette form, will include an analysis of:

1. The applicability of the Copyright Act versus state law once a "first sale" has been made, including a discussion of factors to be considered in determining whether an agreement is merely a license or a sale with restrictions.
2. The effect of a "sale with restrictions" on a remote vendee.
3. The burden of proof as to "first sale" in criminal and civil procedures under the Copyright Act.

There are many motion pictures on which the statutory copyright expired prior to January 1, 1978, because, whether by design, indifference or oversight, the copyright was not renewed. In the jargon of the trade, these are referred to as "P.D." or public domain films.[5] And, although as to motion pictures published after December 31, 1977, there is no renewal requirement, films that were in their first term of protection on January 1, 1978, require renewal as a prerequisite to protection beyond the first term.[6] Finally, for films in their second term as of January 1, 1978, protection will lapse seventy-five years after first granted.[7] Thus, all films will ultimately be "P.D." Once statutory copyright protection of a motion picture terminates is everyone free to make copies of the film? Section I attempts to provide the answer.

I. THE RIGHT TO REPRODUCE "PUBLIC DOMAIN" FILMS

There are two boundary situations that will help to delimit the reproduction issue. First, if a motion picture is currently under copyright, no one may reproduce copies of the film without a license from the owner of copyright; the right of reproduction is a right granted exclusively to the owner of copyright.[8] Even if the motion picture is based on a work in the public domain, no one is free to copy the film. Justice Holmes' language in *Bleistein v. Donaldson Lithographer Co.*,[9] has

5. One source estimates that some 20,000 motion pictures are in the public domain. J. MINUS AND W. HALE, FILM SUPERLIST: 20,000 MOTION PICTURES IN THE PUBLIC DOMAIN (1973).
6. 17 U.S.C. § 304(a) (Supp. II 1978).
7. 17 U.S.C. § 304(b) (Supp. II 1978).
8. 17 U.S.C. § 106(1) (Supp. II 1978).
9. 188 U.S. 239 (1903).

become copyright rubric: "Others are free to copy the original. They are not free to copy the copy."[10] At the opposite end of the spectrum, if the motion picture itself and all of the works upon which it is based are in the public domain, there is no statutory copyright protection and anyone is, as a matter of copyright law, free to copy the motion picture. Between these two polar situations lies the area in dispute. Analysis of the dispute is facilitated by dividing the discussion into two parts based on the status of the underlying work, unpublished or published.

A. Motion Picture Based on an Unpublished Work

Classic Film Museum, Inc. v. Warner Bros., Inc.,[11] addressed the question of whether a common-law copyright on an unpublished work would prevent the unauthorized exhibition, distribution, or other uses of a motion picture derived from the unpublished work despite the fact that the statutory copyright on the motion picture had expired. In 1937, Selznick International Pictures, Inc. (Selznick) produced and released for general distribution a film entitled "A Star is Born," starring Janet Gaynor and Frederic March. The film was based on a story, screenplay and musical score, all of which remained unpublished, written by employees hired by Selznick.[12] While Selznick did not obtain a statutory copyright on the story, screenplay and musical score, it did obtain a statutory copyright on the motion picture on June 7, 1937. In 1953, Warner Bros. Pictures, Inc. acquired all rights in the film and underlying unpublished works; and, in 1967, the parent corporation, Warner Bros., Inc. succeeded to these rights.[13] The 1937 copyright was not renewed and therefore expired in 1965. Classic Film Museum, Inc. (Classic) rented to others positive prints of "A Star is Born" that were made following the expiration of the copyright by individuals having no authority from Warner Bros. to do so. In 1974, Warner Bros. notified Classic that it considered the latter's use of the film to be an infringement of Warner Bros.' common-law copyright in the underlying works. It demanded that Classic cease offering the film for *television* or other *exhibition*.[14] Classic then commenced an action for declaratory relief.

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10. *Id.* at 249.

11. 453 F. Supp. 852 (D. Me. 1978), *aff'd*, 597 F.2d 13 (1st Cir. 1979).

12. The employees included Dorothy Parker and William Wellman. 453 F. Supp. at 853.

13. Warner Bros. remade "A Star is Born" in 1955 starring James Mason and Judy Garland and again in 1976 starring Barbara Streisand and Kris Kristofferson. These remakes were not an issue in *Classic Film Museum*. *Id.* at 853-55.

14. From this language it would appear that Warner Bros. was only interested in protecting its T.V. market; it does not appear that they were attempting to prevent Classic Film Museum from renting to customers for private home viewing. Classic Film Museum, Inc., 453 F. Supp. 852, 854 (D. Me. 1978) (emphasis added). The right to rent for private home viewing is addressed in Section II of this article *infra*.

Warner Bros. claimed that when the film passed into the public domain only the "new" material (*i.e.*, the matter not to be found in the underlying, unpublished story, screenplay, and score) was dedicated to the public, and that to the extent the film incorporated matter from the underlying unpublished works, it was still subject to the common-law copyright in the underlying works. If this argument prevailed, Classic, while theoretically able to exorcise from the film such protected matter, would be left with a virtually unmarketable product. Although Classic admitted that Warner Bros.' common-law copyright in the underlying works would prevent anyone but Warner Bros. from making a fourth version of "A Star is Born," it nonetheless claimed that if works are to be exploitable only for a limited time, as mandated by the Constitution,[15] then when the statutory copyright in a film expires, anyone should be free to use the film in any way despite the common-law copyright in the unpublished underlying works. To counter this assertion, Warner Bros. relied on the holding in *G. Ricordi & Co. v. Paramount Pictures, Inc.*[16] The court in *Classic Film Museum,* however, distinguished *Ricordi* on the basis that the copyright in the underlying published work in *Ricordi* was statutory and thus of limited duration whereas the copyright in the underlying unpublished works in *Classic Film Museum* was common-law and perpetual inasmuch as the 1909 Act did not govern unpublished works. In affirming the right of Classic to have unfettered use of the 1937 version of "A Star is Born" the district court stated:

> Extension of the *Ricordi* doctrine to a case in which the underlying copyright is common-law, not statutory, would permit the proprietor of the copyright in the underlying work to extend for an indefinite time his monopoly of those portions of the derivative work which are based on the underlying material. Since it is impossible to cleave the story, screenplay and musical score of a motion picture film from the film itself, the practical effect of defendant's argument, in the instant case, would be to grant it exclusive control over any use of the film for an unlimited period, despite the 1965 expiration of the statutory copyright therein and despite some 41 years of extensive commercial exploitation of the work by defendant. To permit this result would frustrate the whole concept of limited monopoly in copyright law. . . . It would allow a person to exercise an unlimited monopoly of a derivative work otherwise in the public domain simply through the artifice of having maintained a common-law copyright in the underlying work, instead of having copyrighted the basic work for a fixed period of years pursuant to

15. U.S. CONST. art. I, § 8, cl. 8, states that original works are protected, "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries."

16. 189 F.2d 469 (2d Cir. 1951), *cert. denied,* 342 U.S. 849 (1951).

> statute. There exists no decided case which sustains this result. It is a result which clearly conflicts with the limited monopoly policy of the Copyrights Act and the Copyrights Clause of the Constitution. It is one which, in the view of this Court, cannot be countenanced.[17]

On appeal, the circuit court stated that: "The *Ricordi* doctrine is not equally applicable where there is an underlying common-law copyright which might extend indefinitely. Such unending protection of the derivative work would allow the *Ricordi* exception to swallow the rule of limited monopoly found in the constitution and copyright statutes."[18]

The *Classic Film Museum* case was decided under the 1909 Act. Since the story, screenplay and score were unpublished, they were not within the ambit of the 1909 Act but were left to state protection under the so-called common-law copyright. As such, so long as the works were unpublished, they remained under the unlimited state protection. However, one must ask if an action were brought today on similar facts, whether the result would be the same. Today, fixed works, whether published or unpublished, are governed by the Copyright Revision Act of 1976.[19] The federal preemption provision of the new act expressly provides that for works governed by sections 102 and 103, rights equivalent to those specified in section 106 are governed exclusively by the Act and not by the common-law statutes of any state.[20] Furthermore, the Act provides for limited life for fixed works whether published or unpublished.[21] Thus, no longer can a fixed but unpublished work enjoy perpetual copyright under state law. Unpublished works will have limited life just as did published works under the 1909 Act. Since the objection raised by the court in *Classic Film Museum* no longer is valid, should the result be different?

As to works created on or after January 1, 1978, there is still a possibility of a derivative work falling into the public domain before the underlying work as there is with respect to pre-1978 works. For example, an author might authorize a motion picture producer to create a film based on the author's work. The producer might hire screenwriters to create new material in addition to the material based directly on the underlying work. The new material, being a work made for hire, would have a life limited to seventy-five years;[22] the underlying work would have a term of author's life plus fifty years,[23] a period conceivably end-

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17. 453 F. Supp. 852, 855-56 (D. Me. 1978) (citations omitted).
18. 597 F.2d 13, 14 (1st Cir. 1979).
19. "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression. . . ." 17 U.S.C. § 102(a) (Supp. II 1978).
20. 17 U.S.C. § 301 (Supp. II 1978).
21. 17 U.S.C. §§ 302, 303 (Supp. II 1978).
22. 17 U.S.C. § 302(c) (Supp. II 1978).
23. 17 U.S.C. § 302(a) (Supp. II 1978).

ing after the seventy-five year life of the new material in the derivative work. The same result would occur if an author of a derivative work died before the author of the underlying work; the new material in the derivative work would be in the public domain before the underlying work went into the public domain. Where the story and screenplay are written solely for the production of the film, typically they would be works made-for-hire as would be the motion picture itself. Today, if the made-for-hire story and screenplay are deemed unpublished, as Warner Bros. maintained was the case in *Classic Film Museum, Inc.* and if the published motion picture is a derivative work, as Warner Bros. also maintained, a most curious result occurs under section 302(c).[24] This section provides that in a work made for hire, the work will have a term of copyright of seventy-five years from the year of first publication or a term of one hundred years from the year of its creation.[25] Therefore, if the story and screenplay are deemed unpublished, they will have a term of one hundred years, whereas the derivative motion picture having been published would have a life of seventy-five years. Thus, the copyright in the film would terminate prior to the copyright in the story and screenplay.

One would expect that the motion picture would track the specially written story and screenplay very closely so that the "new material" in the derivative film would be relatively minor. Since the motion picture incorporates or "copies" substantially all of the story and screenplay, permitting the author, as Warner Bros. attempted to do in *Classic Film Museum,* to prevent reproduction of the film based on a longer-lived copyright in an "unpublished" story and screenplay would in effect give the published motion picture not seventy-five years of copyright protection but one hundred years. Such a result can be avoided if the publication of the movie is also deemed to be publication of the underlying made-for-hire story and screenplay.[26] In such a situation, protection for both the motion picture and the underlying story and screenplay would be coterminous. However, the post-1977 work problem will not be of practical interest until well into the 21st Century.[27] Of more immediate interest, is the status of public domain films based on unpublished works created before 1978.

Under the 1976 Act unpublished works fixed before January 1, 1978, and not copyrighted under the 1909 Act, are now governed by the federal act. Their copyright protection will, as provided in section 303,[28]

24. 17 U.S.C. § 302(c) (Supp. II 1978).

25. 17 U.S.C. § 302(c) (Supp. II 1978).

26. *See* notes 22-24 and accompanying text *supra.*

27. In fact the absolute earliest such a problem could arise, absent abandonment of copyright, is 2029 A.D. This date is based on a situation where a derivative work created in 1978 is based on an underlying work also created in 1978, and where the author of the derivative work has died in 1978.

28. 17 U.S.C. § 303 (Supp. II 1978).

endure for the term provided in section 302,[29] but in no instance shall the term expire before December 31, 2002; and, if the work is published before December 31, 2002, the copyright shall not expire before December 31, 2027. In any event, the protection for unpublished but fixed works is no longer in perpetuity but in fact is finite. What is, or should be, the impact on the *Classic Film Museum* decision now that perpetual copyright on unpublished but fixed works no longer exists? Should it matter whether the derivative work entered the public domain before January 1, 1978, or after that date?

There are many films, such as the 1937 "A Star is Born," on which the copyright was not renewed and consequently these films fell into the public domain prior to January 1, 1978. Moreover, if a film was in its first term of copyright as of January 1, 1978, its copyright will expire, as provided in section 304(a), as of December 31 of the twenty-eighth year of protection unless it is renewed within one year prior to the expiration of the original term,[30] in which case it will enjoy an additional period of protection of forty-seven years. Thus, such a film will fall into the public domain at the end of its first term of protection if the copyright is not renewed. The earliest a film could have been copyrighted and have its first term subsiding on January 1, 1978, would have been January, 1950. Consequently, the earliest such a film could fall into the public domain would be January 1, 1979. For films that were in the renewal period prior to January 1, 1978, section 304(b) provides:

> The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.[31]

At first glance section 304(b) would appear to be limited to films originally copyrighted no earlier than January, 1921. However, beginning in 1962, Congress passed a series of bills to extend the life of copyrights in their renewal term in anticipation of the new act providing a longer term of statutory life. The result is that a film copyrighted as early as September 19, 1906, would enjoy statutory copyright, provided copyright had been renewed, through 1981 under section 304(b).

In the near-term, there are three possible categories of public domain film: (1) those for which the first term expired prior to January 1, 1978, and for which renewal was not made in accordance with the 1909 Act; (2) those films in their renewal term between September 19, 1962, and

29. 17 U.S.C. § 302 (Supp. II 1978).
30. 17 U.S.C. § 304(a) (Supp. II 1978).
31. 17 U.S.C. § 304(b) (Supp. II 1978).

December 31, 1977 the protection of which will expire seventy-five years from year of original copyright; and (3) those films in their first term of copyright on January 1, 1978, and for which renewal is not made prior to the expiration of the first term. As of January 1, 1978, any film on which the first term was permitted to expire without renewal prior to January 1, 1978, would be in the public domain. As to films in their first term as of January 1, 1978, the failure to renew will lead to the films going into the public domain as early as January 1, 1979. As to films in their renewal term between September 19, 1962, and December 31, 1977, they begin to fall into the public domain beginning January 1, 1982. However, as to films based on unpublished works, while the films will fall into the public domain as discussed above, the copyright in the unpublished work arguably will subsist until at least 2002 A.D. and if published until at least 2027 A.D. After the copyright on the unpublished work expires, no one can successfully prohibit the unfettered use of the public domain film. The question that arises is what of the period between expiration of the statutory copyright on the film and subsequent termination of the statutory copyright on the underlying unpublished work.

Since the protection is no longer perpetual as to unpublished works, one could argue that *Classic Film Museum* is now only of historical interest and that any public domain film, whether it fell into the public domain before or after January 1, 1978, based on an underlying unpublished work, may not be used if it violates any of the section 106 rights. These rights of the owner of the copyright in the underlying unpublished work, such as reproduction and public performance, will last through at least December 31, 2002, and if the copyright owner publishes the underlying work on or before that date the prohibition will last at least through 2027 A.D. One might even raise the question of whether Warner Bros. could bring a fresh action on the 1937 "A Star is Born."[32] However, an argument can be made that because of the "Transitional and Supplementary Provisions" accompanying the Copyright Revision Act of 1976,[33] one must distinguish between motion pictures on which statutory protection terminated prior to January 1, 1978, and pictures on which copyright terminated after that date.

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32. It is clear that as to any purported infringement of "A Star is Born" that occurred prior to January 1, 1978, any action against Classic Film Museum by Warner Bros. would be barred under the doctrine of *res judicata*. But if the 1976 Act is interpreted as preventing any use of a film that "infringes" the unpublished story and screenplay, could Warner Bros. argue that any post-1977 rentals for public exhibition are new infringements and that *Classic Film Museum* is not *res judicata* and does not bar an action for the post-1977 "infringements" because it was based on a law that is now different?

33. Copyright Revision Act of 1976, Pub. L. No. 94-553, CCH ¶¶ 1219-32 (1976). *See* 17 U.S.C. § 101 *et seq.* (Supp. II 1978).

The Copyright Revision Act of 1976, whereby Title 17 was amended "in its entirety" was accompanied by "Transitional and Supplementary Provisions" that, while not part of the Act, are necessary to an understanding of its implementation. Section 103 of Transitional Provisions provides that "this Act does not provide copyright protection for any work that goes into the public domain before January 1, 1978."[34] The House Report accompanying the Act explained the intent of Transitional Section 103: "Since there can be no protection for any work that has fallen into the public domain before January 1, 1978, Section 103 makes clear that lost or expired copyrights cannot be revived under the bill."[35] Thus a work published prior to January 1, 1978, that went into the public domain under the 1909 Act because of a failure to include an appropriate notice of copyright is not resurrected on January 1, 1978, even though, had it been first published on or after that date, the lack of copyright notice would not necessarily be fatal.[36] It would seem that transitional section 103 has application to the *Classic Film Museum* situation. It is arguable that, if some original work that went into the public domain because of a lack of notice is not resurrected by the 1976 Act, it would be inconsistent to resurrect, in effect, a film the copyright on which expired prior to 1978 simply because it was based on an unpublished work. Admittedly, *Classic Film Museum* is a limited precedent. However, if it was a correct exposition of the law under the 1909 Act, then one must ask what would have been the status of films similarly situated had the 1976 Act not become law?

It is clear that all films based on original stories and screenplays would be subject to unrestricted copying once the statutory copyright on the motion picture terminated. Therefore, any film the copyright on which expired on or before December 31, 1977, could have been freely copied under the 1909 Act after the expiration of copyright and the copyright owner would not have been able to prevent copying of the film based on the common law copyright on the unpublished manuscript because all of the contents of the film not merely the "new material" would have been in the public domain. Thus, it could be said of any such film that it was totally in the public domain prior to January 1, 1978. Now, it would be illogical for the copyright owner of such a film to be permitted to argue that, since protection of unpublished works is now of limited duration, the rationale of *Classic Film Museum* is no longer valid, and that, therefore, as of January 1, 1978,

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34. Copyright Revision Act of 1976, Pub. L. No. 94-553, CCH ¶¶ 1220. *See* 17 U.S.C. § 101 *et seq.* (Supp. II 1978).

35. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 180 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5796.

36. 17 U.S.C. § 405(c) (1976).

any copying of a "pre-1978 P.D." film would be a violation of the copyright on the unpublished screenplay. This would in effect be an attempt to take what was in the public domain prior to January 1, 1978 out of public domain. Such a result is specifically prohibited by section 103 of the "Transitional and Supplementary Provisions" accompanying the Copyright Revision Act of 1976.[37] Thus, there is a reasonable basis for concluding that as to any motion picture, the copyright on which expired prior to January 1, 1978, and that is based on an unpublished work, any one is free to make copies of that motion picture. As to motion pictures on which the copyright expires after January 1, 1978, one is faced with the fact that the rationale of *Classic Film Museum* is no longer valid.

While it is very clear that the *rationale* of *Classic Film Museum* is no longer valid, at least as to post-1977 public domain films, it does not necessarily follow that the *result* in *Classic Film Museum* is inappropriate as to those films. Where a film is based on an independently created work, such as a novel, there is some reason to prevent unauthorized use of the public domain film. One might assume that the exhibition of a film based on a book might satisfy the needs of individuals who might otherwise resort to the novel; if this assumption is correct, then the film exhibition diminishes the market for the novel. One might further assume that the monies the author of the novel receives from the producers of the film is in part to compensate him for diminished revenues on the novel.[38] However, the individual who reproduces and distributes the public domain film without authorization may also diminish the market for the underlying novel and yet he does not compensate the author for this loss. For this reason one could justify the right of an author of a novel still under copyright protection to prevent anyone from an unauthorized use of the derivative film to the extent it uses the underlying novel. By way of contrast, there is no recognized market for the made-for-hire story and screenplay except, possibly, to make new versions of the film as was done with "A Star is Born." The story and screenplay are developed not for themselves but for the ultimate production of a film. In some sense, to classify the film as a derivative work, *i.e.*, derived from the unpublished story and screenplay, is to distort the concept of a derivative work. The story and screenplay, unlike an underlying novel, have no raison d'etre, except the creation of the film. The film industry itself recognizes a distinction between motion pictures based on an original story and those based on adaptations

37. Copyright Revision Act of 1976, Pub. L. No. 94-553, CCH ¶¶ 1219-32 (1976). *See* 17 U.S.C. § 101 *et seq.* (Supp. II 1978).

38. It must be admitted however that a motion picture may actually stimulate renewed interest in a book, witness the effect of the T.V. Mini-series "I Claudius."

of works in other mediums. The Academy of Motion Picture Arts and Sciences awards an Oscar for two separate categories of writings: one for "original story and screenplay" and one for "screenplay based on material from another medium." In fact, the 1937 Academy Award for writing an original story went to Robert Carson and William A. Wellman for "A Star is Born!"[39]

A simple analogy demonstrates the weakness of the proposition that a motion picture should be treated as a work *derived* from a screenplay and story that were written solely for the purpose of making the motion picture and that publication of the motion picture is not publication of the underlying screenplay and story. Suppose a book was published prior to January 1, 1978, and, because it lacked the necessary notice of copyright, failed to qualify for statutory copyright protection. Further suppose that the final published form differed from the original manuscript because of editorial changes. If the author claimed that the published book was a derivative work, *i.e.*, derived from his original manuscript, and that despite the publication of the book, nonetheless his manuscript remained unpublished and, therefore, to copy the printed book would infringe his common law copyright in the manuscript, is there any doubt that no court would seriously entertain his proposition? The publication of the book was publication of the manuscript. Should not the result be the same where what is involved is a screenplay and story created solely for the production of the motion picture; should not the publication of the motion picture also be a publication of the screenplay and story just as the publication of the book was publication of the manuscript?

In *Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago,*[40] the Picasso monumental sculpture was held to be "a mere copy, albeit on a grand scale"[41] of the maquette that Picasso had created to serve as a guide to the creation of the full scale monument. In *Grandma Moses Properties, Inc. v. This Week Magazine,*[42] the court intimated that, if a second rendering with "minor variations in details"[43] by Grandma Moses of her work entitled "Over the River to Grandma's House" was simply a copy, then the sale of it without restriction terminated the common law copyright in the original. Thus, where the so-called derivative work is in fact essentially a copy of the underlying work, the publication of the "derivative" work should also be publication of the "original" work as well. It is true that in the hypo-

39. P. MICHAEL, THE ACADEMY AWARDS A PICTORIAL HISTORY, 68 (1978) [hereinafter cited as MICHAEL].

40. 320 F. Supp. 1303 (N.D. Ill. 1970).

41. *Id.* at 1306.

42. 117 F. Supp. 348 (S.D. N.Y. 1953).

43. *Id.* at 350.

thetical manuscript-book situation, the published book and original manuscript were both in the same medium and it is equally true that the maquette and the final monumental work by Picasso were both sculptures, and that the so-called original and copy by Grandma Moses were both works of fine art, but the mere fact that the screenplay and story are in a different medium that the motion picture does not, of itself, mean that the motion picture cannot be a copy rather than a derivative work. The mere fact the original work is in one medium and the "copy" is in another does not prevent the latter from being a *copy* of the former. This conclusion is borne out in *King Features Syndicate v. Fleischer,*[44] where the court held that a three-dimensional "Spark Plug" horse doll infringed on the copyright of a *book* of cartoons known as "Barney Google and Spark Plug" and in *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.,*[45] where the court held that "a three-dimensional ... [Betty Boop] doll ... is an infringement of the two-dimensional picture or drawing."[46] A closer analogy of the script-film situation is found in *Hill v. Whalen and Martell, Inc.*[47] where the copyright in the cartoon "Mutt and Jeff" was infringed by a dramatic performance, "In Cartoonland," in which actors dressed up in costumes duplicating the figures in "Mutt and Jeff." Directly on point, is the early motion picture infringement decision, *Kalem Co. v. Harper Bros.*[48] in which Justice Holmes wrote that the novel Ben Hur was infringed by a motion picture.

The decisions demonstrate that a copy need not be in the same medium. Therefore, it seems appropriate to conclude that a screenplay and story that were developed specifically to produce a motion picture are analogous to the manuscript that is the basis for a printed book. When the book is published the manuscript is also published, and when the motion picture is published, the specially created screenplay and story should also be deemed published, at least for purposes of that particular motion picture; whether the story and screenplay are also published with respect to the issue of who has a right to make new versions is another question. If the screenplay and story are deemed published when the motion picture is published, if, in effect, the story and screenplay merge with the film[49] just as the manuscript merges with the published book, thereby rendering the film not a derivative work but rather a copy of the screenplay and story, then when statutory copyright

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44. 299 F. 533 (2d Cir. 1924).
45. 73 F.2d 276 (2d Cir. 1934).
46. *Id.* at 278.
47. 220 F. 359 (S.D. N.Y. 1914).
48. 222 U.S. 55 (1911).
49. *Cf.* Gilliam v. American Broadcasting Companies, 538 F.2d 14 (2d Cir. 1976) (television program based on copyrighted script was protected).

on the picture terminates, it would not be an infringement of the copyright, either of the film or of the screenplay and story, to reproduce copies of the motion picture. Under this rationale it does not matter whether the motion picture copyright terminated before January 1, 1978 or after that date; in either situation, once statutory protection in the motion picture terminates anyone would be free to copy it.

Where a motion picture is based on a made-for-hire story and screenplay, there is ample justification, as discussed above, for preventing the "unpublished" story and screenplay from artificially extending the term of protection for the film. Should the result be the same, when the public domain film is based, not on an original story and screenplay, but rather, on an adaptation of an independent *published* work, such as a novel or play, that is still under federal copyright protection?

B. Motion Picture Based on a Published Work

In *Russell v. Price,*[50] the Ninth Circuit Court of Appeals held that, even though the copyright on the motion picture "Pygmalion" had expired, any unlicensed rental of the film for exhibition would be an infringement of the still subsisting copyright in the play. The court stated that "although the derivative work may enter the public domain, the matter contained therein which derives from a work still covered by statutory copyright is not dedicated to the public."[51] "Pygmalion," starring Leslie Howard and Wendy Hiller, was released by Metro-Goldwyn-Mayer (M.G.M.) in 1938; it was copyrighted that year by M.G.M.'s parent corporation Loew's, Inc. The film was based on George Bernard Shaw's play of the same name, first copyrighted in 1913.[52] For some unexplained reason, the renewal copyright for the motion picture was not obtained and protection lapsed in 1966. However, a renewal copyright on the play was obtained in 1941. This renewal would have ordinarily expired under the 1909 Act in 1969. However, Congress, anticipating that the term of statutory copyright protection would be lengthened, extended protection for any work that was in its renewal term as of September 19, 1962. These interim extensions coupled with the provisions of the 1976 Act, result in the Shaw play being under protection through 1988. The defendant, Budget Films, Inc. (Budget Films) had purchased three prints of the film in 1972 from a Dan Price. Among Budget's customers who rented the film was co-defendant Sarb Corporation, a firm that operated a motion picture theatre.[53] Budget

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50. 612 F.2d 1123 (9th Cir. 1979), *cert. denied,* 48 U.S.L.W. 3746 (U.S. May 20, 1980) (No. 79-1505).

51. 612 F.2d 1123, 1128 (9th Cir. 1979).

52. Shaw himself won the 1938 Academy Award for best screenplay; the "Oscar" for best adaptation also went to "Pygmalion." *See* MICHAEL, *supra* note 39, at 76.

53. At the outset of the litigation, Sarb Corporation stipulated to a permanent injunction. Brief for Plaintiffs-Appellees at 3, Russell v. Price, 612 F.2d 1123 (9th Cir. 1979).

Films, while not disputing the exclusive right of the owner of copyright in the play to make new derivative works based on the play, did dispute the right of that copyright owner to prevent defendant's use of the film. To evaluate the correctness of the holding in *Russell v. Price*,[54] it is necessary to begin with *Ricordi & Co. v. Paramount Pictures, Inc.*[55]

In *Ricordi*, the author of a copyrighted novel entitled "Madam Butterfly," authorized David Belasco to write a play based on the novel; Belasco ultimately copyrighted the play. The author and Belasco made a contract with Ricordi & Co. (Ricordi) giving them the right to create an opera based on Belasco's play. The opera was also copyrighted. Ricordi claimed motion picture rights in the opera based on its copyright in the opera.[56] However, Paramount Pictures, Inc. (Paramount) claimed it owned the motion picture rights because of a grant, under the renewal term in the novel, of such rights by the author's administrator and a like grant from the trustee under Belasco's will with respect to the play.[57] The copyrights in the novel and opera were renewed but the copyright on the Belasco play was permitted to expire without renewal in 1945. The court held that Paramount had the motion picture rights in the renewal copyright of the novel and concluded that Ricordi could not make a motion picture based on the novel, although it was free to use the *new matter* that it had created for the operatic version of the novel and was also free to use the *new matter* that Belasco had created for the dramatic version of the novel since the play's *new matter* was now in the public domain.[58] Additionally, the court held that, even if an author had the power to assign his right of renewal during the term of the original copyright, the author had not assigned Ricordi the renewal rights as to motion pictures.[59] It is important to note that the defendant did not challenge plaintiff's right as to the opera but only the plaintiff's right to make a *new* derivative work. Thus, *Ricordi* did not address the right of the creator to use his *original* derivative work to the extent that it incorporated the underlying copyrighted work, but only the lack of his right to make a *new* derivative work. Even more on point, *Ricordi* did not address the right of the public to use the derivative work to the extent it incorporated the underlying copyrighted work where the copyright on the derivative work expired.[60]

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54. 612 F.2d 1123 (9th Cir. 1979).
55. 189 F.2d 469 (2d Cir. 1951), *cert. denied*, 342 U.S. 849 (1951).
56. 189 F.2d 469, 470 (2d Cir. 1951).
57. *Id.*
58. *Id.* at 471-73.
59. *Id.* at 472.
60. The closest the court came to addressing this issue was to state that in making a new derivative work, anyone was free to use the new matter in the Belasco play, because the copyright had expired, but not the still-copyrighted novel; but, it did not address the right of anyone to produce the play. *Id.* at 471-72.

This issue was addressed in *Grove Press, Inc. v. Greenleaf Publishing Co.*[61] Greenleaf Publishing Co. (Greenleaf) published and sold an English translation of Genet's "Journal du Voleur" which had been produced by photocopying an edition published in France by a licensee of Genet. Greenleaf claimed that the authorized English edition was in the public domain, and therefore, anyone was free to copy it despite the admitted fact that the original French-language work was under copyright protection. The court, assuming *arguendo* that the authorized English language edition was in the public domain, stated that a licensee's "reproduction of the novel in another language was permitted by the author but this did not constitute a consent that reproduction by others could be accomplished without Genet's authority if . . . [the licensee] . . . failed to copyright his derivative work."[62] The court went on to state that, although it would have been unnecessary to obtain permission from the licensee of the now public-domain derivative work, "it did not automatically make it unnecessary for Greenleaf to obtain the consent of the copyright owner . . . [of the original work]."[63] To elucidate its holding, the court noted that a "derivative work . . . is separate and apart from the underlying work and a dedication to the public of the derivative work did not without more, emancipate the pattern of the underlying work from its copyright,"[64] and that while the failure of the licensee to copyright the derivative work places it in the public domain, it did not follow that such failure by the licensee "should be fatal to the copyright on the pattern of the underlying work unless the author has consented to such dedication."[65] Thus, *Grove Press* answered in the negative the question of the public's right to copy a public domain derivative work to the extent that it embodies matter from an underlying published work that was still under copyright.[66]

The holding in *Grove Press* was first applied to a public domain film in *Filmvideo Releasing Corp. v. Hastings.*[67] The copyright on several "Hopalong Cassidy" motion pictures had expired and, after the termination, Filmvideo Releasing Corp. (Filmvideo) purchased negatives of the pictures. The agreement under which Filmvideo purchased the negatives restricted their use to foreign exploitation as had the vendor's

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61. 247 F. Supp. 518 (E.D. N.Y. 1965).
62. *Id.* at 525.
63. *Id.*
64. *Id.*
65. *Id.* at 527.
66. The court in *Grove Press* stated its position in unequivocal terms: "If the derivative work cannot be copied without automatically copying the pattern of the underlying work, then the authority to grant third parties the right to make a copy of the copyrighted underlying work or its pattern is not included in the mere authority given to a derivative author to create the new work." *Id.* at 528-29.
67. 426 F. Supp. 690 (S.D. N.Y. 1976).

original contract with his supplier. Despite this, Filmvideo caused the films to be shown on domestic television. Filmvideo sought a declaratory judgment claiming that, since the copyright on the motion pictures had expired, it was free to use them without restriction despite the fact that the underlying "Hopalong Cassidy" novels were still under copyright. As the court stated, "the issue is whether the defendant's renewal copyrights *in the novels* may be infringed by the showing on television of motion pictures now in the public domain which were made under an agreement with the author."[68] In rejecting Filmvideo's position, the court stated that:

> The counterclaim is not for infringement of the motion picture copyrights, however, it is for infringement of the renewal copyrights in the books. . . . These copyrights can be infringed by the use of materials . . . [in this case, motion pictures] . . . in the public domain as readily as they are by the use of separately copyrighted matter.[69]

Taken together, *Ricordi, Grove Press,* and *Filmvideo* clearly supported the contention of the plaintiffs in *Russell v. Price*[70] that any unlicensed use of the motion picture "Pygmalion" would be an infringement of the copyright in the Shaw play. The defendants, Budget Films, sought support for their position that "renting out of the film does not infringe the statutory copyright on Shaw's play"[71] by relying on two decisions, *Classic Film Museum, Inc. v. Warner Bros., Inc.*[72] and *Rohauer v. Killiam Shows, Inc.*[73] The court in *Russell* quickly distinguished the holding in *Classic Film Museum*, noting that the rationale of that decision was that a perpetual common law copyright in an *unpublished* work should not be permitted to, in effect, grant perpetual copyright to the motion picture produced from that work[74] and that in *Russell,* there could be no perpetual copyright because the underlying work had been *published.* In *Rohauer,* the author of a novel, "The Sons of the Sheik," sold the motion picture rights and agreed to renew the copyright in the novel and assign to the purchaser the motion picture rights for the renewal term. However, the author died prior to the renewal term and her daughter obtained the renewal of copyright in the

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68. *Id.* at 692.

69. *Id.* at 694. The phrase "infringed by the use of materials in the public domain" is to some degree inaccurate. One can speak loosely of the motion picture being in the public domain but under *Ricordi* and *Grove Press* it is only the new matter that is in the public domain, the matter in the film that is copied from the underlying still-copyrighted work is not, under these holdings, dedicated to the public. So the phrase, if it is to be correct, must be read as "speaking loosely."

70. 612 F.2d 1123 (9th Cir. 1979).

71. *Id.* at 1126.

72. 453 F. Supp. 852 (D. Me. 1978), *aff'd,* 597 F.2d 18 (1st Cir. 1979).

73. 551 F.2d 484 (2d Cir. 1977), *cert. denied,* 431 U.S. 949 (1977).

74. Russell v. Price, 612 F.2d 1123, 1128-29 (9th Cir. 1979) (emphasis added).

novel and assigned all motion picture and television rights to Rohauer.[75] The original purchaser of motion picture rights from the author produced a silent film, "The Son of the Sheik," starring Rudolph Valentino, in 1926.[76] Copyright was obtained and renewed in the motion picture. The renewal copyright ultimately was transferred to Killiam Shows, Inc. (Killiam).[77] The motion picture was shown on television and Rohauer sued for an infringement of his motion picture and television rights.[78] The trial court rejected Killiam's argument that "the motion picture is an independently copyrighted derivative work, the use of which cannot be controlled by the holder of the renewal copyright in the underlying work."[79] The court held that when the first term of copyright terminated, the original grant of motion picture rights also terminated, and any future motion picture rights could come only under a grant from the owner under the renewal term. On appeal, the district court decision was reversed.[80] After an analysis of section seven of the 1909 Act,[81] the Circuit Court of Appeals concluded that the language of that section did not preclude the possibility that rights to produce a derivative work survive the original term of copyright and are independent of any rights under the renewal term.[82] The court, after a review of judicial decisions, legislative history and the opinions of commentators, concluded that in a situation where the owner of copyright in the first term had agreed to transfer motion picture rights not only under the first term but under the renewal term as well, the purchaser in that agreement and his assigns could continue to use the film despite an assignment to others of motion picture rights under the renewal term. The court was particularly persuaded by policy considerations:

> [T]he equities lie preponderantly in favor of the proprietor of the derivative copyright. In contrast to the situation where an assignee or licensee has done nothing more than print, publicize and distribute a copyrighted story or novel, a person who with the consent of

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75. Rohauer v. Killiam Shows, Inc., 551 F.2d 484, 486 (2d Cir. 1977).

76. *Id.*

77. *Id.*

78. *Id.* at 486-87.

79. Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723, 727 (S.D. N.Y. 1974), *rev'd,* 551 F.2d 484 (2d Cir. 1977), *cert. denied,* 431 U.S. 949 (1977).

80. Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir. 1977).

81. The court gave particular attention to the second part of section seven before concluding that the defendant's continued use of the film would not be prohibited by section seven; that part of section seven provides:

> [B]ut the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

Copyright Act, ch. 391, § 1, 61 Stat. 655 (1909) (current version at 17 U.S.C. § 100 *et seq.* (Supp. II 1978)).

82. *Id.* at 490.

> the author has created an opera or a motion picture film will often have made contributions literary, musical and economic, as great as or greater than the original author.[83]

The court in *Russell* distinguished[84] *Rohauer* on two gounds, first that Budget Films in *Russell* had not bargained for film rights under the renewal term as had the defendant in *Rohauer* and, second, that Budget Films had "contributed nothing to the production of the film 'Pygmalion,' "[85] and therefore, the equitable considerations that were so persuasive in *Rohauer* were non-existent in *Russell.* If *Rohauer* and *Russell* are the final word on their respective issues, then one could conclude that, although the owner of copyright in a derivative work can continue to use it despite a renewal term that grants such rights to another,[86] such right does not extend to the public when the copyright on the film expires but the copyright in the underlying published work is still in force. One might ask, however, whether *Russell* should be *the* last word, at least where motion pictures are involved. Is there some unique property of motion pictures that requires one to distinguish between the theoretical and the pragmatic?

It is not difficult to discuss the separate identities of original and derivative works in terms of copyright theory. The original work has a term of copyright protection of its own, and the copyright of the derivative work does not extend the copyright in the original work beyond its own term but provides a term of protection only for the new matter in the derivative work.[87] It is equally true that if the owner of copyright in the derivative work permits that copyright to expire, this will not, without more, terminate the copyright in the original work.[88]

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83. *Id.* at 493.

84. The court also stated that it would "express no opinion about *Rohauer v. Killiam Shows, Inc.,*" 612 F.2d 1123, 1126 n.10 (9th Cir. 1979).

85. 612 F.2d 1123, 1128 (9th Cir. 1979).

86. This policy with respect to the 1909 Act is codified in the 1976 Act:

> A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

17 U.S.C. § 304(c)(6)(A) (Supp. II 1978).

87. 17 U.S.C. § 303 (Supp. II 1978). *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 57 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5659, 5670-71, wherein it was stated that: "The most important point here is one that is commonly misunderstood today: Copyright in a 'new version' covers only the materials added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material."

88. "It does not follow that such failure . . . [of the licensee to renew the copyright in the derivative work] . . . should be fatal to the copyright in the pattern of the underlying work unless the author has consented to such dedication." Grove Press, Inc. v. Greenleaf Publishing Co., 247 F. Supp. 518, 527 (E.D. N.Y. 1965). "The defense of abandonment, however, requires some overt action undertaken by the copyright owner which indicates an intention to dedicate the rights in the work to the public. . . . [I]naction alone . . . [will not result in] . . . abandonment of the renewal

However, these statements of law do not require a conclusion that the public may not copy a film when its term of copyright expires. The argument for preventing the public from copying a public domain derivative work is, that to the extent such derivative work embodies matter from an underlying work still under copyright, any copying necessarily involves a copying of the underlying copyrighted work. Such copying without license from the owner of the copyright in the underlying work would be an infringement of the section 106(1) rights in that work[89] — but what of the other side of the coin? If the holding in *Russell* is correct what is the result? It is here that the practical aspects of the relationship between copyright and that particular medium of expression, the motion picture, must be taken into account.

As stated previously, it is impossible, as a practical matter, to separate the new matter from the original matter and still have a marketable film.[90] It is also true that a work may infringe even though it is in a different medium of expression than the copyrighted work and, therefore, a motion picture based on a copyrighted novel, but not licensed by the owner of the copyright, would infringe the novel as was held in *Kalem Co. v. Harper Bros.*[91] Where the infringing work is a *new*

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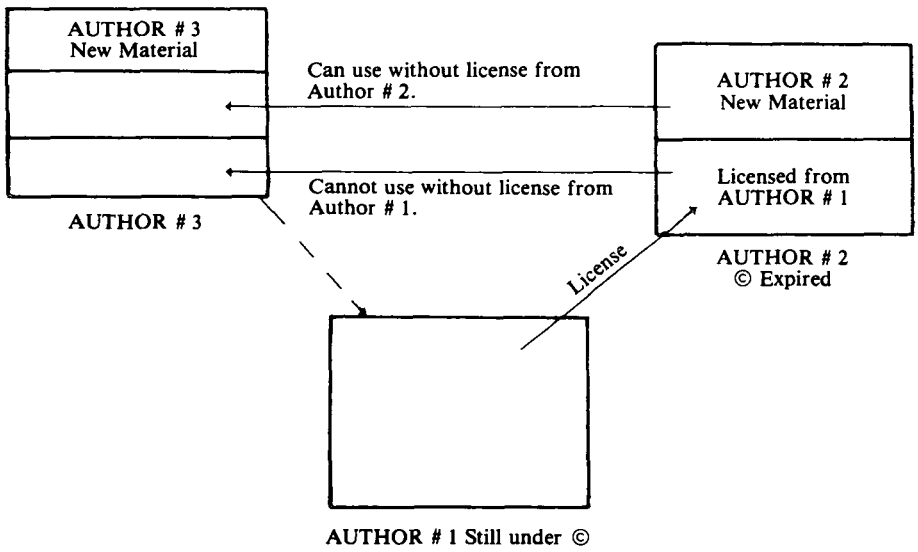
copyright." Filmvideo Releasing Corp. v. Hastings, 426 F. Supp. 690, 695 (S.D. N.Y. 1976) (citations omitted). The following diagram illustrates the theoretical application of the Copyright Act to a "Madame Butterfly" situation:



89. Grove Press, Inc. v. Greenleaf Publishing Co., 247 F. Supp. 518 (E.D. N.Y. 1965).
90. *See* Section I.A., *supra.*
91. 222 U.S. 55 (1911). *See also* notes 40-49 and accompanying text *supra.*

motion picture derived from a copyrighted work, *Ricordi* clearly teaches, as did *Kalem* before it, that, if unlicensed, the *new* motion picture is an infringement. Should it be an infringement of the copyright in an underlying work, to copy a motion picture that the owner of copyright has authorized a licensee to produce and the licensee has permitted the copyright on the motion picture to expire? It is at this juncture that the application of copyright theory to the particular medium of expression, the motion picture, creates a dilemma. If one were dealing with the creation of a *new* derivative work, it would be a simple matter to distinguish between new and licensed material in a *preexisting* derivative work, incorporating into the *new* derivative work only the new material from the *preexisting* derivative work and leaving out any material that found its origin in a still copyrighted *original* work.[92] Further, if one were dealing with the issue of simply copying the *preexisting* derivative work, as opposed to creating a *new* derivative work, in most mediums of expression, one can separate the unprotected new matter from the licensed matter still under protection. For example, an anthology in the public domain but containing some contributions still under copyright can safely be copied by leaving out the still copyrighted contributions and substituting others that are either in the public domain or licensed for such use. Even a play can be copied by using the public domain scenes and rewriting others to avoid copying original material still under copyright; admittedly, this may dramatically change the character of the play, but it is still a technically feasible undertaking. With a motion picture, however, it is not practical to exorcise copyrighted matter from the original work and substitute new material. Much of the interest in a film is in the actors. But actors age and even if they are available for reshooting scenes with non-infringing dialogue and plot, makeup departments can only do so much to "rejuvenate" the now-mature matinee idol. Even the biblical magic of M.G.M. cannot recall the actor who has "stepped beyond the footlights."

In essence, there are but two choices with respect to a public domain film that is based on an underlying published work that is still under copyright: (1) Once the copyright on the motion picture expired, anyone would be free to use it in any way despite the copyright in the underlying work; or, (2) No one could copy the film to the extent it contained matter from the underlying copyrighted work without a license from the owner of copyright of that underlying work. The adoption of the first position would admittedly require a rejection of the holding in *Grove Press* and its progeny *Filmvideo* and *Russell* and an extrapolation of the holding in *Rohauer*.[93] If the second position is adopted, it

92. For an illustration of such a transaction, *see* note 88 *supra*.
93. *See* notes 61-86 and accompanying text *supra*.

will virtually extend the life of copyright in all motion pictures beyond their intended statutory term. It is true that one can use the new material in a public domain film to make a new work, or one might even directly copy the new material in a film and sell or perform such copies of the new material. However, the value of the motion picture is in its *entirety.* If the owner of copyright in the underlying work has lawful possession of a copy of the public domain derivative film, he has a right, like everyone else, to use the new matter in the film because it is in the public domain, but he would be the only one with the right to use the film to the extent that it utilized his original work and would retain this right for the life of his copyright in the underlying work. The practical effect of this situation is that a pre-1978 film on which copyright has lapsed is still protected by the Copyright Act. This same extension of copyright beyond its term will occur in post-1977 motion pictures. The following hypothetical illustrates the point. Suppose an author, age 25, writes a novel in 1980, and, pursuant to a license, a motion picture producer distributes a film based on this novel in 1983. Assuming that the motion picture is classified as a work made for hire, the copyright on the motion picture will subsist through December 31, 2058, a period of seventy-five years.[94] Further, let us suppose the author lives to be seventy-five, dying in 2030; the copyright in his novel will subsist through 2080 some twenty-two years after the copyright in the film expires.[95] Despite the fact the copyright in the film expired, no one but the successors of the author will have the right to copy or exhibit it for the additional twenty-two years. While the court in *Russell* distinguished *Classic Film Museum,* because the latter involved a perpetual copyright, the defendant in *Russell* made an interesting observation: "While that court . . . [Classic Film Museum] . . . was dealing with the alternative of an 'unlimited' period, . . . there should be equal resistance to *any* extension beyond the period for which copyright was obtained."[96] While, as previously noted, the medium of expression is of no consequence in an action for infringement, it is clear that the medium of the motion picture creates a special problem. As has been demonstrated, if the underlying copyright prevents copying of the film to the extent it draws on the underlying work, the effect is to artificially extend the term of copyright for the motion picture as a whole. Thus, the dilemma: to avoid such artificial extension of the copyright of the motion picture requires a surrender of rights espoused in *Grove Press;* but to do otherwise is virtually to grant many motion pictures terms of protection beyond that authorized by Congress.

94. 17 U.S.C. § 302(c) (Supp. II 1978).

95. 17 U.S.C. § 302(a) (Supp. II 1978).

96. Reply Brief for Defendants-Appellants at 18, Russell v. Price, 612 F.2d 1123 (9th Cir. 1979).

There is yet another difficulty to be found if the public is barred from copying the film. if the owner of copyright of the underlying work does not lawfully possess a copy of the motion picture and cannot obtain one, for whatever reason, he can still prevent anyone else in possession of a lawful copy from duplicating or exhibiting it. Thus, in the hypothetical above, a motion picture might be unavailable for public viewing for near a quarter of a century, a result as undesirable as that in *Chamberlain v. Feldman,*[97] where one party had physical, and presumably legal, possession of an unpublished manuscript of "Mark Twain," and the successors to ownership of Clemens' literary property successfully enjoined publication of the work, thereby depriving the public of a valuable work. Such a "Mexican-Standoff" certainly does not comport with the mandate of the Constitution that copyright is to be granted in order to *promote* the progress of science; and, for that matter, the artificial extension of protection for the film provided by the copyright on the underlying work does not comport with the further constitutional mandate that such protection be for *limited* times.[98]

While *Ricordi* only stands for the proposition that one may not make a new version of a derivative work that incorporates matter from an underlying copyrighted work, one can certainly find support, in *Grove Press, Filmvideo* and *Russell,* for the proposition that no one may, without license, copy or exhibit a public domain film to the extent it involves an underlying copyrighted work. Moreover, it is equally true that while *Rohauer* spoke of the right of the owner of copyright in the motion picture to continue to use the film despite a contrary assignment by the owner of the renewal term in the novel, the decision did not go so far as to suggest that the public has similar rights in the event the film copyright expired. The 1976 Act does not yield a definitive answer. It does state in section 103 that "The copyright in . . . [the derivative work] . . . is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyrighted protection in the preexisting material."[99] However, this does not unambiguously[100] answer the question of whether anyone is free to copy the public domain film. Section 304(c)(6)(A) in effect, codifies the *Rohauer* decision by authorizing the owner of the copyright in the film to continue to utilize it despite termination of the grant. The section also codifies

97. 300 N.Y. 135, 89 N.E.2d 863 (1949).

98. U.S. CONST. art. I., § 8, cl. 8.

99. 17 U.S.C. § 103(b) (Supp. II 1978).

100. The House Report accompanying S. 22 did state that the copyright in the "new version" covers only the material added by the later author. This could, admittedly be interpreted as suggesting that the termination of copyright in the film only permits copying of the "material added by the later author." But that conclusion is not explicit and is at best an inference. *See generally* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 80 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5694.

Ricordi by specifically prohibiting the creation of any new derivative work. Section 304 does not, however, deal with the rights of the public to utilize the film once its copyright expired. It is certainly comfortable as a matter of copyright theory to adopt the *Grove Press* holding in derivative motion pictures.[101] It is the practical ramifications of applying the *Grove Press* rationale that create doubt as to the wisdom of such a position. Copyright theory should be consistent with the Constitutional foundation of this intellectual monopoly; but as discussed, the *Grove Press* theory when applied to motion pictures produces results that appear at odds with the Constitutional mandate to Congress.[102]

Neither position discussed is totally satisfactory; each has its rationale. This writer has concluded that, in the medium of the motion picture, the twin aims of progress and limited protection are best served by permitting anyone to use the *entire* motion picture once the copyright on the *new matter* expires. However, borrowing (out of context) the language of Judge Friendly in *Rohauer,* this writer realizes that some readers, though they "recognize that . . . [while] . . . an affirmative answer . . . is by no means illogical . . . believe a negative answer is more in keeping with the letter and purposes of the statute. . . ."[103]

If a motion picture is under copyright or if it is held, under the *Grove Press* rationale, that an underlying copyrighted work bars use of a public domain film, the public is not free to copy the motion picture or to exhibit it publicly. There remains, however, the question of the right of an individual, not licensed by the owner of copyright, to sell or rent a copy of the motion picture for private home viewing. Section II will address these issues and explore the "first sale" doctrine, including its effect on the preemption provision in section 301, its effect on remote vendees, and the burden of proof as to a "first sale."

II. The Sale and Rental of Motion Picture Videocassettes

As stated in the introduction, there are entrepreneurs selling and renting motion picture videocassettes. In addition, many consumers swap films among themselves or through so-called "exchanges." If the motion picture and any underlying work are in the public domain, copyright law can not bar such sale, rental or swapping of the film or videocassette. What, however, are the rights of individuals if the motion picture is still in its term of copyright protection or, if, although the picture

101. *See* notes 61-69 and accompanying text *supra.*

102. *See* notes 96-97 and accompanying text *supra.*

103. 551 F.2d 484, 486 (2d Cir. 1977). This language was employed in holding that the defendant had a right to continue to use the derivative motion picture despite assignment under the renewal term in the copyright. The court noted in reversing the lower court, that the lower court had recognized that such a result would not have been illogical.

is in the public domain, it is based on a published work still under copyright?[104]

If an individual in possession of a copy of a motion picture does not have express authorization, whether direct or derivative, from the owner of copyright to sell or rent the copy, the right of the individual to so utilize the copy will depend on whether the copy has been the subject of a so-called "first sale." It is often difficult to determine whether there has in fact been a first sale.[105] The motion picture industry speaks in terms of license rather than sale. Often the sale is with restriction; are the restrictions enforceable as a matter of copyright law or state law, and against whom can the restrictions be enforced? Collaterally, who has the burden of proof with respect to the existence of a first sale? These issues will be analyzed following a discussion of the concept of a first sale.

A. First Sale

Section 106 enumerates the exclusive rights of the owner of copyright including the rights to sell copies of, to reproduce, and to publicly perform the copyrighted work.[106] Section 202 provides:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.[107]

Thus, the sale of a copy of a motion picture would not by itself authorize the buyer of the copy to publicly perform the copy of the motion picture or to make additional copies of the copy purchased; to obtain such rights would require authorization from the owner of those rights. Subsection (3) of section 106 provides that the owner of copyright has the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[108] This language when read in light of

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104. If one adopts the Warner Bros.' position in *Classic Film Museum* that in effect a public domain film is protected by an underlying unpublished work, during the latter's term of protection, the rights of individuals to sell, rent, or swap would be the same as those where the public domain film is based in a published work. Classic Film Museum, Inc. v. Warner Bros., Inc., 597 F.2d 13 (1st Cir. 1979).

105. For a discussion of the first sale concept, *see* Section II.A. *infra*.

106. 17 U.S.C. § 106 (Supp. II 1978).

107. 17 U.S.C. § 202 (Supp. II 1978).

108. 17 U.S.C. § 106(3) (Supp. II 1978).

section 202 would appear to prohibit a buyer of a copy of a motion picture from reselling or renting the copy without specific permission of the owner of copyright. However, section 106(3) and section 202 are subject to the provisions of section 109(a) which provides: "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[109] The House of Representatives report accompanying the proposed revision to the Copyright Act explains the intent of section 109(a):

> Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it.
>
> Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.[110]

Thus, the copyright owner's right to vend under section 106(3) is limited to the "*first sale.*" The section 109(a) limitation on the rights enumerated in section 106(3) is a codification of the judicial gloss on section 27 of the 1909 Act.

In a criminal prosecution for copyright infringement, the court in *U.S. v. Wise*[111] explained the concept of a *first sale*:

> While the copyright laws protect the right of the copyright proprietor to vend his work, that right is not absolute, but is subject to the "first sale doctrine" as stated in 17 U.S.C. § 27. That statute provides in pertinent part:
>
> "[B]ut nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."
>
> Although the statute speaks in terms of a transfer of possession,

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109. 17 U.S.C. § 109(a) (Supp. II 1978).

110. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 79 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5693.

111. 550 F.2d 1180 (9th Cir. 1977).

> the judicial gloss on the statute requires a transfer of title before a "first sale" can occur. Thus, the first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy.[112]

It is important to note that while section 27 spoke not of *title* but merely of *lawful possession,* the courts interpreted it to in fact require transfer of title before the first sale rights of the copyright owner were extinguished. The point is clarified in the 1976 revision. While section 109(a) speaks to the termination of the section 106(3) rights if there is a transfer of ownership of a copy, section 109(c) addresses the situation where an individual has acquired possession of a copy without acquiring ownership of it by providing: "The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it."[113] The House Report explains the intent of section 109(c):

> Subsection (c) of section 109 qualifies the privileges specified in subsections (a) and (b) by making clear that they do not apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it. Acquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no privilege to dispose of the copy under section 109(a) or to display it publicly under section 109(b). *To cite a familiar example, a person who has rented a print of a motion picture from the copyright owner would have no right to rent it to someone else without the owner's permission.*[114]

Thus, it would appear that if the owner of copyright had not sold the particular copy in question, his transferee and any subsequent transferees would be subject, in the absence of a license, to all of the owner's section 106 rights including those in section 106(3). In the absence of a first sale, one could not sell or even rent a copy of a motion picture without license from the copyright owner. On the other hand, if there has been a first sale, then one lawfully in possession of a copy of a motion picture could sell or rent it for non-public performances.[115] How-

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112. *Id.* at 1187.

113. 17 U.S.C. § 109(c) (Supp. II 1978).

114. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 80 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5694 (emphasis added).

115. A first sale extinguishes the section 106(3) right to vend but does not extinguish the right of the owner of the copyright to publicly perform as provided in section 106(4); thus, the owner of a copy could not rent to a customer knowing that the customer intended to publicly exhibit the film unless permission of the owner of the copyright was obtained. *See* Kalem Co. v. Harper Bros., 222 U.S. 55 (1911).

ever, as previously noted, the language employed by the motion picture industry incident to the transfer of a copy is couched in terms of "license" rather than "sale."[116] Often the agreement contains restrictions on the use or subsequent transfer of the copy. The distinction between a "license" and a "sale" is made the more critical because the applicability of the Copyright Act depends on whether or not there has been a first sale. The next section will discuss the applicability of the copyright depending on whether there has been a first sale or not; it will also review the factors that are relevant to the determination of whether an agreement is merely a license or is in fact a "first sale."

B. License or Sale With Restrictions

If one were in possession of a copy of a motion picture that had not been the subject of a first sale, any exercise of section 106 rights, including sale or rental, without permission of the copyright owner would be an infringement. On the other hand, if there has been an unrestricted first sale of a copy, one lawfully in possession would be free to sell or rent the copy for private viewing under section 109(a). Between these two unambiguous situations is the sale of a copy subject to restrictions. If a copy is sold under an agreement restricting section 109(a) rights,[117] would a violation of that agreement be an infringement of the section 106(3) rights of the copyright owner and thus subject the transgressor to both civil and criminal action under the Copyright Act? The House Report accompanying the copyright legislation, spoke to the applicability of the Copyright Act to restrictive first sales:

> [T]he outright sale of an authorized copy . . . frees it from any copyright control over . . . its future disposition. . . . This does not mean that conditions on future disposition of copies . . . imposed by a contract between their buyer and seller would be unenforceable between the parties as a breach of contract, but it does mean that *they could not be enforced by an action for infringement of copyright.*[118]

The precise question of whether a sale of a copy in violation of a provision in a restrictive first sale agreement is a copyright infringement was apparently first addressed, in this country, in *Henry Bill Publishing Co. v. Smythe.*[119] In *Henry Bill,* the court held that when the owner of copyright sells a copy "the purchaser takes the copy with the ordinary incident of alienation belonging to all property; and *that* copy is no

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116. *See* notes 105, 106 and accompanying text *supra.*

117. *See* notes 109, 110 and accompanying text *supra.*

118. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 79 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5693 (emphasis added).

119. 27 F. 914 (C.C. S.D. Ohio 1886).

longer under the copyright law."[120] In *Harrison v. Maynard, Merrill & Co.*,[121] the court stated that "the right to restrain the sale of a particular copy of the book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all of his title to it . . . although with an agreement for a restricted use."[122] The Supreme Court finally addressed the issue in *Bobbs-Merrill Co. v. Straus.*[123] "The precise question . . . is, does the sole right to vend . . . [under section 106(3)] . . . secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail. . . .?"[124] The court answered its question thus: "In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose by notice . . . a limitation . . . [on] . . . future purchasers, with whom there is no privity of contract."[125] The 1976 Act clearly incorporates the judicial interpretation of the right to vend. Whatever remedy an owner of copyright may have under state law for a breach of a restriction on alienation, he clearly does not have a claim for infringement under the Copyright Act once he has sold the copy.

The statement of the law is unambiguous; its application, however, is made difficult by the language the film industry employs in its agreements. Rarely does the industry use language like "sale" or "purchaser;" it speaks in terms of "license." If there has been no first sale but merely a license, then restrictions on alienation will be a matter not of state law, but of federal copyright law; whereas, if there has been a first sale, the copyright owner is, at best, left with a remedy under state law. If there was no sale but only a license, even remote transferees will be bound by the restrictions; whereas, if there has been a first sale, remote transferees may possibly not be bound by such restrictions.[126] Thus, the determination of whether an agreement between an owner of copyright and his immediate transferee is a sale or merely a license is of critical importance; but, as noted in *U.S. v. Bily*,[127] "copyright pro-

120. *Id.* at 925.
121. 61 F. 689 (2d Cir. 1894).
122. *Id.* at 691.
123. 210 U.S. 339 (1908).
124. *Id.* at 350.
125. *Id.* Other decisions dealing with the termination of section 106(3) protection upon the first sale include, on the civil side: American International Pictures, Inc. v. Foreman, 576 F.2d 661 (5th Cir. 1978); Platt & Monk Co. v. Republic Graphics, Inc., 315 F.2d 847 (2d Cir. 1963); Independent News Co. v. Williams, 293 F.2d 510 (3rd Cir. 1961); Burke & Van Heusen, Inc. v. Arrow Drug, Inc., 233 F. Supp. 881 (E.D. Pa. 1964); and on the criminal side: United States v. Moore, 604 F.2d 1228 (9th Cir. 1979); United States v. Atherton, 561 F.2d 747 (9th Cir. 1977); United States v. Drebin, 557 F.2d 1316 (9th Cir. 1977); and United States v. Wise, 550 F.2d 1180 (9th Cir. 1977).
126. For a discussion of the first sale concept, *see* Section II.A. *supra.*
127. 406 F. Supp. 726 (E.D. Pa. 1975).

prietors frequently transfer rights in their works by complicated agreements which cannot simply be called 'sales.' "[128] The *Bily* court went on to note that "in each case, the court must analyze the arrangement at issue and decide whether it should be considered a first sale."[129] In *Hampton v. Paramount Pictures Corp.*,[130] the court, while finding the agreement to clearly be a license, agreed with the defendant that, in an ambiguous situation, certain factors would be helpful in interpreting the agreement including the facts that "the contract contains no limitation as to time; a flat lump-sum payment . . . [is] . . . to be made for each film transferred; there . . . [is] . . . no requirement that outstanding prints . . . be returned."[131] In *U.S. v. Wells*,[132] the court held that a license to publish that did not on its face reserve ownership in the copyright owner of copies published by the licensee, granted ownership of such copies to the licensee.[133] In contrast, the court in *U.S. v. Wise*[134] held that "the mere failure to expressly reserve title to the film does not require a finding that the films were sold, where the general tenor of the entire agreement is inconsistent with such a conclusion."[135] At the same time the *Wise* court did find that a Warner Brothers agreement furnishing a print of "Camelot" to Vanessa Redgrave was "a transaction strongly resembling a sale with restrictions on the use of the print."[136]

Assuming that an agreement will be characterized as a first sale, albeit subject to restrictions, despite its being couched in terms of "license," a breach by the party to the restrictive sales agreement would not be a copyright infringement, but a breach of contract under state law. Would a subsequent transferee also be liable for breach of contract if he made a use of the copy that was inconsistent with the restrictions in the original contract and would it matter whether or not he knew of the restrictions? These questions are the subject of the next section.

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128. *Id.* at 731.
129. *Id.*
130. 279 F.2d 100 (9th Cir. 1960).
131. *Id.* at 103.
132. 176 F. Supp. 630 (S.D. Tex. 1959).
133. *Id.* at 634.
134. 550 F.2d 1180 (9th Cir. 1977).
135. *Id.* at 1191.
136. *Id.* at 1192. The agreement between Warner Bros. and Redgrave provided:

> 1. You will pay us our cost for said print (*i.e.*, the sum of $401.59).
> 2. Said print is furnished you for your personal use and enjoyment and shall be retained in your possession at all times; said print shall not be sold, leased, licensed or loaned by you to any other person and shall not be reproduced in any size or type prints, or otherwise; and said print shall not be exhibited by you publicly for profit, paid admissions or otherwise, but the use of said print by you shall be confined to private home showings and library purposes.

Id.

C. *The Effect of Restrictive Legends on Remote Vendees*

Virtually all of the videocassettes being marketed today bear a restrictive legend on the cassette itself and/or on the protective cardboard container.[137] To the extent that these restrictive legends prohibit public exhibition or reproduction they do no more than state the rights of the owner of copyright, *i.e.*, that, as provided in section 202, "Transfer of ownership of any . . . copy . . . does not of itself convey any rights in the copyrighted work."[138] However, certain owners of copyright have added to the list of prohibited uses a proscription against rental of the video tape. Where rental to a public exhibitor is contemplated, such a restriction is merely explicative of the public performance rights of the owner of copyright, and, as held in *Kalem Co. v. Harper Bros.*,[139] a vendor with knowledge that the vendee intends to publicly perform a motion picture would be as much an infringer as the public exhibitor

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137. Warner Bros. uses the following restrictive legend on its videocassettes:

> The motion picture contained in this videocassette is protected under the copyright laws of the United States and other countries and the cassette is sold for home use only. Duplication, public exhibition, rental or any other commercial use, in whole or in part, is strictly prohibited. Any unauthorized use may subject the offender to civil liability and criminal prosecution under applicable federal and state law. This cassette contains an individual and traceable serial number as well as 'stop copy' protection.

The Paramount restrictive legend states: "Licensed only for non-commercial private exhibition in homes. Any public performance, other use, or copying is strictly prohibited. All rights under copyright reserved."

The legend also bears a so-called F.B.I. warning: "Federal law provides severe civil and criminal penalties for the unauthorized reproduction, distribution, or exhibition of copyrighted motion pictures and video tapes (Title 17, United States Code, Sections 501 and 506). The Federal Bureau of Investigation investigates allegations of copyright infringement (Title 17, United States Code, Section 506)."

It is interesting to note that the Paramount restrictive legend was contained on the cassette itself but not on the protective cardboard container.

The Magnetic Video Corporation restrictive legend reads: "The copyright proprietor has licensed the picture contained in the videocassette for private home use only and prohibits any other use, copying, reproduction or performance in public, in whole or in part."

The TCA Industries legend states: "The motion picture contained on this cassette is licensed by the copyright holder for home video use only, all other reproductions, duplications, or theatrical use is prohibited by law."

138. Except as discussed with respect to the section 106(3), section 109(a) rights, the restrictive legend does not add to the rights of the owner of copyright under section 106 nor would the absence of such a legend diminish those rights.

139. 222 U.S. 55 (1911). The court stated that:

> [I]t is said that the defendant did not produce the representations, but merely sold the films to jobbers, and on that ground ought not to be held. In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer. . . . But no such niceties are involved here. The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act.

Id. at 62-63.

himself. However, to the extent the restriction attempts to prohibit one from renting to another for private home-viewing, the owner goes beyond what is provided in the Copyright Act and attempts to limit the section 109(a) rights of the owner of a copy.[140] If the so-called "license" is really a sale with restrictions,[141] then any right of the owner of copyright to restrict section 109(a) rights is governed not by the Copyright Act but by contract law as was suggested in House Report 94-1476.[142] Obviously, if a vendee of a copy signed an agreement with the owner of copyright, or any subsequent transferor that restricted section 109(a) rights, one would expect the vendee to be bound by his agreement;[143] "[i]f he agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement . . . he can be punished for a violation of his agreement."[144] What should be the case if the vendee does not sign such a restrictive sales agreement with the owner of copyright or any transferee of that owner, but the copy bears a restrictive legend? Is the vendee, despite the fact he has not signed such an agreement, nonetheless bound by the restrictive terms of the legend? The same question can be asked where there is no restrictive legend on the cassette but the remote vendee has actual knowledge of an earlier agreement containing restrictions on section 109(a) rights.

In *Waring v. WDAS Broadcasting,*[145] the court held that a purchaser of a record was bound by a legend on the record stating it was "[n]ot licensed for radio broadcast."[146] On the other hand, in *Independent News Company v. Williams,*[147] the court refused injunctive relief to enforce a legend in a comic book that read:

> This periodical may not be sold except by authorized dealers and is sold subject to the conditions that it shall not be sold or distributed with any part of its cover or markings removed, nor in a mutilated condition, nor affixed to, nor as part of any advertising, literary or pictorial matter whatsoever.[148]

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140. *See* notes 109-12 and accompanying text *supra.*

141. For a discussion of a license or sale with restrictions, *see* Section II.B. *supra.*

142. *See* note 110 and accompanying text *supra.*

143. For example, the MCA Distributing Corporation "Videocassette Dealer Agreement" while not couched in terms of license and which in fact uses language such as *purchase* and *sold* nonetheless contains a provision that the "Dealer shall not lease or rent the product." The dealer who signs such an agreement and who then proceeded to rent MCA films that he purchased under the agreement would not be liable for copyright infringement but clearly would be in breach of contract.

144. Harrison v. Maynard, Merrill & Co., 61 F. 689, 691 (2d Cir. 1894). *See also* United States v. Wise, 550 F.2d 1180 (9th Cir. 1977); Independent News Co. v. Williams, 293 F.2d 510 (3rd Cir. 1961); Henry Bill Publishing Co. v. Smythe, 27 F. 914 (C.C. S.D. Ohio 1886).

145. 327 Pa. 423, 194 A. 631 (1937).

146. *Id.* at 425, 194 A. 631, at 633.

147. 293 F.2d 510 (3rd Cir. 1961).

148. *Id.* at 517-18.

The court stated that "[W]here the publisher has parted with the title to the copyrighted work and despite the fact that as between the immediate parties there is a contractual restriction on its use, this restriction does not bar subsequent purchasers from vending the periodical as a literary work free of the restriction."[149] In an earlier case, admittedly dealing with the applicability of the Copyright Act, the court in *Bobbs-Merrill Co. v. Straus,*[150] addressed the effect of a restrictive legend in terms of *contract* law. The restrictive legend in the copies of a book stated that: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright."[151] The court noted that the wholesale dealers were familiar with the restrictive legend but concluded that "the wholesale dealers were under no agreement or obligation to . . . restrict their sales to retail dealers who would agree to observe the terms stated in the notice."[152] And, the court went on to note that while the defendant retailer also knew of the restrictive legend there was *no privity of contract* between the plaintiff and defendant.[153] In *Burke & Van Heusen Inc. v. Arrow Drug, Inc.,*[154] again an action brought for copyright infringement, the court there also spoke in contract terms: "The fact that defendants knew of the restrictions which were part of the license agreement between plaintiff and Beecham . . . [does not bind] . . . defendants to a contract to which they were not parties. . . ."[155] While *Independent News, Bobbs-Merrill,* and *Burke & Van Heusen* all were copyright cases, there is in each a strong suggestion that in the absence of a direct contractual relationship, a buyer is not bound by a restrictive legend or agreement imposed by a remote copyright owner attempting to limit section 109(a) rights even if the buyer knows of it at the time he purchases.[156] Furthermore, the House Report accompanying the copyright revision bill, while acknowledging that conditions on future disposition of copies could be enforced under contract law, referred to a *contract between the buyer and seller.* Thus

149. *Id.* at 517.
150. 210 U.S. 339 (1908).
151. *Id.* at 341.
152. *Id.* at 342.
153. *Id.* at 350.
154. 233 F. Supp. 881 (E.D. Pa. 1964).
155. *Id.* at 884.
156. *See also* United States v. Bily, 406 F. Supp. 726 (E.D. Pa. 1975), where the court states: "Even if sales, contracts or licenses prohibited further transfer, and the party transferred the film to Bily in breach of the agreement, Bily could then be the lawful possessor, with no contractual obligations to the copyright owners. . . ." *Id.* at 734; and, in American International Pictures, Inc. v. Foreman, 576 F.2d 661 (5th Cir. 1978), the court stated: "Even if the copyright holder places restrictions on the purchaser in a first sale (such as specifying the permissible uses of the article), the buyer's disregard of the restrictions on resale does not make the buyer or the person who buys in the secondary market liable for infringement." *Id.* at 664.

there is authority to suggest that a remote vendee should not be bound simply because a legend reflects an agreement between two parties to which he was not privy.

Read most broadly, the various restrictive legends could be interpreted to limit a buyer to a single right: personal home-viewing, with no right to resell, whether to a fellow consumer or a second hand dealer, and no right to "swap" his copy of a particular motion picture for a copy of a different picture owned by a fellow enthusiast. The customer of a retail store reasonably expects that what he buys from the retail store he is free to resell or dispose of as he sees fit. While it has been suggested by various courts that an object subject to copyright is a unique type of property,[157] restraints on alienation not mandated by copyright law, but unilaterally imposed by a label on a cassette, seem akin to a fraud on the purchaser and an unwarranted diminution of his reasonable expectations.[158] The court in *American International Pictures, Inc. v. Foreman*[159] stated that: "The first sale thus extinguishes the copyright holder's ability to control the course of copies placed in the stream of commerce."[160] Should the use of a restrictive legend on a cassette be affirmed as a device for circumventing the first sale policy? The problem is compounded by the fact that the retailer sells the cassettes of various copyright owners who employ a variety of restric tions, and then further compounded by the fact that some producers place their restrictive legends only on the cassette and not on the outside container. In addition, many of these legends are on so-called "peelable labels" which can be easily removed. The holding in *Burke & Van Heusen,* indicating that a remote vendee should not be bound by a contract between the copyright owner and some prior transferee even if he knows of the contents of the agreement, provides a solution to the problem. The Uniform Commercial Code (U.C.C.) may also provide a solution to the restrictive legend problem. Obviously, to the extent the

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157. Clearly the courts take into account the unique nature of objects that are subject to copyright law: "[I]n printed books there is, aside from the material property in them, a peculiarly intangible and incorporeal right pertaining to the authorship . . . which requires a further protection. . . ." Henry Bill Publishing Co. v. Smythe, 27 F. 914, 916 (C.C. S.D. Ohio 1886). "[C]opyright law favors the rights of the copyright holder." American International Pictures Inc. v. Foreman, 576 F.2d 661, 665 (5th Cir. 1978).

158. The court in Texas National Bank of Houston v. Aufderheide, 235 F. Supp. 599 (1964), stated that:

> Ordinarily, when a person goes into a merchant's place of business to make a purchase, whether it be of an automobile, a television set, a washing machine, or a pound of nails, the purchaser ought to have the right to assume that the merchant has a right to sell the commodity in question. . . .

Id. at 604.

159. 576 F.2d 661 (5th Cir. 1978).

160. *Id.* at 664.

Copyright Act governs, state's law is pre-empted.[161] However, once it has been determined that there has been a first sale, albeit one with restrictions, the Copyright Act no longer governs at least not with respect to section 109(a) rights, and, as the aforementioned House Report and judicial decisions suggest, the owner of copyright is left to his remedies for breach of contract, as a matter of state law. Section 2-403(2) of the U.C.C. would appear to provide a shield to the buyer against the effects of a restrictive legend: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in the ordinary course of business."[162] Due to the preemption provision of the Copyright Act, the merchant could not transfer rights such as reproduction and public performance under section 2-403, but if there has been a first sale, could not section 2-403 be invoked to permit the buyer to take free of section 109(a) restrictions even if the restrictions appear on the cassettes?

It is true that in *U.S. v. Drebin,*[163] the court upheld the refusal of the trial court to instruct the jury on the applicability of section 2-403; but the court did so on the basis that Drebin had only established possession and "mere possession is insufficient to invoke the first sale doctrine."[164] If Drebin did not establish that he or some predecessor was a buyer and more particularly a buyer in the ordinary course of business he could not invoke section 2-403. The *Drebin* court distinguished *Independent News* on the basis that:

> In that case the applicability of the Uniform Commercial Code was discussed, not in connection with copyright infringement, but in connection with a claim of conversion. The court, in discussing the claim of copyright infringement, found the first sale doctrine applicable, not on the basis of the Uniform Commercial Code, but because title to the goods had passed from the copyright owner.[165]

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161. 17 U.S.C. § 301 (Supp. II 1978) provides:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression.

162. U.C.C. § 2-403(2).

163. 557 F.2d 1316 (9th Cir. 1977).

164. *Id.* at 1330.

165. *Id.*

The *Drebin* court was correct in that the plaintiff in *Independent News* had brought several counts including conversion and copyright, and that the *Independent News* court did discuss section 2-403 with respect to the count in conversion and the doctrine of first sale with respect to the count for copyright infringement, but one can integrate the analysis of the court in *Independent News* with respect to the counts in conversion and copyright infringement and develop an interrelationship between the Copyright Act and the Uniform Commercial Code. First, if there has been no first sale, state U.C.C. law is preempted by the Copyright Act. Should a copyright owner entrust a copy to another with directions to sell that copy, albeit with restrictions, then when the party so entrusted sells the copy there is a first sale even if the sale is in violation of the instructions. At that point the Copyright Act ceases to govern and state law applies at least as to section 109(a) rights, as was held with respect to the copyright infringement count in *Independent News*. Whether section 2-403 of the U.C.C. will apply will depend on whether: (1) the copy was entrusted to a merchant who deals in goods of the kind; and (2) whether the purchaser is a buyer in the ordinary course of business. If the copyright owner had entrusted the copy with a wholesaler or retailer of videocassettes the first criteria for the application of section 2-403 would be met. Can the second criteria, however, be met if the cassette bears a restrictive legend? Section 1-201(9)[166] states that to qualify as a buyer in the ordinary business one must act in good faith and without knowledge that the sale to him is in violation of the ownership rights of a third party. Can one be in good faith if he buys a cassette with the intention to exercise all section 109(a) rights and the legend on the cassette purports to limit those rights? The court in *Independent News* chose not to enforce the restrictive legend in the comic books and held that the waste paper dealer was a buyer in the ordinary course of business. Thus, one could infer from *Independent News* that, where a copyright owner entrusts a copy with an individual who deals in goods of the kind with instructions to sell the copy, a buyer who otherwise qualifies will take the copy free of any restrictions on section 109(a) rights imposed by a legend appearing on the cassette.

Suppose, however, that our copyright owner entrusted a copy with a merchant who deals in goods of the kind, but with instructions only to rent and not sell the copy. If the merchant who was licensed to sell cassettes of other producers violated his agreement only to rent this particular copy, could the buyer take free of the copyright owner's interest? In the absence of a first sale, the Copyright Act would hold the copyright owner's title paramount to that of the "buyer" under section 106(3). On the other hand, if section 2-403 of the U.C.C. were appli-

166. U.C.C. § 1-201(9).

cable, the buyer would prevail over the copyright owner's interest. Could the entrusting with a merchant who deals in goods of the kind coupled with the sale by the merchant, even though in violation of his agreement only to rent, constitute a first sale? If it could be considered a first sale then the Copyright Act would not apply and the buyer would prevail under section 2-403. The issue is can there be a first sale if the sale is not authorized by the copyright owner, *i.e.*, can there ever be an involuntary first sale? *Platt & Munk Co. v. Republic Graphics, Inc.*[167] held that a first sale "need not be a truly voluntary one, but can consist of some reasonable and recognized form of compulsory transfer, such as a judicial sale. . . ."[168] Could the concept of an involuntary first sale be expanded from a judicially enforced sale to include a section 2-403 situation? The *Platt* court held that a sale by an agent entrusted with a copy but without authority to sell did not terminate the copyright owner's right to vend with respect to that copy. It quoted with approval *Henry Bill Publishing Co. v. Smythe (Henry Bill).*[169] In *Henry Bill* the court stated "owing to the peculiar character of this kind of property, the absence of the author's authority to sell is a defect of *title,* and not a mere want of power."[170] However, the court in *Henry Bill* went on to say that "if he has put his copies of the book on the market in such a way as to mislead persons who wish to deal in them . . . it might be that . . . [the copyright owner] . . . would be without remedy to assert his monopoly . . . because estopped by such conduct."[171] Is it not this *misleading* that is at the heart of the estoppel in section 2-403? If the agent with whom a copy is entrusted does not deal in goods of the kind, an unauthorized sale should not terminate section 106(3) rights. However, if the copyright owner entrusted the copy, albeit only with authority to rent, to a merchant who deals, by way of sale in such goods, does this not mislead a public that believes the merchant has the right to sell all of his goods not just all of his goods except *this* copy? While one can find support in the decisions that, absent authorization, there is no first sale, the better solution would be to treat the entrusting with a merchant, coupled with an unauthorized sale, as an involuntary first sale terminating section 106(3) rights and permitting the application of section 2-403 of the U.C.C. In any event, if the copyright owner has entrusted cassettes with a merchant and authorized him to sell, clearly section 2-403 has application in the determination of the effect of restrictive legends.

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167. 315 F.2d 847 (2d Cir. 1963).
168. *Id.* at 854.
169. 27 F. 914 (C.C. S.D. Ohio 1886).
170. *Id.* at 918.
171. *Id.*

Based on the discussion above, one could draw two conclusions: (1) If an agreement is not merely a license but rather a first sale, any restriction on what would otherwise be section 109(a) rights is governed not by the Copyright Act but rather by state law; and, (2) a vendee will be bound, to the extent enforceable under state law, by any agreement containing restrictions that he personally executes but will not be bound by any agreements to restrict section 109(a) rights to which he was not privy, even if he knows of the content of the restrictive agreement, whether because of a legend on the cassette or otherwise.

From the discussion so far, it is clear that the existence or nonexistence of a "first sale" is a matter of exceptional importance. Given this situation, it is obvious that the question of who has the burden of proof as to "first sale" is also a matter of exceptional importance.

D. First Sale: Burden of Proof

Given the significant effect that a first sale has on section 109(a) restrictions, and given the disadvantages that devolve on the party having the burden of proof,[172] upon whom should the burden of proof as to first sale be placed in a civil suit: the copyright owner or the party selling or renting the copy? Should the answer be different where what is involved is a criminal prosecution for infringement under section 506: should the government or should the defendant bear the burden of proof of a first sale? The resolution of the burden of proof question is of unique importance in motion picture infringement cases because of traditional marketing practices in the film industry and will continue to be of importance as new patterns of distribution arise in the era of the videocassette. Prior to the advent of the videocassette, the general practice of the industry was not to sell copies of its films,[173] but rather to "license their use for limited purposes and for limited periods of time."[174] Under such circumstances, "Who has the burden of proof" is

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172. In the various decisions discussed in this section, the courts refer simply to the "burden of proof" without distinguishing between the "burden of production" and the "burden of persuasion." It is clear that in criminal prosecutions, the courts mean "burden of persuasion" when they refer to "burden of proof." Accordingly, in the discussion in this section of decisions involving criminal infringement, the phrase "burden of proof" should be read as "burden of persuasion." With respect to the discussion of civil actions, this section will distinguish "burden of proof" as to whether it refers to "production" or "persuasion."

173. This policy was recognized by Congress in its comments on section 109(c): "To cite a *familiar example,* a person who has rented a print of a motion picture from the copyright owner would have no right to rent it to someone else without the owner's permission." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 80 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5694 (emphasis added).

174. United States v. Wise, 550 F.2d 1180, 1184 (1977). "The companies keep detailed records of films to insure that licensing agreements are enforced and that films are returned within the terms of the agreement. The licensing agreement forbids the licensee from selling or transferring title to the motion picture film in his possession." Warner Bros., Inc. v. Kalish, [1979]

a critical issue. If the burden is placed on the defendant, who thought his vendor had a right to sell the copy, he may well find himself with the virtually impossible task of tracing the prior transfers of this particular copy back to a first sale. If some intermediate transferor is unknown or unavailable, the defendant may be frustrated in his attempt to establish his ownership, and, therefore, found to be an infringer despite the fact he thought himself a *bona fide* purchaser. In contrast, if the burden is placed on the copyright owner, or the government in a criminal prosecution, the plaintiff or prosecutor is faced with proving that the copy in question was not the subject of a first sale, either by establishing that the particular copy was not itself the subject of a first sale, or by proving that no copy had ever been the subject of a first sale and that therefore the particular copy could not itself have been.

The motion picture videocassette is altering the industry's traditional marketing practices. Cassettes are now being sold, albeit subject to restrictive legends. However, the fact that cassettes are now being sold, rather than merely licensed, does not mean that the burden of proof as to first sale has diminished in importance. It has been a tradition of film buffs to swap copies of films with other enthusiasts or commercial exchanges, or to sell them to second-hand dealers. Prints may exchange hands many times; it is likely this practice will be adopted by the viewing public in general. Furthermore, even if copyright owners put unique serial numbers on each copy, counterfeiters may not only duplicate the film but the videocassette identification number as well. Rather than diminish in importance, the issue of who has the burden of proof as to first sale is likely to increase in significance in the era of the videocassette.

It is most appropriate to discuss the burden of proof in criminal prosecutions first; for, if the burden of proof as to first sale is on the defendant in a criminal prosecution, it will surely be upon him in a civil action. As a general proposition, the burden is on the government to prove beyond a reasonable doubt that the defendant is guilty of the criminal activity with which he is charged. However, the question arises as to whether first sale is an element of the government's case or is an affirmative defense of the defendant as to which he has the burden of proof. The question was answered in *U.S. v. Wells*[175] where the court stated:

COPYRIGHT L. REP. (CCH) ¶ 25.052 (W.D. N.Y. 1978). "All of the studio representatives testified that films are not sold but are licensed for use. . . ." United States v. Drebin, 557 F.2d 1316, 1321 (1977). However, while it might not have been the general practice to sell copies of feature length films, some producers did authorize the sale of short three to twenty minute segments of motion pictures in 8mm and super 8mm film size. Warner Bros., Inc. v. Kalish, [1979] COPYRIGHT L. REP. (CCH) ¶ 25.052 (W.D. N.Y. 1978). And in some instances they authorized the sale of full-length features in 16mm film size. American International Pictures, Inc. v. Foreman, 400 F. Supp. 928, 931-32 (S.D. Ala. 1975).

175. 176 F. Supp. 630 (S.D. Tex. 1959).

"Though it may seem burdensome for the Government to be required to produce the testimony of Tobin's 107 contract customers . . . , this burden is not caused by the requirements of law but by Tobin's distribution system."[176] The holding in *Wells* was echoed in *U.S. v. Wise*:[177]

> It is clear that the Government's burden of proof of criminal copyright infringement is threefold: (1) infringement of a copyright (2) done willfully and (3) for profit. Implicit in its burden of proof on infringement by vending is the duty to prove the absence of a first sale as to those copyrighted articles which the defendant is charged with infringing.[178]

Given that in a criminal prosecution the government has the burden of proof as to first sale, it can meet that burden either by proving that the particular copy had not been the subject of a first sale or by proving that no copy had ever been the subject of a first sale. In several prosecutions, the government attempted, with mixed results, to prove no first sale by proving that no copies of the films in question had ever been sold. In *Wise,* the government attempted to demonstrate that Wise did not *own* the copies of several motion pictures in his possession by proving that no copy had ever been sold. As to some of the films, the circuit court affirmed the finding of criminal infringement; however, as to two of the films, the court reversed the finding of infringement. The government was held not to have met the burden of proof as to the absence of a first sale of "Funny Girl." With respect to "Funny Girl," Screen Gems, a division of Columbia Pictures Industries, Inc., executed an agreement with American Broadcasting Company (ABC) granting the latter the right to televise the film. One paragraph provided that at its election ABC could buy a copy of the film. Because the government failed to introduce evidence as to whether ABC exercised the option to purchase, or if ABC did, whether this copy had been resold, it failed to prove that Wise did not own the copy in his possession. With respect to Wise's alleged violation of the copyright in "Camelot," the government was also held not to have met its burden as to the lack of Wise's ownership because it had failed to prove the whereabouts of a film transferred to Vanessa Redgrave under a "V.I.P." agreement. The court concluded that this transfer was more akin to a "sale with restrictions on the use of the print"[179] rather than a mere license. It should be noted that the question of whether the prints in Wise's possession were obtained from ABC and Redgrave never arose; it was enough that the

176. *Id.* at 635-36.
177. 550 F.2d 1180 (9th Cir. 1977).
178. *Id.* at 1190.
179. *Id.* at 1192.

government was unable to prove its contention that there was *no* sale of *any* copy of the films.

The government was to have greater success in *U.S. v. Drebin.*[180] In *Drebin,* the government was able to prove lack of a first sale of any copies of the films in question through the introduction of the license agreements, V.I.P. contracts and the testimony of representatives of the copyrights proprietors and representatives of salvage companies. The defendants attempted to overcome this testimony by evidence that certain films, unrelated to those listed in the indictment, had been sold in the past by copyright owners. The Circuit Court held that while such evidence might have gone to the question of *willfulness* it did not relate to any of the films in the charge, and was, therefore, insufficient to prove a first sale of any of the films in question.[181]

The government was less successful in *U.S. v. Atherton.*[182] Because the task of proving the peripatetic history of a particular copy may prove an impossible task for either party, "[t]he government did not try to prove the source from which Atherton acquired any of the films."[183] Instead, the government, as it did with only partial success in *Wise* but with complete success in *Drebin,* decided to prove that no prints were the subject of any first sale. The government was completely unsuccessful in *Atherton.* While the government did prove there was no first sale of one of the films, "The Exorcist," it lost on that film based on its failure to prove *scienter.* As to the other films in the indictment, it failed to prove that no print had been the subject of a first sale. The court noted that "[i]n a criminal prosecution, a sale for salvage purposes can be a first sale."[184]

In *U.S. v. Moore,*[185] a case involving sound recordings, the government could not pursue "a no first sale of any copy" approach to proving a lack of ownership in a particular copy because the music industry, unlike the film industry[186] does not merely license, but in fact sells sound recordings. Thus, the government was forced to prove that the defendant's copy was not the subject of a prior first sale. The defendants claimed the government failed to prove the absence of a first sale because the government did not "trace the distribution of each recording to its original source to ascertain whether it was the subject of a legitimate first sale."[187] The court, noting that "[s]ound recordings are

180. 557 F.2d 1316 (9th Cir. 1977).
181. *Id.* at 1327-28.
182. 561 F.2d 747 (9th Cir. 1977).
183. *Id.* at 750.
184. *Id.* at 751.
185. 604 F.2d 1228 (9th Cir. 1979).
186. As stated previously, the historical practice of the film industry was to lease rather than sell. The videocassette is altering that practice. *See* Section II *supra.*
187. 604 F.2d 1228, 1232 (9th Cir. 1979).

not readily traced because of their wide distribution and the ease with which they can be reproduced,"[188] held that the government could "prove the absence of a first sale by showing that the tape in question was unauthorized,"[189] and that it could establish proof "not only by evidence tracing the distribution of that tape but also by circumstantial evidence from which a jury could reasonably conclude beyond a reasonable doubt that the recording was never authorized and therefore never the subject of a first sale."[190] The government obtained a conviction by introducing evidence that no one had authorized the defendant to manufacture or distribute the tapes, that the price was substantially below market, and that the quality of the defendant's tapes was poor.

Moore provides the government with the means to deal with motion picture infringement in the age of the videocassette. In *Wise, Drebin* and *Atherton,* the government chose to meet its burden as to no first sale by attempting to prove, with varying success, that no copy had ever been sold. So long as it was the practice of the industry to license rather than sell, this might have been the most expedient means of meeting the burden of proof as to no first sale of a particular copy. However, now that the film industry is engaging in the outright sale of videocassettes, that approach to proof is no longer useful, at least where videocassettes rather than conventional prints are concerned. With respect to such videocassettes, the government, if it still has the burden of proof as to first sale under the 1976 Act, will have to prove that the particular copy in question was not the subject of a first sale. Even with serial-numbered cassettes, direct proof of no first sale will be difficult. The use of circumstantial evidence, as approved in *Moore,* provides a realistic alternative to the virtually impossible task of tracing the origins of a particular copy.

Wise, Drebin, Atherton, and *Moore* were all decided under the 1909 Act. Does the government still have the burden of proof as to first sale under the 1976 Act? The House Committee on the Judiciary made clear its intent that: "The defendant in such actions . . . should have the burden of providing this evidence . . . [as to how possession of the particular copy was acquired] . . . to the court."[191] This statement has led one writer to conclude that under the 1976 Act "the defendant . . . must prove that he lawfully acquired . . . the copy . . . [and because]

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188. *Id.*

189. *Id. See also* United States v. Ilyas Muhammed, [1980] COPYRIGHT L. REP. (CCH) ¶ 25.148 (6th Cir. 1980), where the court stated that: "The first sale doctrine is irrelevant to this prosecution. The illegality of the tapes made it unnecessary for the government to prove the absence of a first sale."

190. 604 F.2d 1228, 1232 (9th Cir. 1979).

191. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 81 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5695.

. . . section 109 does not distinguish between civil and criminal cases . . . presumably the burden of proof in the first sale doctrine will be the same whether raised in either type of action."[192] On the other hand the court in *American International Pictures, Inc. v. Foreman*[193] opined that "criminal copyright cases have consistently held that the government bears the burden of negating a first sale. . . . This result may be required as a matter of constitutional law, under the principle that due process requires the government to bear the burden of proof on every essential element of the crime."[194] Nimmer concludes that "putting the burden of proving the fact of a first sale upon the defendant is constitutionally questionable in criminal actions."[195] A close scrutiny of the House Report suggests that Congress did not intend to shift the burden of persuasion as to first sale to the defendant in criminal prosecutions but only in civil actions. First, the House Report criticizes only *Foreman,*[196] a district court *civil* action. The Report does not criticize the court in *U.S. v. Wells*[197] for holding that the burden of persuasion as to no first sale was upon the government in a *criminal prosecution.* Furthermore the Report does not criticize *U.S. v. Bily,*[198] a holding identical to *Wells* and reported only four months after the district court decision in *Foreman* and some nine months before the House Report. In explaining its rationale for placing the burden of proof as to first sale upon the defendant, the Committee on the Judiciary talked of the "virtually impossible burden on *copyright owners.*"[199] No reference in the House Report is made as to the burden on the *government.* Thus, one could conclude that it was the intent of Congress to put the burden of persuasion as to first sale on the defendant in *civil* actions only, and that in *criminal* prosecutions, the burden remains on the government. Turning now to civil actions, one must ask to what extent the burden of proof as to first sale is, or should be, on the defendant.

In *Bily,* the court stated: "The problems of proof for a civil plaintiff under the copyright laws, as difficult as they may be, are much less than those of the government in a criminal prosecution."[200] This statement in *Bily* is correct with respect to the degree of certainty required in civil actions — a preponderance of the evidence — which is less than the

192. Nolan, *A Brighter Day For the Magic Lantern: Thoughts on the Impact of the New Copyright Act on Motion Pictures,* 11 LOYOLA OF LOS ANGELES L. REV. 1 (1977).

193. 576 F.2d 661 (5th Cir. 1978).

194. *Id.* at 663, 664 n.2.

195. 3 M. NIMMER, NIMMER ON COPYRIGHT 12-78 (1979).

196. 400 F. Supp. 928 (S.D. Ala. 1975).

197. 176 F. Supp. 630 (S.D. Tex. 1959).

198. 406 F. Supp. 726 (E.D. Pa. 1975).

199. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 81 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5694-95 (emphasis added).

200. United States v. Bily, 406 F. Supp. 726, 733 (1975).

burden in a criminal prosecution — proof beyond a reasonable doubt. Although the degree of certainty is less in a civil suit, the task of proving or disproving a first sale is virtually of equal magnitude. Thus, as in criminal prosecutions, so too in civil actions, determining who has the burden of proof as to first sale is of great importance. It will be helpful to the analysis of this issue to distinguish between two aspects of the "burden of proof": (1) the "burden of production" and (2) the "burden of persuasion." The party with the burden of persuasion must do more than produce evidence, he must convince the trier of facts that the existence of the necessary elements is more probable than their non-existence. If the party with the burden of persuasion does not meet an initial burden of production, the verdict will be directed against him. However, if the party with the burden of persuasion meets his initial burden of production, the latter burden, but not the burden of persuasion, shifts to the other party; the failure of the other party to meet this shifted burden of production may well result in a directed verdict against him. With this brief discussion of burden of production and burden of persuasion in mind, let us turn to an analysis of the burdens of proof in civil copyright infringement suits.

In *Rohauer v. Friedman,*[201] the court stated: "The introduction into evidence of a copyright Certificate of Registration creates a prima facie case as to the facts stated therein . . . [and] . . . [t]he burden then shifts to the other party to go forward with the evidence to overcome such prima facie case."[202] Thus, the plaintiff copyright owner must produce evidence of ownership of the copyright in question which is most easily done by submission of the Certificate of Registration. In the absence of rebuttal by defendant, plaintiff would be found to be the owner of the copyright. However, does the introduction of the Certificate only shift the burden of production to the defendant as to the issue of copyright ownership, or will it also shift the burden as to the issue of first sale? If it does, who has the burden of persuasion as to first sale? In *American International Pictures, Inc. v. Foreman,*[203] the District Court for the Southern District of Alabama answered the questions in favor of the defendant, stating:

> Plaintiff's proof, reduced to its most fundamental terms, consists of two elements; ownership of the copyright by the plaintiff and copying or vending by the defendant. . . . [T]he non-occurrence of a "first sale" is part and parcel of the second element of a plaintiff's infringement action, *i.e.* . . . [unlawful] . . . vending by

201. 306 F.2d 933 (9th Cir. 1962).
202. *Id.* at 935.
203. 400 F. Supp. 928 (S.D. Ala. 1975).

> the defendant. . . . [T]herefore a plaintiff must bear the burden of proof with respect to it.[204]

The court in its "Conclusions of Law" had stated that there were "apparently no precedents specifically addressing themselves to this issue of burden of proof [as to first sale]."[205] There was, however, language in an early copyright decision, *Henry Bill Publishing Co. v. Smythe,*[206] that can be interpreted as suggesting that the burden should be on the defendant to prove the lawfulness of his copy:

> And it must not be forgotten, in measuring the equities between parties in all such cases, that while it might be impossible, under some circumstances, to trace the title of each book and its accompanying authority from its author to sell it, this statute has provided ample notice of the author's right; for every book carries the imprint of that notice upon it, and this by the command of the statute. This fact is sufficient, and was intended to put every man who wishes to deal in the book — indeed, every man who wishes to own or read a copy — upon notice that Mr. Blaine owns the copyright, or has transferred it to his publishers, and imposes the duty of reasonable inquiry into the facts of the case to know whether he has been paid or satisfied as to the proposed sale or use, in the matter of his compensation therefor. I do not think, therefore, that the bare fact of the want of actual notice of the defect in the title on the part of the defendant is an answer, in any case, to the plaintiff's claim of infringement; but the scrutiny should go further, and determine whether the statutory notice of the plaintiff's title imprinted in the book has been fairly treated, by especial inquiry, if that inquiry be reasonably demanded by the circumstances of the particular case. . . .
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> It is quite true that the general trade may not be able to identify those copies which are regularly on the market at second-hand

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204. *Id.* at 933. The difficulty of proving or disapproving a first sale is underscored by the language of the court in Foreman:

> Neither the plaintiffs nor the defendant are able to produce an abstract or prove a chain of title to the prints which the defendant sold. The plaintiffs have failed to show that these specific prints did not enter commerce legitimately (*i.e.*, that they were stolen, lost or illegally copied). The defendant has not proven that the prints did enter commerce legitimately. Therefore, the central question of this case is whether the plaintiffs should be required to prove that the film prints which the defendant sold were not the products of "first sale" transactions entered into by the plaintiffs or their agents, or whether the defendant should be required to trace his chain of title for each film print back to one of the plaintiffs or their agents. For the reasons set forth hereinafter the Court finds that this burden of proving that the defendant did not have lawful possession of the prints in question should be on the plaintiffs.

Id. at 932.

205. *Id.* at 933.

206. 27 F. 914 (C.C. S.D. Ohio 1886).

> from those which may otherwise surreptitiously come into market, but a little inquiry by mail or telegraph of the copyright holder, and of the dealers offering the book otherwise than by subscription, would generally develop the true facts, and disclose whether particular copies were offered with the essential authority of the copyright holder. In all fairness this inquiry should be made, and, in the absence of it, any infringement of the copyright holder's monopoly of sale cannot be justified by want of actual notice. Here the defendant would have found, by actual inquiry, that these copies he offers to sell were surreptitiously purchased of a fraudulent agent for delivery only to subscribers, and therefore were not authorized for sale in the general market.[207]

Congress adopted the position enunciated in *Henry Bill* and specifically rejected the holding in the *Foreman* decision:

> During the course of its deliberations on this section, the Committee's attention was directed to a recent court decision holding that the plaintiff in an infringement action had the burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made or acquired under section 27 of the present law. *American International Pictures, Inc. v. Foreman,* 400 F. Supp. 928 (S.D. Alabama 1975). The Committee believes that the court's decision, if followed, would place a virtually impossible burden on copyright owners. The decision is also inconsistent with the established legal principle that the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary. The defendant in such actions clearly has the particular knowledge of how possession of the particular copy was acquired, and should have the burden of providing this evidence to the court. It is the intent of the Committee, therefore, that in an action to determine whether a defendant is entitled to the privilege established by section 109(a) and (b), the burden or [sic] proving whether a particular copy was lawfully made or acquired should rest on the defendant.[208]

The first civil decision to follow publication of the House Report was the Fifth Circuit Court of Appeals' review of *Foreman*.[209] The court was aware of the congressional criticism of the lower court opinion, but, because the 1909 Act governed the case, stated that "This legislative pronouncement, whatever its effect on litigation under the new statute, does not control our interpretation of the old copyright law."[210] While that language might suggest that the circuit court was

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207. *Id.* at 918-19.

208. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 80-81 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5694-95..

209. American International Pictures, Inc. v. Foreman, 576 F.2d 661 (5th Cir. 1978).

210. *Id.* at 663 n.1.

about to affirm the decision of the district court, it quickly dispelled that notion. The language in the *Foreman* appellate decision, but not its actual pattern of evidence, suggests that the circuit court considered the burden under the 1909 Act to be essentially identical to that intended by Congress for the 1976 Act. The court noted that, "in copyright law the copyright certificate is prima facie evidence that the copyright holder retains all rights granted by the copyright . . . [and] . . . [t]he right to vend is one of these rights."[211] The Fifth Circuit Court of Appeals in *Foreman* went on to suggest that the initial "burden of production" as to first sale, under the 1909 Act, was on the defendant. The court stated: "Evidence that the plaintiffs made first sales of the films in the complaint may raise an inference that Foreman acquired a copy through a sale and thus *shift the burden back to the plaintiffs* to show that Foreman's copy was not the one sold."[212] It should be noted, however, that this language is tempered by the fact plaintiff had in the first instance introduced evidence of its distribution practices, as the court recognized:

> Whether the occurrence of a first sale is an affirmative defense on which the defendant bears the burden of proof or is an element of the plaintiff's case, the plaintiffs here came forward with evidence — the copyright certificates and a course of conduct consistent with retaining all rights therein granted — that no first sale had occurred.[213]

In *Warner Bros., Inc. v. Kalish,*[214] another decision under the 1909 Act, but subsequent to both the House Report and the Fifth Circuit's opinion in *Foreman*, the court rejected defendants' claim that the plaintiff had the burden of proving the lack of a first sale, stating: "The holding of the Fifth Circuit follows the general rule that the party who can best meet the burden of proof should bear it. The burden of proving a first sale is on the defendant."[215] However, as was true in *Foreman,* "the plaintiffs . . . [had] . . . presented considerable evidence to show that they . . . [had] . . . not engaged in the general practice of selling their copyright film."[216]

The language in both *Foreman* and *Kalish* suggests that the initial burden of production and ultimate burden of persuasion were on the defendant under the 1909 Act. However, in both cases the plaintiffs had, in fact, not merely introduced their Certificates, but also intro-

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211. *Id.* at 665.
212. *Id.* (emphasis added).
213. *Id.*
214. Warner Bros., Inc. v. Kalish, [1979] COPYRIGHT L. REP. (CCH) ¶ 25.052 (W.D. N.Y. 1978).
215. *Id.* at 15,287.
216. *Id.*

duced initial proof of no first sale. Such an approach under the 1976 Act would meet the criticism raised by Nimmer:

> It is true that the defendant will have particular knowledge of how he acquired possession of the particular copy, but unless (as is unusual) he claims to have been the first purchaser, this knowledge will be irrelevant on the issue of whether prior to his acquisition there has been an authorized first sale of the copy in question. It is the plaintiff rather than the defendant who would be likely to know the practices followed in connection with the initial distribution of copies, and hence the burden of proving the nature of these practices should be on the plaintiff.[217]

However, the language in the House Report precludes such an approach. In its report, the Judiciary Committee concluded that to put the burden of persuasion as to "first sale" on the plaintiff would "place . . . [an] . . . impossible burden on copyright owners.[218] It reasoned that the burden of persuasion as to "first sale" should not be placed on the plaintiff because the defendant "clearly has the particular knowledge of how possession of the particular copy was acquired."[219] It is clear that Congress intended the defendant to bear the burden of persuasion as to first sale. That being so, the plaintiff need only introduce his Certificate to establish his copyright ownership; he would not be required, in the first instance, to produce evidence of no first sale but only after, and only if, defendant produced evidence of a first sale.

The House Report has adopted, contrary to the general trend in American Law, the doctrine of *caveat emptor*. However, facing the epidemic of piracy in the music and film industry, one can not totally fault the Congress for adopting the position it did. Nonetheless, no matter how correct Congress may have been in its assessment of the relative knowledge of plaintiff and defendant in established mediums of expressions such as records, audio tapes and conventional film, the videocassette, which is soon to become a very significant factor in home entertainment, brings with it patterns of distribution and, more importantly redistribution, that challenge the assumptions of Congress.

The two major markets involved in "infringing" sales are the musical record/tape market and the film/videocassette market. The swap/second-hand market in records and "tapes" is limited; most infringing sales are in the initial "retail" market. Thus, to require the defendant to prove the history of his phonorecords is not an undue burden. Where 16 millimeter film is at issue, a relatively small number of vendors and col-

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217. 3 M. NIMMER, NIMMER ON COPYRIGHT 12-78, 12-79 (1979).

218. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 81 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5695.

219. *Id.*

lectors has, historically, been involved, and again there is no great difficulty in placing the burden on the defendant to trace the origin of his copy. However, the videocassette market is certain to complicate greatly the defendant's ability to prove his lawful ownership. Unlike the record/tape market, videocassettes are likely to be exchanged many times over; and, unlike the limited market of the 16 MM-film buff, the videocassette market will ultimately expand to encompass a wide spectrum of middle-class America. As the videocassette becomes a nationwide component of home entertainment, and as videocassettes are swapped and resold, perhaps many times over, the current possessor of a copy will be in no better position to determine whether the particular copy was the subject of a first sale than the copyright owner. If this be the case, and since it is the copyright owner who claims infringement, should not the burden of persuasion as to no first sale be on the plaintiff? If the plaintiff takes the position that the defendant could not possibly be the owner of the copy in his possession because no copy had ever been sold, plaintiff should be required to produce persuasive evidence to support its claim. Where the plaintiff admits, as will be the case generally in the videocassette market, that copies have been sold but denies that the defendant is the lawful owner of the particular copy, he would have to prove that the particular copy in question had not been the subject of a first sale. Obviously to trace the travels of a videocassette back to its origins might well prove to be a virtually impossible task (as it would be for the defendant as well, the conclusions of the House Report notwithstanding). However, the circumstantial evidence approach applied in *Moore* provides a reasonable alternative to the problem. If the plaintiff introduces circumstantial evidence to suggest the illegality of the particular copy, it would then be on the defendant to produce evidence to rebut that of the plaintiff; the burden of persuasion would, of course, remain on the plaintiff. The adoption of the author's proposed allocation of the burden of persuasion to the plaintiff will insure that legitimate dealings in videocassettes are not chilled and will enhance the possibility that this new form of entertainment will be available to a broad spectrum of society.

Conclusion

The videocassette and the emerging video disc technology promise exciting new entertainment possibilities. The availability for homeviewing of inexpensive copies of films not shown on T.V., or televised only rarely, opens the archives of Hollywood to an interested public; and, the ability to rent, at affordable prices, box office hits of the day, places the average citizen and his living room on a par with the V.I.P. and his "screening room." These new mediums of expression are certain to have a dramatic impact on Entertainment America. The Copy-

right Act should be so interpreted as to encourage these new forms of entertainment, keeping in mind the admonition of the Court in *United States v. Masonite Corp.*[220] that "the promotion of the progress of science . . . is the 'main object'; reward . . . is secondary and merely a means to that end."[221]

While the drafters of the Constitution might not have had Gary Cooper, the *Plainsman* (1936), or John Travolta, the *Urban Cowboy* (1980) in mind when they directed Congress "To promote the Progress of Science," nonetheless Congress has granted protection to just such motion pictures under the Copyright Act. However, the grant of a limited monopoly to motion pictures, as with other forms of expression, was not in the first instance out of concern for the author but out of concern for the greater good of the people. Whatever one might conclude as to the contribution to "Science" of a film such as "Beach Blanket Bingo," the fact Congress is willing to grant it copyright protection is reason enough to ask Congress and the courts to insure that the monopoly granted is no more extensive than is necessary to insure the "progress of science." That goal can be achieved by not artificially extending the term of protection for a motion picture, whatever its origin; by relegating to state courts the issue of enforceability of restrictive legends once there has been a first sale; by enforcing restrictions against alienation only when affirmatively assented to by the party; and, finally, by recognizing that in the medium of the videocassette the defendant may be in no better position than the plaintiff to trace the origins of a particular copy.

This article began with two quotations symbolic of the possible answers to the Title question: THE SALE, RENTAL, AND REPRODUCTION OF MOTION PICTURE VIDEOCASSETTES: PIRACY OR PRIVILEGE? Not surprisingly, *Bily* represents this author's answer to the question: *"[I]t is in keeping with the policy of the act . . . not to chill dealing in creative works, when that conduct approaches, but does not cross, the borderline of infringement."*[222]

220. 316 U.S. 265 (1942).
221. *Id.* at 278.
222. United States v. Bily, 406 F. Supp. 726, 730 (E.D. Pa. 1975).

Authors' Rights: Waiver, Estoppel, and Good Faith in Book Publishing Contracts

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The authors examine the use of the contract doctrines of waiver, estoppel, and good faith with respect to acceptability clauses in book publishing contracts. They conclude that authors should invoke these doctrines more often in order to insure that publishers do not abuse their discretion when deciding if an author's manuscript is acceptable for publication.

> "[The publisher] had reserved to itself the absolute right to reject contributions; and the whole of the contract shows that it intended to, and did, reserve to itself the right to treat the articles of contributors as it might see fit. . . . It . . . might arbitrarily reject the same."[1]
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> "There is implicit in all contracts — for book publishing or house building — an implied covenant of fair dealing and good faith."[2]

There is some question as to which of these statements, made seventy years apart, more accurately reflects the situation in the book publishing industry today. While the latter would be regarded by most authors as approaching the ideal, the former would most likely be viewed as representing the reality. It is the purpose of this article to provide some of the tug necessary to pull the reality into conformity with the ideal.

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1. Walker v. Edward Thompson Co., 37 A.D. 536, 539, 56 N.Y.S. 326, 328 (App. Div. 1899).

2. Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 333, 281 N.E.2d 142, 144 (1972), *cert. denied*, 409 U.S. 875 (1972).

The "acceptability" of a book manuscript is generally the end product of the following process. An author's book proposal (in letter or outline form)[3] is presented to a prospective publisher. Once the publisher indicates a desire to publish the book, a contract is drafted and signed, the author agreeing to write and deliver a manuscript to the publisher in exchange for a lump sum amount (the "advance") and a percentage of the revenue produced by sales of the book ("royalties"). The advance is often to be paid in several installments; the first installment upon execution of the contract, the second and subsequent installments as portions of the completed manuscript are received by the publisher.[4] The sticking point is that the obligation of the publisher to pay any installment(s) of the advance is usually conditioned upon the respective, received portion(s) of the manuscript being "acceptable" to the publisher.[5]

If the publisher deems the manuscript to be unacceptable, the publisher will refuse to pay the remaining installments of the advance.[6] Depending on the contract language, the publisher may demand that the author return any installment already paid.[7] Since many authors

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3. While this is typical for most non-fiction and some fiction projects, most novels are first presented to the publisher in complete manuscript form. R. BALKIN, A WRITER'S GUIDE TO BOOK PUBLISHING 9 (1977).

4. *See* EPA Form 1:B-2.01, *contained in* A. LINDEY, ENTERTAINMENT, PUBLISHING AND THE ARTS 39 (1963). *See also* Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975).

5. A number of different acceptability clauses are suggested as models by various organizations and are used in practice by various publishers. It is beyond the scope of this article to catalogue all such clauses. For the text of several such clauses, *see* A. LINDEY, *supra* note 4, at 22, 43-46; [1979] BOOK PUBLISHING AND DISTRIBUTION: LEGAL AND BUSINESS ASPECTS (PLI) 181, 188 [hereinafter cited as PLI]; 14 BULLETIN OF THE SCIENCE FICTION WRITERS OF AMERICA 30-41, 50-56 (1979) [hereinafter cited as SCIENCE FICTION]. The following phrases are representative of those found in acceptability clauses. The author typically must deliver a manuscript "in content and form satisfactory to the [p]ublisher. . . .," EPA Form 1:B-804, *contained in* A. LINDEY, *supra* note 4, at 45; a manuscript "satisfactory in form, character, length . . . and content to a [p]ublisher. . . .," *Times Book Contract,* PLI, *supra,* at ¶ 4.1; a manuscript "acceptable to the [p]ublisher in both form and content for publication," *Sample Contract #2,* PLI, *supra,* at 187-88. The forms suggested by publishers accent "acceptability of" or "satisfaction with" the manuscript, while those suggested by authors' organizations stress only "completeness of" the manuscript. As a practical matter, publishers rarely agree to use form contracts suggested by authors' organizations. R. BALKIN, *supra* note 3, at 46. For the practical significance of the difference between a provision requiring a "completed acceptable manuscript" versus a "completed manuscript," *see* note 7, *infra.*

6. *See* Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975). EPA Form 1:B-2.01, *contained in* A. LINDEY, *supra* note 4, at 39 (1975).

7. The better-drafted contracts expressly provide how much of the already-paid advance the author must return in the event the manuscript is deemed to be unacceptable. At least one commentator maintains that "[c]onventionally, the publisher will insist on repayment of any money advanced only if and when [the author] sell[s] the book to another publisher." R. BALKIN, *supra* note 3, at 52. Several form contracts (one by a publisher) appear to contain such clauses, *see* EPA Form 1:B-8.04(c), *contained in* A. LINDEY, *supra* note 4, at 45-46; *Avon Books Form Contract,* SCIENCE FICTION, *supra* note 5, at 33. Several form contracts go even further by permitting the

already will have expended past installments (either for living expenses generally or in furtherance of the book directly)[8] and committed themselves or relied upon future installments on a manuscript specially tailored to a specific publisher, such refusal and demand on the part of the publisher will be extremely difficult for the average, non-wealthy author to bear.

The question then becomes whether an acceptability clause really gives a publisher the absolute right to reject a manuscript for any reason whatsoever. There is a relative paucity of judicial authority on this question; one tends to hear of disputes through word-of-mouth or references in books,[9] magazines,[10] or newspapers.[11] The balance of this article will deal with three little-used but potentially effective legal theories under which authors may contest disadvantageous acceptability clauses: waiver, estoppel, and good faith.[12]

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author to retain any advance already paid so long as the author delivers (in a timely fashion) a "completed manuscript," even though the "completed" manuscript may not be "acceptable." SCIENCE FICTION, *supra* note 5, at 31-32; *Form Contract of Society of Authors' Representatives,* PLI, *supra* note 5, at 214; *Sample Contract #2,* PLI, *supra* note 5, at 188. Many contracts, however, do require the author to repay any advance already received if the publisher eventually deems the manuscript unacceptable. Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975); SCIENCE FICTION, *supra* note 5, at 31-32, 51-55; *Times Book Contracts,* PLI, *supra* note 5, at 196; *Random House Form Contract,* A. LINDEY, *supra* note 4, at 22, 24.

8. *See* J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993 (S.D. N.Y. 1977).

9. *See* R. BALKIN, *supra* note 3, at 52, regarding a biography of Richard M. Nixon; Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975).

10. *See, e.g.,* Hotchner, *A Fool for a Client,* MORE MAGAZINE, April 1978, at 24-29, *reprinted in* AUTHORS GUIDE BULLETIN, April-June, 1978, at 15-19 (author's representation of himself in a suit by Random House for the installment of an advance paid to him upon the execution of a contract for an autobiographical book).

11. *See, e.g.,* McDowell, *Behind the Best Sellers: Barry Goldwater,* NEW YORK TIMES BOOK REVIEW, Jan. 20, 1980, at 36 (Senator Goldwater's defense of a suit by Harcourt Brace Jovanovich for an apparently initial advance paid upon another autobiographical book).

12. This article was prepared as the result of a case litigated by the writer on behalf of two authors of a travel book eventually rejected by the contracting publisher. In preparing that case, it became apparent that while many authors face difficulties of "acceptability," there are very few cases and a total lack of scholarly articles on the subject. There are a number of explanations for this paucity of authority. First, many book publishing contracts contain provisions requiring arbitration, usually before the American Arbitration Association, of any dispute arising under the agreement. *See, e.g., Form Contract of the Society of Authors' Representatives,* 7 (1974); Form 1:A-1.01, *Society of Entertainment, Publishing and the Arts,* #28 (1963). Since commercial arbitration decisions are neither formally reported nor generally available, most disputes over acceptability clauses (and the reasoned resolution thereof) are not widely known. Second, probably few authors (or their representatives and lawyers) have attempted court litigation, since the amounts of advances are often only a few thousand dollars. *See, e.g.,* Freund v. Washington Square Press, Inc., 41 A.D.2d 371, 343 N.Y.S.2d 401 (1973), *modified and aff'd,* 34 N.Y.2d 379, 314 N.E.2d 419 (1974); R. BALKIN, *supra* note 3, at 70-71; and since precedents like Walker v. Edwardson Thompson Co., 37 A.D. 536, 56 N.Y.S. 326 (App. Div. 1899), have appeared so formidable. It is hoped that a third reason for the lack of litigated authority in this area is the willingness of some publishers to fairly adjust acceptability disputes prior to ultimate judicial resolution. *See* Hotchner, *supra* note 10, at 29; R. BALKIN, *supra* note 3, at 52.

I. THE "ACCEPTABILITY" CLAUSE IN PUBLISHING CONTRACTS

Acceptability clauses in book-publishing contracts fall within the contract law concept of "express conditions."[13] Under this concept, one party to a contract may expressly condition its duty to perform its side of the contract upon the occurrence of an event, often an event related to the other party's performance of its side of the contract.[14] One such condition might be that a party paying for services must first be "satisfied" with those services before the payor need compensate the provider.[15] In context, an acceptability clause conditions the duty of the publisher to pay (and to publish) upon the satisfaction of the publisher with the work the author provides.

In New York[16] and most other American jurisdictions,[17] agreements calling for a performance satisfactory to a payor fall into two separate categories.[18] The first category includes those contracts in which the satisfaction requirement relates to performances involving commercial

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13. *See* Crawford v. Mail and Express Pub. Co., 163 N.Y. 404, 57 N.E. 616 (Ct. App. 1900); *see generally* RESTATEMENT OF CONTRACTS §§ 205-06 (1932); RESTATEMENT (SECOND) OF CONTRACTS §§ 250-54 (1973); 3 A. CORBIN, CONTRACTS §§ 622-55, 724-27, 752-71 (1963); 5 S. WILLISTON, CONTRACTS §§ 663-881 (3rd ed. 1978); J. CALAMARI & J. PERILLO, CONTRACTS §§ 11-15 — 11-18 (2d ed. 1977).

14. RESTATEMENT OF CONTRACTS § 258 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 252 (1973).

15. RESTATEMENT OF CONTRACTS § 265 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 254 (1973).

16. The law of New York will be emphasized for three interrelated reasons. First, most of the reported decisions involving publishing arise from New York courts. *See* notes 53, 80 and 101, *infra*. Second, many publishers, and perhaps most of the large publishers in the United States, are located in New York. Third, many book publishing contracts contain a choice of law provision designating the law of New York as controlling any disputes arising under the contract. *See, e.g.*, E.P.A. Form Contract, *contained in* A. LINDEY, *supra* note 4, at 31; *Form Contract of Representatives*, PLI, *supra* note 5, at 22.

17. *See generally* RESTATEMENT OF CONTRACTS § 265 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 254 (1973).

18. *See* Mattei v. Hopper, 51 Cal. 2d 119, 122-23, 330 P.2d 625, 626-27 (1958); Fursmidt v. Hotel Abbey Holding Corp., 10 A.D. 447, 449, 200 N.Y.S.2d 256, 259 (App. Div. 1960); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562 (Civ. Ct. N.Y. 1965). *See generally* RESTATEMENT OF CONTRACTS § 265 (1932); 5 S. WILLISTON, CONTRACTS § 675A (3d ed. Supp. 1978).

One authority identifies a third category, performances which must be satisfactory to a third-party, such as the situation of the performance of a general contractor, under an agreement with an owner, having to be satisfactory to the owner's architect. J. CALAMARI & J. PERILLO, CONTRACTS § 11-17 (2d ed. 1977).

It is not unusual for publishers, especially those of scientific or academic texts, to send manuscripts submitted for acceptance to experts in that particular discipline for their views on the manuscript. Even if such outside views were made the basis of acceptability under a book-publishing contract, the same standard of satisfaction and the same requirement of good faith seem to be applied to both the payor (publisher) satisfaction situation and the third-party (expert)

value or quality, operative fitness, or mechanical utility.[19] For such performances, the satisfaction standard used is that of a reasonable man, and dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously.[20] In effect, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."[21] Examples of performances within this "reasonable satisfaction" category are contracts to install an elevator satisfactory to the owner of a building[22] and a heating system satisfactory to the owner of a house,[23] an agreement to obtain governmental permits satisfactory to a purchaser,[24] and an agreement to rub and apply stain to woodwork.[25]

The second category includes those contracts in which the satisfaction requirement relates to performances involving fancy, taste, sensibility or judgment[26] (or convenience or individual preference).[27] For such performances, the satisfaction standard used is that of the contracting party in whose favor the satisfaction requirement runs.[28] The contracting party's dissatisfaction must be genuine.[29] That is, most courts require the determination of dissatisfaction by that party to be made in good faith.[30] It is the good faith requirement which provides

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situation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 253, Illus. 5 (1973). Therefore, this article will treat both situations under the umbrella of payor (publisher) satisfaction.

19. Mattei v. Hopper, 51 Cal. 2d 119, 123, 330 P.2d 625, 626-27 (1958); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 564 (Civ. Ct. N.Y. 1965). *See also* RESTATEMENT OF CONTRACTS § 265 (1932).

20. *Id.*

21. Duplex Safety Boiler Co. v. Garden, 101 N.Y. 387, 390, 4 N.E. 749, 750 (1886) (Danforth, J.).

22. *See, e.g.*, RESTATEMENT OF CONTRACTS § 265, Illus. 1 (1932).

23. *See, e.g.*, Hawkins v. Graham, 149 Mass. 284, 21 N.E. 312 (1889); RESTATEMENT OF CONTRACTS § 265, Illus. 4 (1932).

24. *See, e.g.*, American Oil Co. v. Carey, 246 F. Supp. 773 (E.D. Mich. 1965).

25. *See, e.g.*, Doll v. Noble, 116 N.Y. 230, 22 N.E. 406 (1889).

26. *See, e.g.*, Mattei v. Hopper, 51 Cal. 2d 119, 123-24, 330 P.2d 625, 627 (1958); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 564 (Civ. Ct. N.Y. 1965).

27. J. CALAMARI & J. PERILLO, CONTRACTS § 11-18 (2d ed. 1977).

28. Mattei v. Hopper, 51 Cal. 2d 119, 123-24, 330 P.2d 625, 627 (1958); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 564 (Civ. Ct. N.Y. 1965). *See generally* RESTATEMENT OF CONTRACTS § 265 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 254 (1973); 5 S. WILLISTON, CONTRACTS § 675A (3d ed. Supp. 1978); J. CALAMARI & J. PERILLO, CONTRACTS § 11-18 (2d ed. 1977).

29. RESTATEMENT OF CONTRACTS § 265, Comment a (1932).

30. *See, e.g.*, Mattei v. Hopper, 51 Cal. 2d 119, 123-24, 330 P.2d 625, 627 (1958); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 564 (Civ. Ct. N.Y. 1965); J. CALAMARI & J. PERILLO, CONTRACTS § 11-18 (2d ed. 1977). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 254, Comment a (1973). For an interesting discussion of the different standards to be used when dealing with matters in the reasonable man category versus the personal taste category, *see* Fursmidt v. Hotel Abbey Holding Corp., 10 A.D.2d 447, 200 N.Y.S.2d 256, 259 (App. Div. 1960), *reargument denied*, 11 A.D.2d 649, 203 N.Y.S.2d 1012 (1960) (valet services provided to hotel).

consideration by preventing the payor's promise from being illusory,[31] since without the good faith requirement, the payor's "duty" to pay would be based purely on the payor's "caprice and whim."[32] Examples of performances which fall within this "personal satisfaction" category but which appear not to require a good faith determination by the payor are contracts to paint a portrait,[33] to design and make a fur coat,[34] and to perform a vaudeville act.[35] Examples of performances which fall within this "personal satisfaction" category but which do appear to require a good faith determination by the payor are contracts to provide a valet service to a hotel,[36] contracts to play music in a bar,[37] contracts conditioned on satisfactory financial status or credit rating,[38] and a contract requiring a satisfactory lease.[39]

Traditionally, contracts between an author and a publisher or purchaser of the author's work have been interpreted to fall within the second category of performances.[40] In *Haven v. Russell,*[41] the personal satisfaction of an actor who had commissioned a play was required before the actor had a duty to pay the playwright. Similarly, in *Crawford v. Mail and Express Publishing Co.,*[42] the personal satisfaction of a newspaper publisher who had commissioned an article was re-

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31. RESTATEMENT (SECOND) OF CONTRACTS § 254, Comment a (1973), cross-referencing § 231 (imposing on every contracting party a duty of good faith and fair dealing) and § 79 (illusory promises are not sufficient consideration to form a contract).

32. 5 S. WILLISTON, CONTRACTS § 675A (3d ed. Supp. 1978). One recent text explains the illusory promise difficulty in contracts calling for personal satisfaction as follows:

> The agreement clearly call[s] for the [payor's] personal satisfaction. . . . Does this mean, however, that his statement with respect to his satisfaction must be accepted? If such were the agreement, it would be illusory. Thus, where personal satisfaction is called for it is almost invariably held that the dissatisfaction must in fact exist in good faith and must not merely be simulated. Such an interpretation removes the contract from the class of illusory agreements. The same analysis generally applies whenever a matter in the contract is left to the determination of one party.

J. CALAMARI & J. PERILLO, CONTRACTS § 11-18 (2d ed. 1977) (footnotes omitted). *See also* Mattei v. Hopper, 51 Cal. 2d 119, 124, 330 P.2d 625, 627-28 (1958); RESTATEMENT OF CONTRACTS § 265, Comment a (1932); 3 A. CORBIN, CONTRACTS §§ 644-45 (1960).

33. RESTATEMENT OF CONTRACTS § 265, Illus. 3 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 254, Illus. 4 (1973).

34. Haehnel v. Trostler, 54 Misc. 262, 104 N.Y.S. 533 (App. Term 1907).

35. Schuyler v. Pantages, 54 Cal. App. 83, 201 P. 137 (Cal. Dist. Ct. App. 1921).

36. Fursmidt v. Hotel Abbey Holding Corp., 10 A.D.2d 447, 449, 200 N.Y.S.2d 256, 259-60 (App. Div. 1960), *reargument denied,* 11 A.D.2d 649, 203 N.Y.S.2d 1012 (1960).

37. RESTATEMENT (SECOND) OF CONTRACTS § 254, Illus. 5 (1973).

38. J. CALAMARI & J. PERILLO, CONTRACTS § 11-18 (2d ed. 1977), *citing* Strilbing v. Ailion, 223 Ga. 662, 157 S.E.2d 427 (1967) and Holton v. Monarch Motor Car Co., 202 Mich. 271, 168 N.W. 539 (1918).

39. Mattei v. Hopper, 51 Cal. 2d 119, 330 P.2d 625 (1958).

40. Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 564 (Civ. Ct. N.Y. 1965).

41. 34 N.Y.S. 292 (Sup. Ct. 1895).

42. 163 N.Y. 404, 57 N.E. 616 (1900).

quired before the publisher had to pay the reporter. The rule of personal satisfaction in the publishing area was expressed in *Walker v. Edward Thompson Co.*,[43] a case in which an article had been submitted to a publisher of a law treatise:

> The defendants in this case were publishing this work over their own names. Their reputation was at stake. They had reserved to themselves the absolute right to reject contributions, and the whole of the contract shows that they intended to and did reserve to themselves the right to treat the articles of contributors as they might see fit. The article was intended to be a literary production, which the publishers of the book were to adopt and publish as their own, and it was for them to determine whether they were willing to have the contribution form part of their work, or not. An article in a legal work is certainly as much a matter of taste as a suit of clothes.[44]

A somewhat less aesthetic reason is given by a more recent case:

> This court finds that the provision that the author deliver a manuscript "acceptable in form and content to the publisher" reflects economic realities and should be enforced. Defendant publisher logically insists that it not be required to risk its capital and its reputation unless in its judgment a manuscript is "acceptable in form and content." Judgment as to whether a manuscript is "acceptable in form and content" is necessarily a judgment to be made by the publisher. The instant contract so provides and the court believes that it should be enforced.[45]

While virtually none of the earlier cases on publishing expressly require that the determination of unacceptability or dissatisfaction by the publisher be made in good faith,[46] that requirement has been expressly imposed, though questionably interpreted, in later publishing cases.[47]

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43. 37 A.D. 536, 56 N.Y.S. 326 (App. Div. 1899).

44. Walker v. Edward Thompson Co., 37 A.D. 536, 539, 56 N.Y.S. 326, 328 (App. Div. 1899). *See also* Crawford v. Mail and Express Pub. Co., 163 N.Y. 404, 57 N.E 616 (1900), where the court stated: "The plaintiff did not agree to satisfy a court or jury, but understood to satisfy the publisher. It was their [sic] taste, their fancy, their interest, and their judgment that was to be satisfied." *Id.* at 407-08, 57 N.E. at 617.

45. Haynes v. Ginn & Co., No. 72-C-690 (N.D. Ill. 1973), *reported in* PLI, *supra* note 5, at 275-78. *See also* Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979).

46. *See, e.g.*, Crawford v. Mail and Express Pub. Co., 163 N.Y. 404, 407, 57 N.E. 616, 617 (1900); Walker v. Edward Thompson Co., 37 A.D. 536, 56 N.Y.S. 326 (1899).

47. Haynes v. Ginn & Co., No. 72-C-690 (N.D. Ill. 1973), *aff'd*, 511 F.2d 1405 (7th Cir. 1975), *reported in* PLI, *supra* note 5, at 278; Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308-09 (S.D.N.Y. 1979). *See* Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 333-35, 281 N.E.2d 142, 144 (1972), *cert. denied*, 409 U.S. 875 (1972).

II. WAIVER AND ESTOPPEL

A. General Application

Reserving the question of good faith,[48] there are a number of ways in which the right to insist upon personal satisfaction can be lost. Personal satisfaction is a condition, and conditions can be excused in many ways.[49] Two such ways, long recognized but not always clearly distinguished from each other, are waiver and estoppel.[50]

Few terms in the law have been as frequently confused for each other as waiver and estoppel.[51] An attempt to definitively reconcile and discriminate between the two is beyond the scope of this article. Accordingly, working definitions of each will be attempted and then applied within the context of acceptability clauses in book publishing contracts.

Waiver is typically, if inexactly,[52] defined as the voluntary relinquishment of a known right.[53] Estoppel is defined as precluding one party, because of his conduct (whether by acts,[54] representations,[55] or promises[56]), from asserting a right to the detriment of another party, when

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48. *See* notes 30-32 and accompanying text *supra*, and section III, *infra*.

49. *See generally*, J. CALAMARI & J. PERILLO, CONTRACTS, §§ 11-31 — 11-41 (2d ed. 1977); RESTATEMENT OF CONTRACTS §§ 294-308 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 255 (1973).

50. *See, e.g.*, Nathan Miller, Inc. v. Northern Insurance Co., 39 A.2d 23 (Del. Super. Ct. 1944); White v. LaDue & Fitch, 277 A.D. 1092, 101 N.Y.S.2d 408 (App. Div. 1950), *rev'd on other grounds*, 300 N.Y. 122, 100 N.E.2d 167 (1950); Vandeweghe v. City of New York, 150 Misc. 815, 270 N.Y.S. 570 (Sup. Ct. 1934), *aff'd*, 242 A.D. 762, 275 N.Y.S. 218 (App. Div. 1934); Clark v. West, 193 N.Y. 349, 86 N.E. 1 (1908); Northwestern National Life Insurance Co. v. Ward, 56 Okla. 188, 155 P. 524 (1916); S.S. Steiner, Inc. v. Hill, 230 P.2d 537 (Ore. 1951); Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 244 A.2d 10 (1968). *See also* RESTATEMENT OF CONTRACTS § 297 (1932) (waiver of condition precedent), § 308 (1932) (waiver of condition subsequent); J. CALAMARI & J. PERILLO, CONTRACTS §§ 11-33 — 11-37 (2d ed. 1977).

51. Waiver alone is often confused with other concepts. For example, waiver is frequently used in the case of an agreement which is substituted for a previously made but as yet unperformed agreement. A noted authority suggests that this situation should more properly be called a collateral promise, a substituted contract, or an accord; the term "waiver" should be differentiated from that situation in that the substituted obligation really operates to rescind the inconsistent terms of the prior obligation rather than to waive them. 5 S. WILLISTON, CONTRACTS, § 679 (3d ed. Supp. 1978). Moreover, Williston seeks to distinguish election from waiver and to determine as "waiver" reliance on the promise not to insist upon a future condition. *Id.* Another well-known authority in the area acknowledges that waiver has been given so many different definitions that no one is exclusively correct. 3 A. CORBIN, CONTRACTS § 752 (1963).

52. RESTATEMENT OF CONTRACTS § 297, Comment b (1932).

53. *See* Clark v. West, 193 N.Y. 349, 360, 86 N.E. 1, 5 (1908). *See generally*, RESTATEMENT OF CONTRACTS § 297, Comment b (1932). E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW 850 (2d ed. 1977); J. CALAMARI & J. PERILLO, CONTRACTS § 11-34, n.97 (2d ed. 1977); 5 S. WILLISTON, CONTRACTS § 678 (3d ed. Supp. 1978).

54. Clark v. West, 193 N.Y. 349, 360-61, 86 N.E. 1, 5 (1908).

55. Estoppel by misrepresentation of an existing fact was the first type of estoppel recognized and was known as equitable estoppel or estoppel *in pais*. J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 (2d ed. 1977); 1 S. WILLISTON, CONTRACTS § 139 (3d ed. Supp. 1978).

56. The expansion of the doctrine of estoppel from equitable estoppel (or estoppel *in pais*) to include promises as well as misrepresentations of fact has led to a new doctrine popularly called

the second party has reasonably relied and acted on that conduct.[57] A working distinction between waiver and estoppel is probably best expressed in *Northwestern National Life Insurance Co. v. Ward*:[58]

> Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert a right which the law places on one as a consequence of his own conduct which has resulted in injury or detriment to another. . . . Waiver belongs to the family of estoppel in a sense, and yet an estoppel . . . has connections that are no kin to waiver. Waiver depends upon what one himself intends to do; estoppel depends rather upon what he has caused his adversary to do.[59]

Although waiver has been used rather loosely to cover a myriad of situations,[60] waiver generally arises in three major contexts. First is mere or true waiver, in which the payor, after the provider has substantially performed the contract, expressly advises the provider that he will not insist upon the fulfillment of a nonmaterial condition.[61] The second type of waiver is election waiver, in which the payor, after a material or nonmaterial condition has not been fulfilled and with knowledge of the nonfulfillment, nevertheless elects to proceed with performance under the contract.[62] The third situation is waiver by acquiescence, arguably a subset of election waiver, in which the payor, with knowledge of the nonfulfillment of a material or nonmaterial condition, does not advise the provider of nonfulfillment or does not object to nonfulfillment within a reasonable time.[63]

Estoppel, though not as abused as waiver, is similarly used in different contexts. The first type of estoppel recognized was equitable estoppel, or estoppel *in pais,* in which a payor who misrepresents an existing fact to the provider cannot later insist on the true situation if, in

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"promissory estoppel," although that label does not appear in the authorities recognizing the expansion. *See, e.g.,* Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898); RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1973).

57. That the reliance by party B must be reasonable is expressly required under promissory estoppel, RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1973), and impliedly required under equitable estoppel, Clark v. West, 193 N.Y. 349, 360-61, 86 N.E. 1, 5 (1908); J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 (2d ed. 1977).

58. 56 Okla. 188, 155 P. 524 (1916).

59. *Id.* at 195, 155 P. at 527, *quoting* Kennedy v. Manry, 6 Ga. App. 816, 66 S.E. 29 (1909) and Libby v. Haley, 91 Me. 331, 39 A. 1004 (1898). *See also* Clark v. West, 193 N.Y. 349, 360-61, 86 N.E. 1, 5 (1908). *See generally* Morris, *Waiver and Estoppel in Insurance Policy Litigation,* 105 U. PA. L. REV. 925 (1957).

60. 3A A. CORBIN, CONTRACTS § 752 (1963); J. CALAMARI & J. PERILLO, CONTRACTS § 11-34, n.98 (2d ed. 1977).

61. *See, e.g.,* Imperator Realty Co. v. Tull , 228 N.Y. 447, 127 N.E. 263 (1920); E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW 850 (2d ed. 1977).

62. *See, e.g.,* Lee v. Casualty Co. of America, 90 Conn. 202, 96 A. 952 (1916); E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW 850 (2d ed. 1977).

63. Danville Lumber and Manufacturing Co. v. Gallivan Building Co., 177 N.C. 103, 97 S.E. 718 (1919) (*per curiam*); 5 S. WILLISTON, CONTRACTS § 685, 688 n.5 (3d ed. Supp. 1978).

the meantime, the provider has relied on the misrepresentation to his detriment.[64] Equitable estoppel has been expanded to include the (nonverbal) acts of as well as express misrepresentations by the payor.[65] Estoppel was expanded to include promises by the payor as well, though classically these promises relate to formation of, rather than performance under, a contract.[66] For all types of estoppel, however, the reliance by the provider must be substantial and reasonable[67] and must have been foreseen or foreseeable by the payor.[68]

B. Application of Waiver to Acceptability Clauses

Turning to acceptability clauses in publishing contracts and the concepts of waiver, it seems evident that the concept of mere or true waiver[69] cannot be applied to an acceptability clause since the concept traditionally required that a nonmaterial term of the contract be involved, and the acceptability of a manuscript can hardly be called a nonmaterial term of a book-publishing contract.[70] Even most authors would agree that a manuscript's acceptability, in the literary as opposed to the marketability sense,[71] is, and probably should be, the most material factor in a publishing contract. The reason why true waiver is applicable only to nonmaterial terms is that "[i]f performance of the condition is a material part of the agreed exchange, an agreement to be liable in spite of the non-performance of the condition involves to so great a degree a new undertaking that the requisites for the creation of a new contract must exist."[72]

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64. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 (2d ed. 1977); 1 S. WILLISTON, CONTRACTS § 139 (3d ed. Supp. 1978).

65. *See* Clark v. West, 193 N.Y. 349, 360-61, 86 N.E. 1, 5 (1908).

66. *See* Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898). *See generally* RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1973).

67. *See* note 57, *supra*. Corbin notes that although there is no absolute standard of substantiality, the court should properly look to the content of the promise, the relative circumstances of the case, the social mores of the times, the need for the enforcement, the interests and relative capabilities of the parties, and the standard of the parties' behavior against the normal acts of human nature. 1A A. CORBIN, CONTRACTS, § 200 (1963).

68. *See* Ricketts v. Scothorn, 57 Neb. 51, 57-58, 77 N.W. 365, 367 (1898); J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 (2d ed. 1977); 1 S. WILLISTON, CONTRACTS § 139 (3d ed. Supp. 1978).

69. *See* note 61 and accompanying text *supra*.

70. *See* Crawford v. Mail and Express Pub. Co., 163 N.Y. 404, 57 N.E. 616 (1900); Walker v. Edward Thompson Co., 37 A.D. 536, 56 N.Y.S. 326 (1899). There is at least one acceptability clause case in which the possibility of waiver of the acceptability clause was recognized. *See* Haynes v. Ginn & Co., No. 72-C-690 (N.D. Ill. 1973) at 278, aff'd. 511 F.2d 1405 (7th Cir. 1975), where the court stated, "No facts have been disclosed which have raised any inference that the [publisher] waived its right to decide whether a manuscript was 'acceptable in form and content to the publisher.' "

71. *See* the text accompanying notes 151-71 *infra*.

72. RESTATEMENT OF CONTRACTS § 297, Comment c (1932); *see also* J. CALAMARI & J. PERILLO, CONTRACTS § 11-36 (2d ed. 1977).

By comparison, in *Clark v. West,*[73] a clause provided that the author writing a three-volume law treatise would receive six dollars per page if he abstained from alcohol during the course of writing the treatise but only two dollars per page if he did not.[74] Although he did not abstain, the court found that he could be entitled to the additional four dollars per page for the three published books if the publisher knew during the writing of the first book that he had not abstained, and if the publisher thereafter assured the author that he would nevertheless receive the additional four dollars per page.[75] The court noted that the abstinence provision was not the main purpose of the contract:

> [T]he obvious import of the contract construed in the light of the purpose for which it was made . . . [is that] it is not a contract to write books in order that the plaintiff shall keep sober, but a contract containing a stipulation that he shall keep sober so that he may write satisfactory books.[76]

In a more modern example, where a manuscript is to be delivered by April 1, and the publisher before April 1 advised the author that April 15 would be fine, the publisher cannot claim, after submission by April 15, that the author failed to fulfill the April 1 delivery condition.[77]

On the other hand, there may be aspects of acceptability that are not material. For example, assume that the acceptability clause stated that the author was to deliver a manuscript "in form and content satisfactory to the publisher." If the author, prior to the delivery date, advised the publisher that the manuscript contained a number of typographical errors and misspellings, and the publisher advised the author not to worry about them, a court should treat an attempted rejection by the publisher after the delivery date on the ground of form as unavailing because of a waiver by the publisher of a, in effect, nonmaterial term.[78]

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73. 193 N.Y. 349, 86 N.E 1 (1908).

74. *Id.* at 355, 86 N.E. at 3.

75. *Id.* at 361, 86 N.E. at 5.

76. *Id.* at 357, 86 N.E. at 3-4. Two interesting further points should be noted about the *Clark* case. First, it appears that the court would not recognize election waiver, or waiver by acquiescence as opposed to an express waiver, since it stated that no waiver could be implied from the publisher's mere acceptance of the books and his payment of $2 per page without objection. *Id.* at 359, 86 N.E. at 4. This observation by the court may be based, however, more on old civil procedure restraints than on viable substantive law analysis, since the court characterized the complaint and certification of question by the lower court as being predicated on the theory of express waiver: "The plaintiff must stand upon his allegation of express waiver and if he fails to establish that he cannot maintain his action." *Id.*

This conclusion is buttressed by a further point about *Clark.* Despite the fact that the court discussed the elements of equitable estoppel in detail and distinguished the doctrine from the concept of waiver, it mentioned but did not discuss the allegations in the complaint of misrepresentation by the publisher of its intention to assist on the abstinence condition and the author's reliance on that misrepresentation in continuing to work on the books. *Id.* at 360-62, 86 N.E. at 4-5.

77. This example is based upon RESTATEMENT OF CONTRACTS § 297, Illus. 1 (1932).

78. This is especially so since it is the job of the copy editor to catch and correct typos and

Turning to election waiver, the authorities appear less concerned over the question of whether the condition involved is material. This may be because under the very definition of election waiver, the payor proceeds with performance of the contract after the condition has failed to occur, thereby making it clear that fulfillment of the condition, though perhaps material at the time of formation of the contract, is no longer truly material. In this sense, action (election) speaks louder than words (express waiver).[79]

As applied to acceptability clauses, the extreme case would be where, after a publisher has received a manuscript, but without communicating its acceptability to the author, the publisher publishes the manuscript or takes a number of steps toward publishing it. If the publisher were then to assert unacceptability, the author could argue that the publisher had accepted the work or had waived the condition of acceptability by electing to proceed with the contract despite unacceptability.[80] For a more

misspellings. An attempted rejection of this type could also be dealt with under the doctrine of good faith. *See* notes 101-113 and accompanying text *infra*.

If the facts simply will not support a finding of waiver, (or of estoppel, *infra*), but the condition involved is a non-material one, then the author should argue that the doctrine of forfeiture excuses the condition. *See generally* RESTATEMENT OF CONTRACTS § 302 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 255 (1973); J. CALAMARI & J. PERILLO, CONTRACTS § 11-40 (2d ed. 1977). Under the doctrine, a court may excuse the non-occurrence of a condition solely on the basis of the extreme forfeiture that would otherwise result. RESTATEMENT OF CONTRACTS § 302(a); RESTATEMENT (SECOND) OF CONTRACTS § 255, Comment a (1973). Forfeiture occurs when the performer loses his right to the agreed exchange after he has relied substantially through preparation or performance on the expectation of that exchange. RESTATEMENT (SECOND) OF CONTRACTS § 255, Comment b (1973). In determining whether a given forfeiture is "extreme," the court should weigh the forfeiture against the importance and the extent of the protection the condition afforded the other party. *Id.* While the doctrine both impliedly and expressly requires that the condition be non-material, RESTATEMENT OF CONTRACTS § 302(b) (1932); RESTATEMENT (SECOND) OF CONTRACTS § 255, Comment c (1973), and while it has relatively rarely been applied (*see* Ledford v. Atkins, 413 S.W.2d 68 (Ky. 1967)), several recent decisions may increase the use of the doctrine although they do not explicitly rely thereon. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 11-40 n.40 (2d ed. 1977), *citing* Holiday Inns of America v. Knight, 70 Cal. 2d 327, 450 P.2d 42 (1969), 74 Cal. Rptr. 722; Sy Jack v. Pergament Syosset, 27 N.Y.2d 449, 267 N.E.2d 462 (1970), 318 N.Y.S.2d 720.

79. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 11-37 (2d ed. 1977). Of course, the payor should still be able to insist on the condition, material or non-material, so long as he expressly reserves this right at the time of his otherwise apparent election, thereby expressly disclaiming the implied waiver his conduct would otherwise reflect. 19 AM. JUR., *Estoppel* § 64, at 690 (1st ed. 1942). If the rights sought to be retained are inconsistent with a course of conduct (as opposed to rights only incidental in nature), however, then even though expressly retained, the rights may be lost. 5 S. WILLISTON, CONTRACTS § 684 n.1 (3d ed. Supp. 1978).

There are cases, involving what at least one authority characterizes as election expressed in words, which appear to hold that neither consideration nor detrimental reliance is necessary for elective, post non-fulfillment election. J. CALAMARI & J. PERILLO, CONTRACTS § 11-37 n.26 (2d ed. 1977). While there may be good reasons for distinguishing between words and conduct pre-non-fulfillment and works and conduct post-non-fulfillment, such attempted distinction may lead only to more confusion over waiver.

80. *See* Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 380, 314 N.E.2d 419, 420 (1974). *See also* Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 563 (Civ. Ct. N.Y. 1965); DeMaris v. G.P. Putnam's & Sons, 379 F. Supp. 294, 295 (C.D. Cal. 1973).

difficult situation, let us assume that a contract to write a travel book is entered into on March 1. The acceptability clause provides that "the manuscript shall be acceptable in form and content to the publisher." The delivery schedule calls for submission of one half of the manuscript by June 1 and the second half by September 1.[81] The author submits the first half of the manuscript, and one month later receives from the publisher informational materials to be included in the second half of the manuscript. If prior to receipt of the second half of the manuscript, the publisher attempts to terminate the contract on the ground that the first half is unacceptable, the author could argue that, even if the first half were unacceptable, the publisher had waived its right to object on that ground because it elected to proceed with the contract by sending the informational materials after a time by which the publisher should have determined unacceptability.[82]

The concept of waiver by acquiescence in a publishing sense may be illustrated by assuming the last hypothetical, omitting the fact that the publisher sent information materials. This would appear to be the weakest form of waiver. However, even if within the month's time the publisher did not become aware of the unacceptability of the first half of the manuscript, authority concerning nonpublishing cases would hold that he should have known.[83] Indeed, "[e]ven silence when it is likely to mislead the other party and induce him to believe that further performance of the contract will be accepted may lead to [a waiver]."[84] This is so because "[h]e who is silent when he ought to have spoken, will not be heard to speak when he ought to be silent,"[85] because his election has had its natural effect. When silence will operate as waiver by acquiescence is a question of fact to be determined at trial.[86]

C. *Application of Estoppel to Acceptability Clauses*

Turning now to estoppel and book-publishing contracts, the operation of the various forms of estoppel can be illustrated by variations of

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81. This example is based upon Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979). Although counsel for the authors in that case argued waiver and estoppel, the arbitrator based her decision against the publisher on the ground of breach of the implied covenant of good faith. *See* notes 101-13 and accompanying text *infra*.

82. *See* J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993, 994 (S.D. N.Y. 1977). As to the damages then awardable, *see* notes 184-97 and accompanying text *infra*.

83. When acquiescence takes the form of silence, the courts generally require such silence to be of the type maintained with knowledge of the facts. 5 S. WILLISTON, CONTRACTS § 679 n.7 (3d ed. Supp. 1978). Some courts will find that given certain circumstances, a person should have known of the facts, regardless of whether there was actual knowledge, for "one can not be wilfully ignorant and relieve himself . . . because he did not know." Danville Lumber & Manufacturing Co. v. Gallivan Building Co., 177 N.C. 103, 107, 97 S.E. 718, 720 (1919) (*per curiam*).

84. 5 S. WILLISTON, CONTRACTS § 688 n.5 (3d ed. Supp. 1978).

85. *Id.*

86. *Id.*

the hypotheticals considered under waiver. For example, under traditional equitable estoppel,[87] a statement by a publisher that an unacceptable portion of a manuscript was "fine," thereby inducing the author to continue working on the balance of the manuscript while turning down other writing opportunities, should estop the publisher from later denying that the portion was unacceptable.[88] Estoppel here seems appropriate in that the author's reliance on the publisher's statement appears reasonable (the publisher's view was positive) and substantial (the author turned down other work). The publisher should also have foreseen that his statement would produce that effect on an author who was working, no doubt, under a deadline.

If instead of "fine," the publisher had said "I promise you that there will be no problem with acceptability," the author could argue promissory estoppel.[89] The difficulty with this approach is that promissory estoppel has been most recognized as protecting reliance related to the formation of a contract rather than the performance of a contract.[90] However, since equitable estoppel has been expanded to include promises as well as misrepresentations, it may not be practically necessary to distinguish between promissory and equitable estoppel so long as the objective requirements (reasonable, substantial and foreseeable reliance) of both are met.[91]

Lastly, assume that instead of misrepresenting or promising, the publisher merely sent, one month after a portion of the manuscript had been received by the publisher, informational materials to be included within the remaining portion of the work or placed their work on its next season's publishing list. Assume also that the author thereby kept working and turned down alternative opportunities. It seems that estoppel by conduct should be available in this situation. The author's reliance was reasonable and foreseeable (the publisher would not have

87. *See* notes 64-66 and accompanying text *supra.*

88. The publisher may also be estopped from later rejecting the portions being worked on in reliance on the statement. For a projection on the treatment of this situation for damages purposes, *see* notes 187-90 and accompanying text *infra.*

89. *See* note 56 *supra. See also* RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1973).

90. J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 (2d ed. 1977), *citing* B.F. Goodrich v. Parker, 282 Ala. 151, 209 So. 2d 647 (1968); *see also* Morgan v. Maryland Casualty Co., 458 S.W.2d 789 (Ky. 1970). *But see* Drier v. Sherwood, 77 Colo. 539, 238 P. 38 (1925) (Party A promising before payment date to accept a late payment by party under an existing contract, which led to Party B's not paying on time, estopped Party A from asserting the lateness of the payment).

91. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 11-34, at 94 (2d ed. 1977). While another respected commentator recognizes this type of promise situation as triggering relief, he feels that since there is no misrepresentation of an existing fact, the reason for relief is better called waiver than estoppel. 5 S. WILLISTON, CONTRACTS § 679 (3d ed. Supp. 1978). *See also* New England Structures, Inc. v. Loranger, 354 Mass. 62, 234 N.E.2d 888 (1968).

sent them additional materials for a subsequent section if he believed the earlier section to be unacceptable), and the substantial nature of the author's reliance is unchanged. Also, the same conduct by the publisher which arguably appears weak in the context of waiver by election[92] seems more weighty in the context of estoppel, where the publisher's conduct has induced some reliance by the author (and thus has caused some additional injury, beyond hurt feelings, to the author).

An interesting question is whether the publisher need know (at the time of his misrepresentation, promise, or conduct) that the manuscript or portion thereof *is* unacceptable. Under the modern doctrine of estoppel, it is clear that a fraudulent, deceitful intent is not necessary for either a promise or a misrepresentation of fact to qualify for estoppel purposes.[93] In fact, silence may form the basis for estoppel provided there is a duty to speak (*i.e.*, the publisher knows that the author will continue to work on the balance of the manuscript to the exclusion of other opportunities, yet does not get around to reviewing the already submitted portions within a reasonable time, thereby inducing the author's reliance on the acceptability of the first portion of the manuscript).[94] Accordingly, there would seem no reason to require knowledge of unacceptability for estoppel by conduct, since estoppel focuses more on the effect on the performer than on the one being estopped.[95]

Both waiver and estoppel must be affirmatively pleaded, especially when used defensively[96] by an author against a publisher suing to recoup an advance already paid. While the burden of proving waiver or estoppel is usually upon the party asserting it,[97] the facts supporting waiver or estoppel will ordinarily be relatively objective and therefore relatively easy to produce and introduce into evidence.[98] The same is not necessarily true of our next topic, good faith.[99]

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92. *See* notes 78-82 and accompanying text *supra*.

93. *See* Danville Lumber & Manufacturing Co. v. Gallivan Building Co., 177 N.C. 103, 97 S.E. 718 (1919) (*per curiam*). *See also* J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 n.95, 96 (2d ed. 1977) and cases cited therein.

94. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 n.96 (2d ed. 1977), *citing* Schulze v. Kwik-chek Realty Co., 212 Va. 11, 181 S.E.2d 629 (1971).

95. *See* Northwestern National Life Insurance Co. v. Ward, 56 Okla. 188, 155 P. 524 (1916); Clark v. West, 193 N.Y. 349, 361, 86 N.E. 1, 5 (1908).

96. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 n.90 (2d ed. 1977) and cases cited therein. *See also* FED. R. CIV. P. 8(c).

97. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 11-34 n.90 (2d ed. 1977).

98. For example, most evidence of waiver will be written or oral communications between publisher and author or publisher and third party.

99. Most evidence of bad faith will either be in the form of motives or thinking processes within a publisher's mind, or communications within a publishing house's staff.

III. GOOD FAITH

If the doctrines of waiver and estoppel do not bar a publisher's assertion of an acceptability clause, the author may still argue that the publisher has not acted in good faith. While waiver and estoppel excuse the condition of acceptability,[100] the doctrine of good faith implies (or imposes) a separate promise by the publisher which may be breached.[101] The major drawback in arguing good faith is the present, and questionable, status of interpretation of that term in book publishing contracts.[102]

The doctrine of good faith in contract law is a comparatively recent development; there was no mention of it in the First Restatement of Contracts.[103] The doctrine nevertheless represents one of the basic tenets of the Uniform Commercial Code (UCC): "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[104] The Code further defines good faith as "honesty in fact in the conduct or transaction concerned."[105] While the writing and offering of a book to a publisher has not as yet been defined as "a sale of goods,"[106] the UCC article controlling sale of goods transactions further defines the good faith required of merchants[107] as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[108]

The Second Restatement of Contracts also recognizes that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[109] Restatement (Second) attempts to describe (rather than define) good faith by emphasizing "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," while eschewing as bad faith

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100. *See* note 50 and accompanying text *supra.*

101. Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308 (S.D. N.Y. 1979); Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 45, 330 N.Y.2d 329, 333, 281 N.E.2d 142, 144 (1972), *cert. denied,* 409 U.S. 875 (1972).

102. *See* text accompanying notes 151-71 *infra.*

103. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 231 (1973), Reporter's Notes.

104. UCC § 1-203. *See generally* Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Code,* 30 U. CHI. L. REV. 666 (1963); Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 VA. L. REV. 195 (1968).

105. UCC § 1-201 (19).

106. *Id.* at 2-105(1) (definition of a "good"). *Cf.* National Historic Shrines Foundation, Inc. v. Dali, 4 UCC REP. SERV. 71 ("painting done for money while painter on television not a sale of goods"). One court, however, referred to Article 2 sections in discussing damages under book publishing contracts. *See* Freund v. Washington Square Press, Inc., 41 A.D.2d 371, 374, 343 N.Y.S.2d 401, 404 (1973). *See also* text accompanying notes 209-10 *infra.*

107. UCC § 2-104(1) (definition of "merchant").

108. *Id.* at § 103(1)(b).

109. RESTATEMENT (SECOND) OF CONTRACTS § 231 (1973).

"types of conduct . . . which . . . violate community standards of decency, fairness, or reasonableness."[110] While "[a] complete catalogue of types of bad faith is impossible,"[111] the imposition of a covenant of good faith and fair dealing in rejecting performance has been recognized by many courts in many contexts, both in New York and elsewhere.[112]

A. Van Valkenburgh

The doctrine of good faith was found applicable to book publishing contracts in *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Company, Inc.*[113] In that case, the plaintiff "author" owned the copyright to a series of books on basic electricity and electronics which were published by the defendant.[114] The publishing contract expressly required that the publisher use its "best efforts" in the promotion of the series.[115] When the time came for a new edition of the books, the publisher requested a reduction in the royalty sale, a suggestion which the author, over a year's span, would not accept.[116] The publisher then retained a group of writers to provide a series of books very similar to plaintiff's.[117] When trade reports triggered inquiry by the plaintiff, the publisher denied the parallel project.[118] Three years later, the parallel series was published, and the publisher made efforts to sell it to customers who had been ordering plaintiff's series.[119] The publisher suspended its advertising of plaintiff's series and began very similar advertising of the parallel project.[120]

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110. *Id.* at § 231, Comment a.

111. *Id.* at § 231, Comment d. The list includes "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Id.*

112. *See, e.g.,* Richard Bruce & Co. v. J. Simpson & Company, Inc., 243 N.Y.S.2d 503, 40 Misc. 2d 501 (Sup. Ct. 1963); Griffith v. Blue Shield of Western New York, Inc., 281 N.Y.S.2d 593, 28 A.D.2d 808 (App. Div. 1967); Cowden v. Broderick & Calvert, Inc., 108 S.W.2d 562 (Tex. Cir. App. 1937), *aff'd,* 131 Tex. 434, 114 S.W.2d 1116 (1938); Paquette v. City of Fall River, 278 Mass. 172, 179 N.E. 588 (1932).

113. 30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329 (1972), *cert. denied,* 409 U.S. 875 (1972). The doctrine of good faith is discussed in many publishing cases, including Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308-09 (S.D.N.Y. 1979); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 563 (Civ. Ct. N.Y. 1965); Webster-and-Fodor's Modern Guide, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979); Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975); Holt, Rinehart & Winston v. Wolman, 368 N.Y.S.2d 813 (1975) (memorandum decision).

114. 30 N.Y.2d 34, 42, 281 N.E.2d 142, 143, 330 N.Y.S.2d 329, 330-31 (1972).

115. Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 44, 281 N.E.2d 142, 144, 330 N.Y.S.2d 329, 332 (1972), *cert. denied,* 409 U.S. 875 (1972).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

The trial court found a breach of good faith by the publisher based upon a fiduciary relationship between the author and the publisher and granted substantial equitable relief.[121] The Appellate Division modified the lower court's decision by rejecting the finding of a fiduciary relationship, by basing liability on a breach of the "best efforts" clause, and by scheduling a hearing on damages.[122]

Upon certification, the Court of Appeals stated that "[t]here is implicit in all contracts — for book publishing or housebuilding — an implied covenant of fair dealing and good faith."[123] The court went on to hold, however, that while most intrahouse competition which might affect an author's sales would not be barred by a "best efforts" clause, "there may be a point where that activity is so manifestly harmful to the author, and must have been seen by the publisher to be harmful, as to justify the court in saying there was a breach of the covenant to promote the author's work."[124] Thus, the Court of Appeals affirmed the Appellate Division's finding of a breach of the "best efforts" clause, "not . . . a breach of the implied condition of fair dealing."[125] The chief justice dissented in part and, arguing in favor of the equitable relief granted by the trial court,[126] suggested placing liability on the publisher under the doctrine of good faith and fair dealing.[127]

B. Random House, Inc. v. Gold

Even if the recognition of an implied covenant of good faith in *Van Valkenburgh* had not been dicta, there still might remain the question of whether the covenant controlled the acceptability clause of such a contract. That question has been answered in the affirmative in a number of recent cases,[128] most expressly and most notably in *Random House, Inc. v. Gold.*[129]

In the *Gold* case, the author and the publisher entered an agreement for the writing and publishing of four books.[130] The author was to be

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121. *Id.* at 44, 281 N.E.2d at 144, 330 N.Y.S.2d at 332. The relief was a permanent injunction restraining the publisher from proceeding with the sale and distribution of the parallel project and included orders for physical destruction of the parallel books and an accounting of the profits earned by the publisher on the parallel books. *Id.*

122. *Id.*

123. *Id.* at 45, 281 N.E.2d at 144, 330 N.Y.S.2d at 333.

124. *Id.* at 45-46, 281 N.E.2d at 145, 330 N.Y.S.2d at 334.

125. *Id.* at 46, 281 N.E.2d at 144, 330 N.Y.S.2d at 332.

126. *See* note 121 *supra.*

127. Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 47-48, 330 N.Y.S.2d 329,335, 281 N.E.2d 142, 146 (1972) (Fuld, C.J., dissenting in part).

128. *See, e.g.,* Haynes v. Ginn & Co., No. 72-C-690 (N.D. Ill. 1973) at 278; Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 563 (Civ. Ct. N.Y. 1965); Holt, Rinehart & Winston v. Wolman, 47 A.D.2d 872, 368 N.Y.S.2d 813 (1973) (memorandum decision). *See also* Schisgall v. Fairchild Publications, 207 Misc. 224, 230, 137 N.Y.S.2d 312, 317-18 (Sup. Ct. 1955).

129. 464 F. Supp. 1306 (S.D.N.Y. 1979).

130. *Id.* at 1307.

paid an advance of $150,000 in ten equal annual installments against royalties, and the manuscripts were to be "in content and form satisfactory to the publisher."[131] The author had the option to terminate the agreement with respect to the fourth book if he earned $150,000 or more in royalties on the first three.[132] The first two books under the agreement were written, accepted, and published.[133] As of January, 1973, the author had received $60,000 of the $150,000 advance; by March, 1973, the first two works had generated only about $10,000 in royalties.[134] When the third manuscript was received on July 30, 1973, the editor-in-chief of the publisher read it, and asked a second editor to read it; the editor-in-chief also requested and reviewed the March financial data.[135] In August, 1973, the second editor reported to the editor-in-chief, criticizing the work as "shallow and badly designed."[136] In considering whether to publish the book, the second editor asked whether the publisher "was behind financially on the contract with [the author]."[137]

In September, 1973, the editor-in-chief communicated some of the criticisms about the work to the author and indicated he was "uneasy" about the manuscript.[138] The author began revising the work.[139] Subsequent facts from the court's opinion are worth quoting at length:

> On December 20, 1973, just ten days before another installment of the agreed advance would have fallen due and after being assured by [the publisher's] attorneys that in their opinion [the author] would have to repay about $50,000 if the contract were terminated, [the editor-in-chief] wrote to [the author's agent], stating that the manuscript was unsatisfactory in form and content and that [the publisher] was terminating the agreement. . . . [The editor-in-chief] testified that he decided to reject the book after reading a second, revised manuscript.[140] He did not give the second manuscript to . . . anyone else to read. He could not remember exactly why he thought that the work was not a good book and he did not keep a written memorandum of his criticisms, but said that they were the

131. *Id.*
132. *Id.*
133. *Id.*
134. On the same page of the opinion, the court states that the amount of royalties on the first two books earned as of December, 1973, was $9,304.71 and as of March, 1973, was $11,579.35. *Id.* at 1307. This apparent chronological anomaly may be the result of a typographical error by the court or of appropriate bookkeeping rectifications over time. The approximate figure of $10,000 is a compromise used for clarity.
135. *Id.* at 1307.
136. *Id.* at 1307-08.
137. *Id.* at 1308.
138. *Id.*
139. *Id.*
140. It should be noted that although there is no mention in the opinion when a second, revised manuscript was delivered, the author appears not to have contested the chronological soundness of this testimony.

> same as the [second editor's earlier report]. *[The editor-in-chief] admitted that he was conscious of the financial circumstances of [the author's] contract at the time he decided to reject the book.*
>
> On January 2, 1974, [the editor-in-chief] and [the author's agent] spoke over the telephone about the third work. . . . *[The editor-in-chief] offered to renegotiate the terms of the [author's] contract, and told [the agent] that the manuscript for the third work would be acceptable to [the publisher] on different terms.*[141] (Footnotes and emphasis supplied).

Following the rejection by the publisher, the author placed the manuscript for the third book with another publisher and received a $10,000 advance.[142] The original publisher then sued the author for the return of all already-paid advance installments minus the approximately $10,000 in royalties earned on the first two works.[143] The author denied this claim and counterclaimed for the $90,000 balance of the $150,000 total advance on the ground of bad faith.[144]

The trial court dealt with the author's contention succinctly:

> [The author] contends that [the publisher] acted in bad faith when it rejected the [third] manuscript because it gave undue and improper weight to financial considerations in the making of that decision and to escape from the remaining financial obligations if it rejected the third work. [The author] points to the [publisher's] offer to accept and publish the third work on different terms. [The author] has offered no authority, however, for the proposition that a publisher's financial circumstances and the likelihood of a book's commercial success must be excluded from the range of factors that may be weighed in the decision to accept or reject a manuscript offered for publication, and this Court declines to endorse such a view. The requirement that a manuscript be satisfactory to the publisher gives it the right to reject a work if it acts in good faith; the publisher is not bound to incur the significant costs of publication if it declines to accept the risk of financial loss.[145]

In response to the author's allegations of bad faith, the court held

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141. Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308 (S.D.N.Y. 1979).

142. *Id.*

143. *Id.*

144. *Id.* The damages aspects of the *Gold* case are dealt with in detail in notes 205-09 and accompanying text *infra*. *Accord* Haynes v. Ginn & Co., No. 72-C-690 (N.D. Ill. 1973) at 277. *Cf.*, Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 334, 281 N.E.2d 142, 144 (1972) (a clause requiring the publisher to use its best efforts in promoting an author's work "does not close off the right of a publisher to issue books on the same subject, to negotiate with and pay authors to write such books and to promote them fully according to the publisher's economic interests, even though those later publications adversely affect the contracting author's sales").

145. Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308 (S.D.N.Y. 1979).

that while an acceptance decision must be made in good faith, a rejection based upon economic considerations complies with the standard. The court attempted to moderate the impact of that holding by adding:

> This view may permit overreaching by publishers attempting to extricate themselves from bad deals, as has arguably occurred in the instant case. As will be seen *infra,* the multibook contract in this case only allowed the publisher to avoid further losses as to future books; it did not permit the publisher to shift the entire burden of unsuccessful published books to the author.[146]

C. Good Faith Determination of Acceptability

The difficulty with the *Gold* court's holding at first glance appears to be that it ignores the mechanical purpose behind the good faith rule. In fact, the difficulty stems from the fact that the court ignores the substantive purpose behind the good faith rule in the context of the publisher's decision. In so doing, the court has effectively cut the heart out of the good faith doctrine.

The court did not in fact ignore the mechanical reason behind the good faith rule, that is, to provide consideration. As noted above,[147] even in a "personal satisfaction" situation, the satisfaction decision must be made in good faith because it is the good faith requirement which provides consideration by preventing the payor-publisher's promise from being illusory, since without the good faith requirement the publisher's duty to pay would be based purely on the publisher's caprice and whim. Simply stated, where one party retains the right to cancel a contract at any time, the contract is void for lack of mutuality.[148]

Imposing a requirement of good faith in reaching the satisfaction decision is not, however, the only way to achieve consideration. For example, if a payor agrees either to take goods from a supplier or to give reasonable notice that it will not, the alternative of giving notice, though not difficult of performance, is a sufficient consideration to

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146. *Id.* at 1308-09 n.1.

147. *See* notes 29-47 and accompanying text *supra.*

148. *See, e.g.,* Miami Coca-Cola Bottling Co. v. Orange Crush, 296 F. 693 (5th Cir. 1924); Ivor B. Clark, Inc. v. Boston Road Shopping Center, 24 Misc. 2d 84, 207 N.Y.S.2d 582 (Super. Ct. 1960). *See also* Meurer Steel Barrel Co. v. Martin, 1 F.2d 687 (3rd Cir. 1924); Weniger v. Union Center Plaza Associates, 387 F. Supp. 849 (S.D.N.Y. 1974) (loan commitment subject to "approval leasing" where defendant had the right to reject arrangements made by plaintiff with third parties found to be an enforceable contract); Boston Road Shopping Center v. Teachers Ins. & Ann. Ass'n of America, 13 A.D.2d 106, 213 N.Y.S.2d 522 (1961) (right of the defendant to reject leases as unsatisfactory did not make the undertaking illusory so that the contract lacked mutuality); Smith v. Diem, 223 A.D. 572, 229 N.Y.S. 56 (App. Div. 1928); Realty Advertising & Supply Co. v. Englebert Tyre Co., 89 Misc. 371, 151 N.Y.S. 885 (App. Div. 1915).

bind a contract.[149] Therefore, a provision in a contract requiring notice of unacceptability[150] should satisfy the consideration purpose behind the good faith doctrine.

The *Gold* court did misperceive, however, the reason behind the good faith doctrine in the nature of the decision being made by the publisher. The provision of consideration is only one reason for the existence of the good faith doctrine. Quite independent of consideration, the duty of good faith and fair dealing is imposed in "satisfaction" situations as a regulation of the conduct of the payor.[151] Even when the satisfaction need be only personal, and not reasonable, it must nevertheless be honest; the dissatisfaction must be with the circumstances and not with the bargain:[152]

> [The payor's] expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance of the contract and his dissatisfaction must be genuine.[153]

It is submitted that this is the very point which the court overlooked in the *Gold* case. That the publisher was "satisfied" with the book as a piece of literary art cannot be questioned, despite the court's apparent finding to the contrary.[154] Since the editor-in-chief, after rejecting the third manuscript, told the author's agent that the manuscript would be acceptable to the publisher "on different terms,"[155] the publisher was obviously satisfied with the author's performance, but not with the contract. The condition was, and should have been interpreted to be, that the author produce and deliver a good book, not necessarily one that would sell.[156]

The *Gold* court's interpretation of what constitutes good faith also

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149. *See* Niagara Mohawk Power v. Graver Tank & Manuf. Co., 470 F. Supp. 1308, 1316 (N.D.N.Y. 1979); 1A A. CORBIN, CONTRACTS, § 1-63 (1963); J. CALAMARI & J. PERILLO, CONTRACTS § 4-17 (2d ed. 1977). Where a contract contains a retained power of termination but no provision for giving notice of termination, such notice within a reasonable time may be implied (Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir. 1945) 105, or imposed (UCC § 2-309(3)). While such implication or imposition may appear to make sense, it is questionable whether it can be justified by reasoning under the consideration doctrine. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 4-17 (2d ed. 1977).

150. *See, e.g.,* Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 357 N.Y.S.2d 857, 314 N.E.2d 419 (1974).

151. RESTATEMENT (SECOND) OF CONTRACTS § 254, Comment a, Illus. 2; § 231 (1973). *See also* Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 333, 281 N.E.2d 142, 144, *cert. denied,* 409 U.S. 875 (1972); Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308 (S.D.N.Y. 1979).

152. RESTATEMENT OF CONTRACTS § 265 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 254, Comment a; § 231 (1973).

153. *Id.* at § 265, Comment a. *Accord* RESTATEMENT (SECOND) OF CONTRACTS § 254, Comment a (1973).

154. Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308-09 (S.D.N.Y. 1979).

155. *Id.* at 1308.

156. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 253, Comment d (1973).

misperceives the nature of the publisher's decision. Book publishing is not parallel to the situation of the father commissioning a portrait of his daughter to hang in his living room.[157] The publishing situation is akin to the commissioning of a portrait for resale purposes. So long as the book is aesthetically acceptable,[158] economic considerations short of bankruptcy or near bankruptcy should not intrude. In *Feld v. Henry S. Levy & Sons, Inc.*,[159] a buyer of bread crumbs agreed that it would purchase at six cents per pound all the bread crumbs the seller could produce, the agreement being subject to cancellation on six months' notice by either side.[160] One year later, without giving notice, the seller ceased producing bread crumbs.[161] The seller said it was uneconomical to continue, but indicated that it would resume production if the contract price were raised to seven cents per pound.[162] The court observed:

> The parties by their contract gave the right of cancellation to either by providing for a six months' notice to the other. Short of such a cancellation, defendant was expected to continue to perform in good faith and could cease production of the bread crumbs, a single facet of its operation, only in good faith. Obviously, a bankruptcy or genuine imperiling of the very existence of its entire business caused by the production of the crumbs would warrant cessation of production of that item; *the yield of less profit from its sale than expected would not. Since bread crumbs were but a part of defendant's enterprise* and since there was a contractual right of cancellation, good faith required continued production until cancellation, even if there be no profit. In circumstances such as these and without more, defendant would be justified, in good faith, in ceasing production of the single item prior to cancellation only if its losses from continuance would be more than trivial, which overall, is a question of fact.[163]

Except for the smallest publishers, no one book is likely to be more than "a part of [the publisher's] enterprise," and the question of marketability is really only a question of "the yield of less profit from

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157. *Id.* at § 254, Illus. 4. *See also* RESTATEMENT OF CONTRACTS § 265, Illus. 3 (1932).

158. In Demaris v. G. P. Putnam's Sons, 379 F. Supp. 294 (C.D. Cal. 1973), the court, without mentioning the good faith doctrine, upheld a publisher's decision that a manuscript was "unsatisfactory" when that decision was based on outside counsel's legal opinion that publication of the book would put the publisher "in grave danger of suits for invasion of privacy and litigation for violation of common law copyright." *Id.* at 296. *See also* Holt, Rinehart and Winston, Inc. v. Wolman, 47 A.D. 872, 368 N.Y.S.2d 813 (1975) (memorandum decision) (allegedly plagiarized materials in manuscript might amount to good faith rejection of manuscript by publisher). While such situations are not exclusively aesthetic or economic, they appear to be unavoidably good faith reasons for rejecting a manuscript.

159. 37 N.Y.2d 466, 373 N.Y.S.2d 102 (1975).

160. *Id.* at 468, 373 N.Y.S.2d 103.

161. *Id.* at 468-69, 373 N.Y.S.2d 103.

162. *Id.*

163. *Id.* at 471-72 (emphasis supplied). *Accord* RESTATEMENT (SECOND) OF CONTRACTS § 254, Illus. 3 (1973).

[the book's] sale than expected." The time for deciding whether a book is marketable, as compared to the advance, is at the time the contract is negotiated and the amount of the advance is agreed upon, not at the time the decision is made on whether the book is "acceptable." If the book at the time of the acceptability decision is deemed not to be marketable, the publisher need not publish it, but the author should retain any advance paid and receive any advance remaining that is conditioned on "acceptability."[164]

Viewed from a different perspective, if the *Gold* decision is followed, then what remains of the good faith requirement? What action by the publisher cannot be robed in economic terms? Can the publisher take into account that the "market has changed, that another publisher's competing book has just appeared, that the book despite the manuscript being delivered on time, itself no longer would be topical or timely?"[165] May the publisher consider, at the time the acceptability decision is to be made, that he has generally decided to cut back on titles or even cancel a whole series?[166] What decision can a publisher make that would amount to bad faith? Would his rejecting a sure best seller out of spite for the author suffice?[167] Paying lip service to a good faith requirement in acceptability determinations, and then defining that requirement so as to permit economic considerations to apply, results in no good faith doctrine at all.

If the *Gold* decision is followed, an accompanying corollary should

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164. *See* R. BALKIN, *supra* note 3, at 57. *See also* notes 179 and 218-28 and accompanying text *infra,* for damages available upon a breach of the covenant of good faith.

It may be argued that the reasoning of the *Feld* case is based upon the availability of "a contractual right of cancellation," in that the *Feld* court would not have held the buyer to a long-term, unprofitable deal unless the option of escape by notice were present. While there was a termination provision in the *Gold* contract, it was as to the fourth book only, and it was an option (triggered by a condition precedent) held by the author, not the publisher. Random House, Inc. v. Gold, 464 F. Supp. 1306, 1307 (S.D.N.Y. 1979). In fact, however, there are at least two "escape" aspects to most publishing contracts. First, most publishing contracts provide for an initial printing but leave subsequent printings up to the publisher's decision on marketability. *See, e.g.,* PLI, *supra* note 5, at 182-83, ¶3(d) and 11; *id.* at 189, ¶7(a). Second, and perhaps more basically, the publisher probably will not (and, perhaps, cannot) be ordered to publish the book at all. *See* note 181 *infra*. With the decision on subsequent printing being left to the publisher, and with the probable unavailability of specific performance, the reasoning of the *Feld* case, even if it is based upon an escape provision, is applicable to book publishing contracts.

165. R. BALKIN, *supra* note 3, at 51.

166. *Id.* at 52. Balkin feels that the commercial reasons in this note and the one preceding should not be "legally valid." *Id.* at 51.

167. In Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 33, 34, 330 N.Y.S.2d 329, 334, 281 N.E.2d 142, 145 (1972), *cert. denied,* 409 U.S. 875 (1972), the court recognized that certain activity engaged in by a publisher for "economic reasons" might be a breach of a "best efforts" provision, but did not reach the question of whether the covenant of good faith had been breached. *Id.* at 46, 281 N.E.2d at 145, 330 N.Y.S. at 334. *Compare* Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 47-48, 281 N.E.2d 142, 146, 330 N.Y.S.2d 329, 335 (1972) (Fuld, C.J., dissenting); RESTATEMENT (SECOND) OF CONTRACTS § 231, Illus. 1 (1973).

be adopted. If the court recognizes that economic considerations as well as aesthetics may be weighed in a good faith determination of acceptability, the court should split its review of that determination into two parts.[168] First, it should ask whether the publisher found the book aesthetically worthy as a piece of literature. On this question, the issue is the honesty, and not the reasonableness, of the publisher's decision; no other publisher's opinion is relevant.[169] Second, it should ask whether the book is marketable. On this question, the issue is whether a reasonable person in the publisher's position would be satisfied with the book; the opinion of other publishers (or experts in publishing) should be relevant thereon.[170] Publishing contracts should be construed strictly against the publisher because of its superior bargaining power.[171] If the publisher is to have his cake, he should not be able to eat it too.

Even if *Gold* were not followed, the author has the burden of proving bad faith, and that burden is not an easy one to meet.[172] Obviously, if the publisher admitted that he rejected the manuscript for nonaesthetic reasons, bad faith would be shown.[173] However, bad faith may include covert as well as overt conduct,[174] most evidence of bad faith is not likely to be in the form of objective manifestations but rather contained in

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168. *Cf.* Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 564 (Civ. Ct. N.Y. 1965); J. CALAMARI & J. PERILLO, CONTRACTS § 11-18, n.8 (2d ed. 1977).

169. RESTATEMENT OF CONTRACTS § 265, Illus. 3 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 264, Illus. 4 (1973).

170. *Compare* Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975) at 1. There are several problems with this approach. First, the Second Restatement focuses on the type of satisfaction demanded in the agreement (personal versus reasonable), not the nature of the product to be tested. RESTATEMENT (SECOND) OF CONTRACTS § 254, Comment a (1973). So long as the language used is clear enough, personal as opposed to reasonable satisfaction can be demanded on any type of performance. *Id.* at Comment b. Therefore, so long as the publisher's desire for personal satisfaction is sufficiently explicit in the agreement, that desire would be honored.

Second, there may be situations, even when no clear expression of personal satisfaction standard appears, where it is simply impracticable to apply a reasonable person standard. RESTATEMENT (SECOND) OF CONTRACTS § 254, Comment a and Illus. 5 (1973). *See also* Wynkoop, Hallenbeck Crawford Co. v. Western Union Telephone Co., 268 N.Y. 108, 112, 196 N.E. 760, 761 (1935) (satisfaction, where the cost factor included "overhead satisfactory to [payor]," must be personal satisfaction of payor, rather than reasonable satisfaction, since the components of the term "overhead" are non-uniform). It may be that the marketability of a book is one such situation, in that it is impossible to hold a publisher to the opinions of its peers (and competitors) or potential adversaries (the authors' agents). On the other hand, no immediate reason appears why a publisher should not be bound by the actions (as opposed to the potentially ulterior opinions) of its competitors, as in introducing evidence of the sales of a book rejected by one publisher but subsequently accepted and published by another, on the issue of marketability. *See* Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562, 564 (Civ. Ct. N.Y. 1965). "[W]here the subject matter relates to utility, marketability or fitness, the courts infuse reasonability into the determination of satisfaction."

171. *See* J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993, 995 (S.D.N.Y. 1977).

172. J. CALAMARI & J. PERILLO, CONTRACTS § 11-18 (2d ed. 1977).

173. *See* RESTATEMENT (SECOND) OF CONTRACTS § 253, Illus. 6 (1973).

174. *Id.* at § 231, Comment d.

communications within the publishing house itself, and thereby difficult to ferret out. One counter example might be a situation in which the publisher, at the time of acceptability decision should have been made, attempted to reject on the ground of untimely delivery, but at trial claims unacceptability.[175]

IV. DAMAGES — GENERAL OVERVIEW

A discussion of grounds for liability under an acceptability clause would be hollow unless accompanied by a discussion of the remedies that may be pursued once liability is found. While the remedies available upon a showing of waiver, estoppel or bad faith must depend to a great extent upon the exact wording of the acceptability and other provisions of the particular contract in litigation, a few general comments may be made.

First, conceptually waiver and estoppel are excuses of the condition of acceptability.[176] Therefore, a showing of waiver or estoppel removes acceptability from the contract. If the payor-publisher then refuses to pay the author for his work, the publisher is breaching the contract.[177] There appears no doctrinal reason why the author should not at the time of breach have all the traditional contract remedies available to him.[178]

Second, a breach of an implied covenant of good faith and fair dealing appears to be more directly a breach of the contract. Since, however, the covenant being breached is implied (or imposed) by law rather than by specific agreement of the parties, and since the act constituting breach varies from situation to situation, the appropriate remedy for a breach of the duty of good faith also varies with the circumstances.[179]

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175. This example is abstracted from Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979). In that case, a termination notice was sent by a publisher to the authors of a travel book, basing rejection on untimely delivery. No pre-termination notice, as required by the agreement, was sent prior to the termination notice, and at trial the publisher argued unacceptability of the manuscript. While the arbitrator found a breach of good faith on the part of the publisher, the arbitrator did not articulate in her award the exact facts upon which she based that finding.

176. *See* notes 49-50 and accompanying text *supra.*

177. It does not matter whether the publisher's refusal is called an actual breach (time for payment had arrived) or an anticipatory breach (time for payment had not yet arrived), as the rules for determining damages are the same. RESTATEMENT OF CONTRACTS § 338 (1932).

178. Promissory estoppel presumes a "variable remedy" aspect. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1973) ("[t]he remedy granted for breach may be limited as justice requires"). As a particular matter, this form of estoppel will rarely be involved in book publishing contracts. *See* notes 89-91 *supra.* Even if it were involved in a particular case, however, there is no reason to presume that because the remedy *may* be limited it always *should* be limited. *See* Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898); RESTATEMENT (SECOND) OF CONTRACTS § 90, Comment d (1973) ("[a] promise binding under the section is a contract, and full-scale enforcement by normal remedies is often appropriate").

179. RESTATEMENT (SECOND) OF CONTRACTS § 231, Comment a (1973).

Third, there are certain types of remedies which the courts (and arbitrators) seem reluctant to award. Research has disclosed no case in which punitive damages have been awarded against a publisher.[180] Similarly, specific performance, in the sense of ordering the publisher to publish the book, has thus far been unavailable.[181] Lastly, damages

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180. *See generally* RESTATEMENT OF CONTRACTS § 342 (1932) ("[p]unitive damages are not recoverable for breach of contract"); J. CALAMARI & J. PERILLO, CONTRACTS § 14-3 n.14 (2d ed. 1977) and authorities cited therein. Where the breach of contract also involves the malicious or wanton violation of a fiduciary duty, punitive damages may be awarded. J. CALAMARI & J. PERILLO, *supra* at § 14-3 n.15. Book publishing contracts between an author and a publisher have been held not to impose on the publisher a fiduciary duty to the author. Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30 N.Y.2d 34, 44, 330 N.Y.S.2d 329, 332, 281 N.E.2d 142, 144 (1972), *cert. denied,* 409 U.S. 875 (1975). Punitive damages occasionally have been awarded on contract cases outside the fiduciary sphere but emphasizing good faith requirements. *See* Gordon v. Nationwide Mutual Ins. Co., 30 N.Y.2d 427, 436-37, (1972), where the court stated:

> For a breach of implied conditions of the contract to act . . . in good faith in refusing to settle within the policy limits, the damages may exceed the policy limits. . . . The punitive nature of damage for the bad faith breach of contract is characteristic of the law of contracts generally. . . . But a punitive measure of damages is not applied routinely for breach of contract, and bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract.

Accord Cohen v. New York Property Ins. Underwriting Association, 65 A.D.2d 71, 87-88 (1st Dept. 1978) ("[i]t is the criminal indifference to civil obligations, the moral culpability, the bad faith, *i.e.,* the extraordinary showing of a disingenuous or dishonest failure to carry out a contract, which renders a party susceptible to an award of punitive or exemplary damages"). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 231, Comment a (1973). It would therefore seem that the precedent exists for imposing punitive damages upon a publisher for a breach of the implied covenant of good faith.

181. It is obvious that the author wants the publisher to not only accept his or her book, but also to publish the book. An author writes so that others may share his or her thoughts; an unpublished book is not likely to be read by many others. Most publishing contracts contain a "duty to publish" clause. *See, e.g.,* Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 380-81, 357 N.Y.S.2d 857, 858, 314 N.E.2d 491-20 (1974); PLI, *supra* note 5, at 181, ¶3. Also, the rules of the American Arbitration Association (incorporated in many publishing contracts) explicitly authorize the arbitrator to award specific performances. AAA COMMERCIAL ARBITRATION RULES § 42.

Specific performance is, however, rarely sought. *But see* Freund v. Washington Square Press, Inc., 41 A.D.2d 371, 343 N.Y.2d 379, 402 (1973); Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979) at 1. This may be explained in part by the fact that in many of the litigated cases, the author has, prior to trial, successfully placed the book with a subsequent publisher. *See, e.g.,* Random House, Inc. v. Gold, 464 F. Supp. 1306, 1308 (S.D.N.Y. 1979); Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975) at 1. It may also be explained in part by the difficulties of supervision that an order for specific performance would present (is the publisher spending enough money in the right fora to advertise the book, are the publisher's field representatives adequately "pushing" it to bookstores, etc.). But certainly specific performance is frequently awarded in situations far more difficult to supervise. *See, e.g.,* City Stores Company v. Ammerman, 266 F. Supp. 766 (D.D.C. 1967), *aff'd* 394 F.2d 950 (D.C. Cir. 1968) (oral contract to build and lease a department store in a shopping center specifically enforced).

It may also be explained in part by the argument that since the book would bring the author money (by the way of an advance and royalties) the author's remedy at law was not inadequate. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 16-1 *et. seq.* (2d ed. 1977). The difficulty with this argument is that, if the work is not publishable with another publisher, and the author is relatively new in the field, there are many benefits that would accrue to the author that are difficult to

for royalties lost because a book was not published generally are not recoverable because such damages are too speculative in nature.[182] The author does, however, have a duty to mitigate any damages to which he might be entitled.[183]

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measure in money damages. For example, in Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979), an author's agent with twenty years experience in the industry testified that the chances of an author's works being subsequently published are greatly enhanced by the number of books the author had previously published. Specific performance, while sought in that case, was denied by the arbitrator. Webster-and-Fodor's Modern Guides, Inc., *supra*, at 1.

It is also interesting that authors seem unenthusiastic about demanding specific performance. *See* Hotchner, *supra* note 10, at 24. It may well be that the reticence of both tribunals and authors regarding specific performance arises from two fundamental senses. First, as a matter of almost natural law, it may be felt that the publisher should not have to publish a particular work any more than an author should have to write one. Second, as a matter of federal constitutional law, it may be felt that ordering a publisher to publish a book is transgressing on certain penumberal first amendment rights, regardless of how commercial publishing may have become. *See* Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

182. Hewlett v. Caplin, 275 A.D. 797, 88 N.Y.2d 926 (App. Div. 1949), *aff'd* 301 N.Y. 591 (1950), 93 N.E.2d 492 (1950); Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 383, 314 N.E.2d 419, 421 (1974). In *Freund,* the Court of Appeals reasoned that since there was no way to determine the value of the book until it was actually marketed, any estimation of royalties would be too conjectural. *Id.* at 383. Therefore, one can use royalties as a basis for damages if a reasonable estimate can be shown. *See* Bloor v. Falstaff Brewing Corp., 601 F. 609, 615 (2nd Cir. 1979), *citing* Freund v. Washington Square Press, Inc., 34 N.Y.2d 379 (1974). While the prior "track record" of an established author might provide that foundation, royalty estimates for a mystery work have been held to be too speculative where a successful playwright and scriptwriter had no reputation in the mystery field. Gilroy v. American Broadcasting Co., 58 A.D.2d 533, 395 N.Y.S.2d 658 (App. Div. 1977), *appeal dismissed,* 43 N.Y.2d 644 (App. Div. 1977).

On the other hand, in DeMaris v. G.P. Putnam's Sons, 379 F. Supp. 294 (C.D. Cal. 1973), the court expressly awarded royalty damages based upon expert witness testimony of what the hardback and paperback books sales of a wrongfully rejected manuscript would have been. *Id.* at 295-96. The same court denied damages "for loss of foreign rights, for loss of sale of subsidiary rights, such as radio, motion pictures, television and for any other loss. . . ." as being too "speculative and uncertain." *Id.* at 297. Also, in Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979), the arbitrator did not expressly award royalty damages. The contract in that case, however, provided for an advance of $12,500, payable $4,000 upon execution, $4,250 upon the submission of the first half of a "completed acceptable manuscript" and $4,250 upon the submission of the second half of a "completed, acceptable manuscript." *Id.* at 1. When the publisher rejected the first-half of the manuscript and demanded return of the $4,000 already paid, the authors demanded arbitration, seeking the additional $8,500 and specific performance of the duty to publish the book. The arbitrator found for the authors, basing the decision upon a finding that the publisher breached a duty of good faith in its evaluation of the manuscript. While denying specific performance, the arbitrator awarded the authors $14,500 in damages and denied the publisher's claim for the $4,000 advance already paid. Thus, the authors received $18,500 against a $12,500 advance, reflecting an award which must have taken royalties into account.

The strongest case for royalties not being too speculative would be that of an established author writing in his or her established field (Freund v. Washington Square Press, Inc., *supra* at 421), perhaps with the added advantage of a long-running series character. *Cf.* Bloor v. Falstaff Brewing Corp., *supra,* at 615 (royalties on beer distributorship for Brand A awardable and measured by royalties accruing on similarly-priced and advertised brands B and C). Recovery of lost profits has also been denied to the publisher (upon the failure of the author to deliver an acceptable manuscript) as also being too speculative. J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993, 995 (S.D.N.Y. 1977).

183. The Courts assume that the author has a duty to mitigate without ever defining precisely

What remedies, then, does the author have?[184] Conceptually, he could be entitled to restitution if the publisher wrongfully terminates the contract.[185] Practically, however, this translates to a return to the author of the physical manuscript submitted,[186] apparently on the unspoken theory that a publisher is not otherwise unjustly enriched by receiving a manuscript that it does not publish. So long as the author has kept a copy of what was submitted, then restitution is a superfluous remedy.

Reliance damages may also be awarded.[187] Reliance damages would be those incurred in performing the contract or in making the necessary preparations to perform.[188] They are recoverable to the extent they are foreseeable and ascertainable.[189] While no case to date has enumerated reliance damages in a book publishing context, they should include costs of research, typing, photocopy, and so on. The conceptual difficulty for the author seeking reliance damages is that they are likely to be relatively small in amount and will be held subsumed within any advance recovered.[190]

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what that duty entails. *See* DeMaris v. G.P. Putnam's Sons, 379 F. Supp. 294, 295-96 (C.D. Cal. 1973). It at least should include offering the book to other, potentially-interested publishers. *Id.* Even without such a duty, authors would be likely to so offer their books in order to get them published. However, such an offer creates an interesting dilemma. If the reasonable man test is to be applied to the marketability issue (*see* notes 168-71 above), then does the rejection of the work by other publishers mean that it is not marketable? Moreover, does the acceptance, publication and good faith but unsuccessful marketing of the work by another publisher lead to the same conclusion? *See* Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975) and Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979), in which mitigation not only was required, but apparently ignored when it did occur.

184. For an interesting discussion of damages in a suit for failure to publish under British law, *see* Abrahams v. Herbert Reiach, 1 K.B. 477 (1921), *reprinted in* 126 THE LAW TIMES 546 (1922).

185. Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 389, 357 N.Y.2d 857, 859-60, 314 N.E.2d 419, 421 (1974).

186. *Id.*

187. *Id.* at 383, 357 N.Y.2d 860, 314 N.E.2d 421.

188. *Id.* Thus, while New York appears to recognize only essential, as opposed to incidental reliance damages, *compare* L. Albert & Sons v. Armstrong Rubber Co., 178 F.2d 182 (2nd Cir. 1949); E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW, 1095 n.1 (2d ed. 1977).

189. Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 382, 357 N.Y.2d 857, 860, 314 N.E.2d 419, 421 (1974). New York thus requires a Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854), type showing for reliance, as well as consequential damages. *See* E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW, 1096 n.2 (2d ed. 1977).

190. The injured party should not recover more from the breach than he would have gained had the contract been fully performed. Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 382, 357 N.Y.2d 857, 860, 314 N.E.2d 419, 420 (1974). Since most publishing contracts do not provide costs for research, typing, etc. beyond the advance, it is assumed that the author would have paid for these expenses from the advance. Thus, if the author is awarded some portion of his advance, he is unlikely to receive additional reliance damages as well, since the advance is his gross revenue out of which he is expected to pay his expenses. While the injured party may recover *net* profit *plus* reliance expenses (if the expenses were actually paid) or *gross* profit *minus unpaid* reliance expenses, he may not recover *gross* profit *plus* reliance expenses, since that would put the injured party in a better position than he would have been in had the publisher performed the contract. E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW, 1100 n.1, n.2 (2d ed. 1977).

Authorities outside the publishing field suggest that damages for "mental anguish" and "injured credit" should be allowed as the result of a breach of contract.[191] At least one case within the publishing field has raised the possibility that "notoriety, prestige or other benefits that might [attend] publication" might be compensable in damages[192] even if not sufficient to trigger specific performance.[193]

Virtually all of the remedies cases in the publishing area involve disputes over the advance.[194] In most advance situations, the publisher sues the author for the advance already paid at the time the unacceptability decision is made,[195] or the author sues the publisher for the advance not yet paid.[196] Denials and counter-claims follow.[197]

The specific provisions of the acceptance and advance clauses are most important on these claims.[198] Assuming, however, that there is no allocation or provision for retention of the advance in the event the publisher rejects the manuscript as unacceptable, how do and how should courts deal with these competing claims?

Generally, where rejection of the manuscript under the acceptability clause has been found to be justified, the author has been required to disgorge the advance already received.[199] This is, of course, appropriate, in that where there has been a justified rejection, there has been no breach triggering a claim for damages.[200] However, in *Wm. Safire -and-Wm. Morrow & Co., Inc.*, despite a finding of good faith rejection by

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191. RESTATEMENT OF CONTRACTS Comment h, § 329 (1932).

192. Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 384, 357 N.Y.2d 857, 314 N.E.2d 419, 421 (1974).

193. *See* note 181 *supra*.

194. *See, e.g.,* Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979); J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993 (S.D.N.Y. 1977); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562 (Civ. Ct. N.Y. 1965); Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979); Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975).

195. *See* Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979); J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993 (S.D.N.Y. 1977); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562 (Civ. Ct. N.Y. 1965).

196. *See* Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979); Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975).

197. *See* Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979); Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979); Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975).

198. *See* note 7 and accompanying text *supra*.

199. *See generally* J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993 (S.D.N.Y. 1977); Frederick A. Praeger, Inc. v. Montagu, 35 C.O. Bull. 562 (Civ. Ct. N.Y. 1965). *See also* Haynes v. Ginn & Co., No. 72-C-690 (N.D. Ill. 1973), *aff'd* 511 F.2d 1405 (7th Cir. 1975), where the court granted the publisher's motion for summary judgment. While the *Haynes* court did not specify whether the publisher sought a return of the advance paid, such a claim is inferrable from the issues discussed and the language used in the case.

200. The author in J.B. Lippincott Co. v. Lasher, 430 F. Supp. 993 (S.D.N.Y. 1977), advanced an "intriguing interpretation" of the contract in that case. *Id.* at 995. The author had been

the publisher, the arbitrators denied the publisher's cross-claim for the advance already paid to the author.[201] The arbitrators in *Safire* based their decision on the "equitable" ground that the author "diligently and in good faith attempted to conform to [the publisher's] editorial suggestions and did deliver a lengthy manuscript, even though it was not acceptable to [the publisher]."[202] It would appear that the arbitrators were trying to give the author a *quantum meruit* recovery despite a liability finding in favor of the publisher.[203] In *Random House, Inc. v. Gold,*[204] the court found that the publisher rejected in good faith the manuscript of the third book in a four book series.[205] The court nevertheless permitted the author to keep the advance already paid.[206] Although the *Gold* case may appear to be an aberration from the general rule, in fact it is not. The court allowed the author to retain the advance already paid because it was attributable to the two books in the series already accepted, published, and marketed.[207] Thus, no advance was retained for a work rightfully rejected.

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paid an advance but had submitted at best only a first chapter of a manuscript plus some research materials. He pointed out that only one paragraph in the contract provided for a return of the advance paid. Since that paragraph contained a triggering condition which had not occurred, the author argued that he did not have to repay the advance despite the fact that his "manuscript" was "unacceptable." The court dismissed the author's interpretation, noting that the fact of a publisher's superior bargaining power "does not mean that a complete breach and disregard of the contract by an [author] should unjustly enrich him at the expense of the publisher." *Id.* at 995-96. A similar argument by an author in a case involving a manuscript which had been completed, and submitted, but not acceptable, was successful in Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979).

201. Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975) at 2.

202. *Id.*

203. This seems especially so in light of the following language:

> Under the circumstances we therefore deny [the publisher's] cross-claim. We have considered but not persued [sic] conditioning the denial of the cross-claim upon a repayment by [the author] of the amount of the cross-claim from all or part of the royalties which may accrue to him under his publication contract with [a second publisher].*
>
> In permitting [the author] to retain the one-third part of the total advance which had been paid to him on the execution of the contract, we point out that if this were a case where the writer had delivered no material or had not diligently tried to meet the publisher's requirements other considerations which have motivated our denial of the cross-claim would not apply. . . .
>
> *Such a practice is not uncommon in the publishing industry.

Id. at 2.

Thus, despite the fact that *Safire* had already placed the book with another publisher, no reduction of advance would occur as the result of monies received by the author from the second publisher.

204. 464 F. Supp. 1306 (S.D.N.Y. 1979).

205. *Id.* at 1308-09.

206. *Id.* at 1310-11.

207. The *Gold* court's approach becomes clear when viewed in light of the totality of payments involved in the case. The author and the publisher entered into a contract for four books under which the author was to receive $150,000 divided into ten equal annual installments. The first two books were published, and the first four installments (totalling $60,000) were paid. When the publisher rejected the manuscript for the third book, the publisher sued for the $60,000 paid

Where the rejection of a manuscript has been found to be unjustified, tribunals also have not observed strictly any particular guideline. In *Freund v. Washington Square Press, Inc.*,[208] the Appellate Division allowed the author to keep the advance already paid and in addition awarded him the amount which expert testimony estimated as the costs of publication.[209] The Court of Appeals affirmed that part of the Appellate Division's judgment which allowed the author to keep the advance already paid but reversed the award of cost of publication, substituting therefor nominal damages of six cents.[210] Similarly, in *Webster -and- Fodor's Modern Guides, Inc.*,[211] the arbitrator permitted the authors to retain the advance already paid, and awarded all future advances as well.[212]

If the above cases are an indication of how the tribunals have dealt with advances under an acceptability clause, how should tribunals deal with them? Virtually all publishing contracts which provide for advances further specify that any advances paid will be offset against royalties to be received. However, because a tribunal may not award damages based on future royalties does not in itself mean that the advance, paid or unpaid, should not be awarded.[213] The reason for not

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less approximately $10,000 of earned royalties from the first two books. The author denied the publisher's entitlement to the advance already paid and claimed the additional $90,000 of advance remaining. *Id.* at 1307-08.

The court found that the publisher rejected the third book in good faith. The court, however, found that it was the intention of the parties to divide their agreement into four separate transactions. *Id.* at 1309. The court based its divisibility decision on the custom in the publishing industry. *Compare* Lowy v. United Pacific Ins. Co., 60 Cal. Rptr. 225, 429 P.2d 577 (1967); 6 S. WILLISTON, CONTRACTS § 860 (3d ed. Supp. 1978) "a contract is divisible where by its term (1) performance of each party is divided into two or more parts, and (2) the number of parts due from each party is the same, and (3) the performance of each part by one party is the agreed exchange for a corresponding part by the other party." Therefore, the court in effect allocated one-fourth of each year's $15,000 equally to all four books. Since the publisher had paid $60,000, of which $30,000 related to the second two books, and since the author had not yet received the $45,000 attributable to the remaining six years on the first two books, the court ordered the publisher to pay the author an additional $15,000 giving the author a total of $75,000 for the first two books, or one-half of the $150,000 allocable to all four books. *Id.* at 1311.

The court's divisibility decision, based on industry custom, appears sensible in that the first two books did have independent use to the publisher, although they had earned the publisher relatively little money. *Id.* at 1307. The court did not require the author to suffer a deduction of $10,000 for the advance paid to him by a second publisher for the third manuscript. *Id.* at 1308. It should be noted that the court did not state its reason for refusing to account for the $10,000. It may be because, there being no breach by the publisher as to the third book, there can be no duty to mitigate as to the third book.

208. 41 A.D.2d 371, 374, 343 N.Y.S.2d 401 (1973).

209. *Id.* at 403-04.

210. Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 385, 357 N.Y.S.2d 857, 862, 314 N.E.2d 419, 422 (1974).

211. Webster-and-Fodor's Modern Guides, Inc., American Arbitration Ass'n Case No. 1310-0659-78 (1979).

212. *Id.* at 1. *See also* note 182 *supra.*

213. Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 383, 357 N.Y.S.2d 857, 862, 314 N.E.2d 419, 421 (1974).

awarding damages based on royalties to be earned on an unpublished book is uncertainty.[214] The amount of advance is, however, certain. The advance amount is provided in the contract, and it seems an unspoken premise that it should be considered to represent the amount of money the parties have allocated to the author's work up to various points in the manuscript's chronology.[215] It represents the amount of money which the publisher is willing to pay for the book, even if it is published but does not sell.[216]

V. DETERMINING DAMAGES IN ADVANCE CLAUSE SITUATIONS

Proceeding from this position, let us analyze several advance situations through the liability doctrines of waiver, estoppel, and good faith to determine what damages should result.

Assume first a variation on the situation in *Freund v. Washington Square Press, Inc.*,[217] a small advance ($2000) is paid to the author upon execution of the contract.[218] There is no further advance to be paid, and the publisher waits four months after the submission of the completed manuscript before finding it "unacceptable." Whether the lapse of time is analyzed in terms of waiver, estoppel, or good faith, it would seem that the damages should be the same: the author is permitted to retain the $2000 advance.

Second, assume the situation in *Random House, Inc. v. Gold*:[219] after two books in a series of four have been accepted, published, and marketed, the publisher, in an apparently timely manner and with no prior positive indication, rejects the third book for economic considerations.[220] A subsequent court finds, as argued above,[221] that economic considerations amount to a rejection in bad faith, but that there is no evidence of waiver or estoppel regarding the rejection of the third book. Since the advance in *Gold* was $150,000 to be paid over a ten-year

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214. *See* note 182 *supra*. *Cf.* Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 357 N.Y.S.2d 857, 314 N.E.2d 419, 421 (1974) ("There is no dispute that plaintiff expectancy in the "advance" was fulfilled — he has received his $2,000"); *see also* Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975).

215. The term unspoken premise is used here because there is no expression of this position in the cases. Yet, one infers that tribunals treat the advance as a pre-determined *quantum meruit*, as though the publisher were saying, "The advance is what it is worth to me to have the author trying to write an acceptable book even if I later decide not to publish it."

216. Most contracts make no provision for a return of the advance or part thereof if the royalties generated by the book do not equal the advance. *See, e.g.*, Random House, Inc. v. Gold, 464 F. Supp. 1306, 1309 (S.D.N.Y. 1979), Wm. Safire-and-Wm. Morrow & Co., American Arbitration Ass'n Case No. 1310-1230-73 (1975); PLI, *supra* note 5, at 187, #1(c)(2), 188, #2(d).

217. 34 N.Y.2d 379, 357 N.Y.S.2d 857, 314 N.E.2d 419 (1974).

218. *Id.* at 420.

219. 464 F. Supp. 1306 (S.D.N.Y. 1979).

220. *Id.* at 1308.

221. *See* notes 151-67 and accompanying text *supra*.

period, it would seem that the author is entitled to two-fourths of the $150,000 representing the amount of the advance attributable to the first two books, regardless of whether bad faith was found.[222] The author should also be entitled to an additional one-fourth of the $150,000 because of the bad faith associated with the rejection of the third book. Since no work was done on the fourth book, and since the publisher could have eventually rejected it for good faith reasons, no amount is awarded for it.

Lastly, assume a variation on the *Webster* case: an author executes a contract calling for a travel book, with a total advance of $16,000, payable $4,000 upon execution, $4,000 upon submission of the first third of the completed acceptable manuscript, $4,000 upon submission of the second third of the completed acceptable manuscript, and $4,000 upon submission of the final third of the completed acceptable manuscript. The author completes and submits the first third of the manuscript, and the publisher is aware that the author is working diligently on the next one-third and thereby forsaking other writing opportunities. After receiving and reviewing the first third of the manuscript, the publisher does not advise the author of its literary unacceptability nor does it send the author the second $4,000; rather, the publisher sends the author information to include in the second third. After receiving the second third, along with a request for the $8,000 now due, and after the author has produced (but not submitted) half of the last third, the publisher sends the author a termination notice based on the unacceptability of the first third, and demands a return of the execution advance.

If the publisher in good faith believed the first third of the manuscript to be unacceptable for literary (as opposed to market) reasons, and he was waiting for the second third to see if the author was redeeming himself, or herself, and the publisher in good faith believed the second third to be also unacceptable, then there would appear to be no breach of the implied covenant of good faith. There would, however, remain arguments of waiver and estoppel. Waiver is applicable in that failure to respond in a timely manner after submission of the first third coupled with information sent could be interpreted as waiving the acceptability of that portion.[223] Estoppel is applicable in that by not replying promptly on the first third of the manuscript and by sending the information knowing that the author would be foregoing other opportunities, the publisher is estopped from asserting the unacceptability of the first third.[224] However, since a waiver of a condition for one performance in

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222. This is, of course, what the *Gold* court awarded. Random House, Inc. v. Gold, 464 F. Supp. 1306, 1311 (S.D.N.Y. 1979).

223. *See* text accompanying notes 62, 79-82 *supra*.

224. *See* text accompanying notes 64-68, 86-95 *supra*.

a series of performances is not a waiver of the condition for future performances,[225] damages for waiver should be limited to the advance already paid plus the $4,000 due for the first third of the manuscript. Since the publisher knew the author would rely on apparent acceptability, damages for estoppel should include the $4,000 execution and the $4,000 attributable to the first third. The author might also recover the $4,000 attributable to the second third of the manuscript on the theory that the publisher is estopped from asserting the unacceptability of this portion because the publisher should have known the author would continue to rely on the apparent acceptability of the first portion by working on the second portion.[226] Neither waiver nor estoppel should permit recovery of the $4,000 attributable to the last third of the manuscript.

On the other hand, if the publisher had determined in bad faith not to accept the book for economic considerations[227] or to injure the author,[228] then all of the advance should be recovered by the author. This is appropriate in that the publisher's rejection was a direct breach of an implied covenant in the contract, which breach prevented the author from performing his side as he was ready, willing and able to do.

It might be argued that much of the above discussion on both liability and damages effectively can be mooted: as soon as a court accepts the above articulated reasoning of waiver, estoppel and good faith, the publishers will change their forms by elaborating and intensifying the condition of acceptability so as to avoid the reasoning. Two responses to this criticism appear appropriate. First, the articulated reasoning, if sound, nevertheless will help the author(s) invoking it prior to a change in forms. Second, any change in the form of the acceptability clause which effectively gave the publisher a truly unfettered right to reject a manuscript may be unconscionable,[229] either because it was too onerous or because it attempted to disavow the implied covenant of good faith present in all contracts.

Granting the counterarguments made in the preceding paragraph, a final criticism may be voiced: should tribunals generally embrace the reasoning articulated above, publishers will simply cease offering writers advances under acceptability clauses. The answers to this criticism are basically two-fold. First, authors as a group may not have much bargaining power vis-a-vis publishers as a group, but the former

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225. 3A A. CORBIN, CONTRACTS, § 754 n.13 (1963); J. CALAMARI & J. PERILLO, CONTRACTS § 11-36 n.14 (2d ed. 1977).

226. J. CALAMARI & J. PERILLO, CONTRACTS § 11-36 (2d ed. 1977).

227. *See* notes 151-67 and accompanying text *supra*.

228. *See* note 167 *supra*.

229. RESTATEMENT (SECOND) OF CONTRACTS § 231, Comment b, § 234 (1973). *Cf.* UCC §§ 2-302, 2-103.

probably have enough power to prevent the latter from abolishing the now entrenched system of advances. Second, and less adversarial, publishers will realize that to nurture the publishing industry today and in the foreseeable future, authors will need advances and should be treated fairly in determining their right to obtain, and retain, them.

Conclusion

The problem of the acceptability of a book manuscript has been present in the publishing industry and the reported cases since the last century. Traditionally, tribunals have upheld the relatively unfettered exercise of discretion by publishers in determining acceptability. So long as publishers condition payment of advances or portions thereof to authors on the acceptability of the manuscript, the problem is likely to remain.

Tradition may and should, however, give way to the expansion and application of the concepts of waiver, estoppel and good faith. The essence of waiver and estoppel, regardless of which definitional distinctions one wishes to observe, has a place in publishing contracts in general and acceptability clauses in particular and should be invoked more frequently. The doctrine of good faith in determining acceptability has developed from an implied requirement of consideration to an imposed demand for fair dealing and must not be eviscerated by holdings that recognize economic factors as satisfying it.

As we stated at the outset, the purpose of this article is to help conform publishing realities to publishing ideals. We hope our efforts will promote that conformity by serving as common-sense persuasion in neighborly negotiations and as a helpful source in dispute resolution if necessary.

Celebrity Endorsements: A Case for Alarm and Concern for the Future

*Michael E. Jones**

Professor Jones examines the use of celebrity endorsements in product advertising. After analyzing the case law and Federal Trade Commission guidelines relating to celebrity endorsements, the author offers some guidance to celebrities wishing to avoid liability for false and deceptive advertisements.

Advertising seeks to convey persuasive information to potential consumers through the media of mass communication.[1] This fulfills consumer demand for information concerning product availability, characteristics and pricing. However, consumers still lack knowledge regarding the financial relationship existing between the product manufacturer and the various endorsers.

Consumers may believe that an endorsement or testimonial reflects the opinions, beliefs, or experience of the endorser as well as the sponsoring advertiser.[2] Typically, an endorsement or testimonial arises when

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1. Definition adopted from S. ALEXANDER & THE COMMITTEE ON DEFINITIONS, MARKETING DEFINITIONS; AMERICAN MARKETING ASSOCIATION (1963), at 9. Additional background readings on the scope and function of advertising include: Y. BROZEN, ADVERTISING AND SOCIETY 29-41 (1974); J. ENGEL, H. WALES & M. WARSHAW, PROMOTIONAL STRATEGY (4th ed. 1979); J. JOHNSON, ADVERTISING TODAY (1978); M. MANDELL, ADVERTISING; J. WRIGHT, D. WARNER, W. WINTER & S. ZEIGLER, ADVERTISING (4th ed. 1977).

For a discussion of the economic justification for advertising, *see generally* R. POSSNER, REGULATION OF ADVERTISING BY THE FTC 4 (1973); Miller, *Federal Trade Commission Activities Related to Consumer Information*, J. CONSUMER POL'Y 62 (1977); Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974); Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970); Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

2. 16 C.F.R. §§ 255.1, 255.2 and 255.5 (1980), *complementing* 16 C.F.R. §§ 255.0, 255.3 and 255.4 (1979).

a well-known individual or organization is hired to deliver a commercial message. For instance, when a manufacturer of automobile tires employs a recognized professional automobile racing driver to praise the "smooth ride, strength, and long life of the tire," it may constitute an endorsement.[3] The crucial test of what constitutes an endorsement is whether consumers "think the advertising message reflects the driver's personal views as well as those of the sponsoring advertiser."[4] To constitute an endorsement it is not necessary for the advertiser to expressly declare that the message is the personal opinion of the driver. Generally, the "net impression" of an advertisement must be assessed in determining whether the message is attributed to the personal beliefs, findings, opinions, or experience of the individual or organization. Where no verbal statement is made in an advertisement it is also possible that an advertisement showing only a prominent and well-recognized person demonstrating a product's benefits may nevertheless constitute an endorsement. For example, a professional golfer merely shown hitting golf balls in a television advertisement would be considered an endorsement.[5] However, an announcer who is unfamiliar to consumers except as a company product spokesman will be regarded to speak or act, not on the basis of his own personal opinions, but rather on behalf of the company whenever he pushes the company's products.[6]

The Major League Baseball Player's Association, the National Football League, and the Professional Golfer's Association are examples of organizations that license or market their names or emblems for promotional endorsement purposes. Public figures and stars in particular, have been successfully employed to endorse a company's goods and services via the mass media. Years ago, the predecessor of the American Tobacco Company introduced a "Ty Cobb" brand of cigarette. Swimming great Johnny Weismuller pounded his chest for Wheaties. Lou Brock, in numerous advertisements, attributed his base stealing prowess to the energy packed in every box of Milk Duds. Today, stars of stage and screen, television and even corporate executives, such as New York Yankees owner George Steinbrenner, are being employed by corporate marketing as product endorsers.[7]

The recent growth in the use of celebrities as endorsers of products has not, however, occurred without some trepidation on the part of

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3. 16 C.F.R. §§ 255.0 (Example 4) (1980), *amending* 16 C.F.R. § 255.0 (Example 4) (1979) (racing drivers role changed from "spokesman" to "individual").

4. *Id.*

5. 16 C.F.R. § 255.0 (Example 5) (1979).

6. 16 C.F.R. § 255.0 (Example 3) (1979).

7. For an informative discussion of advertising tie-ins between athletes and advertisers, *see* Mullin, *The Use of Athlete Endorsements in Consumer Product Advertisements, reprinted in* CURRENT ISSUES IN PROFESSIONAL SPORTS (M. Jones ed. 1980). *See also* ADVERTISING AGE, July 30, 1979, at 5-12, for a detailed account of categories of celebrities used in product endorsements.

both advertisers and endorsers. Advertisers must make certain that the personality is effectively matched to the right product with the proper selling message. Endorsers must be cautious when authorizing endorsement arrangements for fear of damage to personal reputation or, perhaps, personal liability for misleading claims.

This article examines the use of celebrities in commercial consumer product endorsements. In particular it explores the body of law available on the issues of false and deceptive advertising as it applies to celebrity endorsements. Two recent Federal Trade Commission (FTC) opinions are discussed in depth, since they focus on many of the most recent endorsement concerns. Recently issued federal guidelines directly addressing limits and restrictions imposed on endorsers are also probed. Finally, this article will offer a glimpse into the future of celebrities as product endorsers.

I. PUBLIC FIGURE ENDORSEMENT OF CONSUMER PRODUCTS—THE "HOOK"

The proliferation of new products in the market place and the intensifying competition for the consumer's purchasing dollar has led to a dramatic increase in the number of attention-grabbing media figures used to hype a product.[8] In order for these commercial endorsements to be effective, it is necessary for the personality involved to have some logical connection to the message of the advertisement.[9] Industry parlance for this connection is the "hook."

Perhaps the best-known example of the hook is Hertz Corporation's utilization of O.J. Simpson. In 1974, Hertz conducted research which revealed that the heavy users (businessmen) of rental cars perceived little or no difference between Hertz and its primary competitor, Avis.[10] Research also indicated that what the principal benefit businessmen looked for in a car rental company was speed of service.[11] In light of these research results, Hertz instructed its advertising agency to produce advertisements that would appeal to the heavy users and stress speed of service. The agency came up with the theme "Superstar in rent-a-car" to identify Hertz's position as the industry leader and as the company with the fastest service. Hertz hired professional football's then premiere running back, O.J. Simpson, to provide the connection or hook. One year after the association between Simpson and Hertz, public awareness of the company increased by two fifths, while its

8. *See* BUSINESS WEEK, May 22, 1978, at 77.

9. *See* ADVERTISING AGE, Aug. 27, 1979, at 5-6, which provides mini-case histories of celebrity endorsers that were successfully matched with the proper products and advertising messages.

10. Howard, *Playing the Endorsement Game,* DUNS REVIEW, Aug. 1977, at 46.

11. ADVERTISING AGE, *supra* note 7, at S-4.

market share widened to about forty percent.[12] It should be noted that Simpson, always dressed as a businessman in the endorsement advertisement, was perceived as a member of the heavy user category. This strengthens the connection in the eyes of the viewing public.

A similar success story was that of the Miller Brewing Company in its campaign to introduce a light beer. Research indicated that many beer drinkers felt that light beers were watered down, had less body and substance, lacked in taste, and were strictly for women.[13] Miller searched for former athletes,[14] sports executives, and game officials who could effectively dispell the existing image of light beers. Formidable ex-athletes like Dick Butkus and Joe Frazier were hired to carry out this purpose through a series of combative "less filling" vs. "tastes good" endorsements. Miller's light beer entry, "Lite," quickly gained a substantial market share of the low calorie beer market and helped propel Miller to the number two brewery spot, behind Anheuser-Busch.[15]

Besides the potency of the hook, image and personality must be considered in any testimonial endorsement employing celebrated individuals. For instance, Valvoline chose Mario Andretti as an endorser of its motor oil. He was picked not just because of his racing achievements, but because research revealed that he exhibited high credibility among Valvoline's target audience of males aged 18 to 54, and that his personal, distinctive delivery on camera was well received.[16] Jimmy Stewart was persuaded to assist Firestone in polishing its image which had been tarnished by problems with its radial tires. The public's affection for Mr. Stewart helped Firestone overcome its lowly image as an uncaring manufacturer of an unsafe tire.

Reliability, persuasiveness, sincerity, leadership, charisma, and staying power are additional personal attributes that are frequently sought by marketers when selecting individual endorsers.[17] Former Navy veteran, Annapolis graduate, Heisman trophy winner, and starting quarterback for the Dallas Cowboys, Roger Staubach, personifies

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12. ADVERTISING AGE, July 30, 1979, at S-2.

13. *See* Coate, *Using Sport to Change the Beer Drinking Habits of America: Miller Lite the Champagne of TV Ads*, — PROFESSIONAL SPORTS J. — (Aug. 1979).

14. Current professional and amateur athletes are not permitted to endorse any alcoholic beverage under provisions of the Bureau of Alcohol, Tobacco and Firearms regulations.

15. Coate, *supra* note 13, at 29. Miller's Lite beer celebrity advertising campaign success is not being ignored by competing breweries. Anheuser-Busch recently undertook a major assault on Miller's Lite beer by urging Lite drinkers to switch to Anheuser-Busch Natural Lite Beer. Three former Miller Lite endorsers — Mickey Mantle, Nick Buoniconti and Joe Frazier — made the initial announcement that they had switched to Natural Light beginning with a series of television commercials on the N.C.A.A. 1980 Basketball Semi-finals and Finals broadcast. *See* ADVERTISING AGE, Mar. 10, 1980, at 1, 82.

16. ADVERTISING AGE, July 30, 1980, at S-12.

17. *See* ADVERTISING AGE, Dec. 31, 1973, at 22. *See also Marketing News*, Mar. 23, 1979, at 3, col. 1, for additional listings for attributes and personality qualities frequently sought by advertisers.

many of these qualities. His recent endorsement of a life insurance policy for armed service veterans buoys the public's perception of the firm, National Home Life, in what is also a natural hook.

By one estimate, almost one in every three television advertisements involves a celebrity.[18] Research has shown that retention of information contained in the commercial message is greater when a readily identifiable figure is used.[19] For the most part the advertising industry has failed to scrutinize effectively the problems of unauthorized usage and unsubstantiated representations. To protect the public, the FTC has stepped in to establish restrictions on the use of celebrity endorsements so as to protect the public.

II. REGULATION OF ADVERTISEMENTS

An in-depth analysis of the historical development of the FTC's power is beyond the scope of this article.[20] However, in brief, it is relevant to note that in 1914 Congress first authorized regulation of advertising by enacting the Federal Trade Commission Act.[21] Under this act the FTC could only prevent false advertising that adversely affected competition.[22] In 1938, Congress passed the Wheeler-Lea Act,[23] expanding the scope of FTC regulation of advertising. This amendment

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18. BUSINESS WEEK, May 22, 1978, at 77. A recent publication indicated that "most of the country's leading advertisers have used athletic spokesmen at least once," and at least one in twelve television commercials now involve an athlete. ADVERTISING AGE, Aug. 27, 1979, at S-4. A study conducted by Professor Jones infers that the percentage of athlete-endorsed television commercials is closer to 2-3 percent. Jones, *Use and Frequency of Celebrity Endorsers in Prime Time Television* (May 1980) (unpublished paper). Some major advertisers no longer use individual athletes as product endorsers. Gillette, for instance, once used athletes but now prefers to sponsor Major League Baseball's All-Star game and the World Series.

19. *See* ADVERTISING AGE, Dec. 31, 1973, at 22.

20. *See* HENDERSON, THE FEDERAL TRADE COMMISSION 1-48 (1924); Austern, *The Parentage and Administrative Ontogeny of the Federal Trade Commission, reprinted in* 1955 N.Y.S.B.A. ANTITRUST LAW SYMPOSIUM 83; Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition,* 7 VILL. L. REV. 517 (1962); Hammer, *FTC Knights and Consumer Date: The Regulation of Deceptive or Unfair Advertising,* 32 ARK. L. REV. 446 (1978); Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising,* 31 COLUM. L. REV. (1931); MacIntyre & von Brand, *Unfair Method of Competition as an Evolving Concept-Prelude to Consumerism,* 44 ST. JOHN'S L. REV. 597 (1970); Rublee, *The Original Plan and Early History of the Federal Trade Commission,* 11 ACAD. POL. SCI. PROC. 666 (1926). Also, the Commission summarizes its activities in the area of advertising in its annual report.

21. Act of Sept. 26, 1914, ch. 311, § 1, 38 Stat. 717 (current version at 15 U.S.C. §§ 41-77 (1976)). Before the amendments of 1938 and 1975, the pertinent quoted section 5 stated:

> Sec. 5. The unfair methods of competition in commerce are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Act of Sept. 26, 1914, ch. 111, § 5, 38 Stat. 719 (current version at 15 U.S.C. §§ 41-77 (1976)).

22. FTC v. Raladam Co., 283 U.S. 643 (1930). An earlier Supreme Court decision, FTC v. Winchester Hosiery Co., 258 U.S. 483 (1922), was the first case to focus on the regulation of advertising because business was attracted to a competitor by a false or deceptive claim.

23. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111 (current version at 15 U.S.C. §§ 45, 52-55 (1976)).

to the original act vested the FTC with power over "unfair or deceptive acts or practices" mandating the Commission's protection of consumers as well as competitors.[24]

The principal regulatory powers over advertising are provided by sections 5 and 12 of the Federal Trade Commission Act. Under section 5, deceptive or false advertising in or affecting commerce constitutes an unfair method of competition and an unfair or deceptive practice.[25] Neither the statute nor its legislative history define "unfair or deceptive."[26] Nonetheless, section 5 has been found to apply to all forms of advertising including newspapers, brochures, catalogues, magazines, direct mail and radio and television.[27] The dissemination of any false advertising for the purpose of inducing the purchase of foods, drugs, cosmetics, or devices are unlawful activities under section 12.[28]

While the scope of section 5 is much broader than section 12, both sections have been used to allow the FTC to investigate representations made by celebrity endorsers that are false, misleading, deceptive or unsubstantiated.[29] Prior to an analysis of the restrictions imposed by the FTC on authorized celebrity endorsements, an overview of unauthorized endorsements will be discussed.

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24. *Id. See* FTC v. Sperry Hutchinson Co., 405 U.S. 233 (1972), where the Commission's powers were expanded to prohibit and prevent trade practices that were objectionable because of their unfair effect on consumers. The "in commerce" language that appeared in the Wheeler-Lea Act was held to preclude the Commission's jurisdiction over completely intrastate commerce activities. FTC v. Bunte Bros., 312 U.S. 349 (1941). However, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (1975), provides the Commission with jurisdiction over violations "in or affecting commerce," thereby overriding *Bunte*. Pub. L. No. 93-637, tit. II, 201(a), 88 Stat. 2183 (amending 15 U.S.C. § 45 (Supp. IV 1974)).

25. 15 U.S.C. § 45 (1976).

26. For readings on the Act's legislative history, *see* S. REP. NO. 597, 63d Cong. 2d Sess. 13 (1914); 51 CONG. REC. 11, 598 (1914); 51 CONG. REC. 11, 084 (1914) (comments of Senator Thomas on the meaning of Section 5).

27. *See generally* M. HOWARD, LEGAL ASPECTS OF MARKETING, 105-29 (1964). Other materials that discuss false or deceptive claims appearing in various kinds of media include: Hammer, *supra* note 20; MacIntyre & von Brand, *supra* note 20; Millstein, *The Federal Trade and False Advertising*, 64 COLUM. L. REV. 439 (1964); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); Reed & Coalson, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733 (1977).

28. 15 U.S.C. § 52(a) (1976) (originally enacted as Act of Mar. 21, 1938, ch. 49, § 4, 52 Stat. 114).

29. Amongst other things, the FTC may assess penalties as follows:

1. If no court review is sought within sixty days of issuance of a Commission order to cease and desist, the order becomes final: violation of a final order may result in a penalty of up to $10,000 each day that a violation continues.
2. When the advertisement of a food, drug, device, or cosmetic is likely to induce the purchase of a commodity injurious to health or when there is intent to defraud, a criminal proceeding may be instituted, with fines up to $5,000 and imprisonment up to six months.
3. The Commission may seek a temporary injunction against the dissemination of false information about foods, drugs, medical devices, and cosmetics, pending a final determination by the Commission and subsequent court review.

See 15 U.S.C. §§ 41-77 (1976).

A. Unauthorized Testimonials and Endorsements

The advertiser who employs unauthorized endorsements or testimonials is liable to the individual or organization whose name, photograph, signature, or likeness has been wrongly used. The most common cause of action is for misappropriation or invasion of privacy. Suit under this theory recognizes the celebrity's "right to be left alone" as well as a property right allowing the individual to contract away his identity.[30]

It is also possible that a forged testimonial might give rise to a defamation action. In *Foster-Milburn Co. v. Chinn,*[31] the manufacturer of Doan's Kidney Pills published a letter purportedly written by Senator Chinn, a very popular and well-known Kentucky horseman. The testimonial alluded to the cure of Chinn's back pain misery through the use of Doan's pills. In fact, the statement was false, forged and published without Chinn's consent.[32] The court awarded him damages for the public ridicule and disgrace he suffered.

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30. The notion of a cause of action arising because of one party interfering in an individual's "right to be left alone" stemmed from an article by Warren and Brandeis at the turn of the century. *See* Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890). Professor Prosser many years later classified this "right" as the tort of "right to privacy," or "right to publicity," as it is known today. W. PROSSER, THE LAW OF TORTS, 802-18 (4th ed. 1971).

Two cases illustrate application of this tort. In Haelan Laboratories, Inc. v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953), *cert. denied,* 346 U.S. 816 (1953), a professional baseball player entered into a contract with one chewing gum manufacturer, granting exclusive rights to use his photographs in advertisements. The player then turned around and made a contract with a second chewing gum manufacturer giving it rights to use his photographs. The second manufacturer defended itself by claiming that the only right the player had in his photograph was a right to privacy, and that the player's contract with the first manufacturer was merely a release of liability for an invasion of his right to privacy. The court rejected the second manufacturer's argument and stated that a professional athlete has, in addition to and independent of the right to privacy, a "right of publicity." Recognition of this distinct right in the publicity value of the athlete's name or likeness allows him to receive payment for its authorized use and collect pecuniary damages when an advertiser uses his likeness without authorization. *Id.* at 868.

Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970), involved the issue of the rights of major league baseball players in their names, sporting activities, and accomplishments when game manufacturers used their names, pictures, and game statistics for commercial purposes without any licensing or endorsement contracts with the player or players' association. It was the court's "view that a celebrity has a legitimate proprietary interest in his public personality. A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. The identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property." *Id.* at 1282.

31. Foster-Millburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909).

32. The collateral issue of relinquishing the right of publicity has given rise to interesting case law. In Cepeda v. Swift and Co., 415 F.2d 1205 (8th Cir. 1969), the court found that Orlando Cepeda entered into a contract with Wilson Sporting Goods Company that in part read as follows:

> "1. Cepeda grants to Wilson the exclusive world right and license to manufacture, advertise and sell baseballs, baseball shoes, baseball gloves and baseball mitts identified by his name, facsimile signature, initials, portrait, or by any nickname popularly applied to him, and to license others so to do. During the term of this agreement Cepeda agrees not to grant any similar right or license to any other person. Cepeda shall sign all lawful documents which may be necessary to enable Wilson to secure federal, state or foreign registration of trade marks or trade names for products identified as herein provided."

Id. at 1207. Wilson in turn was to pay Cepeda a royalty of one dollar for each dozen gloves sold

Some states, such as New York, have statutes providing that any person whose name, portrait or picture is used for the "purposes of trade" without his or her written consent may sue to restrain such use and recover damages.[33] A recent case involving former New York Jet quarterback, Joe W. Namath, illustrates a reluctance by the courts to broadly apply this statute.[34] Namath brought suit against *Sports Illustrated* for its unauthorized use of his photograph in advertisements promoting magazine subscriptions. The court held that so long as the photograph "was used to illustrate the quality and the content of the periodical in which it originally appeared, the statute was not violated, albeit the reproduction appeared in other media for purposes of advertising the periodical."[35] The court further held that the photograph was not suggestive of any endorsement of the magazine by Namath.

These cases illustrate that limited remedies exist for individuals and organizations whose identity has been commercially exploited. The New York statute does represent a worthwhile attempt to remedy many of the common law inadequacies of proof, caveat emptor, and puffing.[36] Nonetheless, protection of consumers from mistaken impressions resulting from unauthorized testimonials and endorsements has generally rested with the FTC. The FTC has successfully prohibited the dissemination of direct assertions of product approval where in fact the testimonials or endorsements were fictitious. False representations that baseball star Mickey Mantle preferred and regularly consumed the milk, cottage cheese and other products of a particular dairy were barred by the Commission.[37] In *FTC v. Allied Golf Company,*[38] a

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and sixty cents for each dozen baseballs sold by Wilson or its licensees, provided that the royalties should not be less than fifty dollars per year nor more than $500.00 per year (although when the contract was renewed the maximum was raised to $1,000.00 per year). *Id.*

Wilson then entered into an agreement with Swift and Company that allowed Swift to conduct a "Special Offer" advertising campaign on its packages of franks and bacon, offering an Orlando Cepeda baseball for only one dollar. Cepeda's picture appeared in some of the advertising material, but at no time was the public led to believe that he was endorsing the Swift products. *Id.* at 1208. The court held that Cepeda granted Wilson an exclusive right to manufacture, advertise and sell baseballs and Wilson was free to contract its right to others. *Id.* at 1207-08.

A few years before this decision basketball player Bill Sharman of the Boston Celtics hired an agent to seek endorsements. After his picture was taken and sent to various advertising agencies, he was selected by Ted Bates and Company to pose for additional pictures. Unknown to him at the time, the photographs were planned for use in beer commercials by Schmidt. Sharman signed a general release giving unrestricted permission to publish his picture for advertising purposes and received $125.00. Over his objections that the advertisement would bring him scorn and ridicule, the court allowed Schmidt to continue using his picture in its advertisements. Sharman v. C. Schmidt and Sons, Inc., 216 F. Supp. 401 (E.D. Penn. 1963).

33. N.Y. CIVIL RIGHTS LAW § 51 (McKinney's 1966).

34. Namath v. Sports Illustrated, 48 App. Div. 2d 487, 371 N.Y.S.2d 10 (1975).

35. *Id.* at 489, 371 N.Y. Supp. 2d at 12, *quoting* Booth v. Curtis Publishing Co., 15 App. Div. 2d 343, 350, 223 N.Y. Supp. 2d 737, 744 (1962).

36. A lively discussion of many of the present day flaws of the law in attacking these problems can be found in I. PRESTION, THE GREAT AMERICAN BLOW-UP (1977).

37. *In re* Lifetime, Inc., 59 F.T.C. 1238 (1961).

38. 7 F.T.C. 250 (1924).

wholesaler had the words "Official Golf Ball. This ball is standard and official as required by the United States Golf Association, the Royal & Ancient Club and other governing bodies," stamped on its wrappers and containers. The wholesaler was ordered to discontinue the use of such endorsements since the balls had never in fact been designated as official by the aforesaid authorities, nor by any other authoritative governing body.[39] It was found that the misbranding and mislabeling constituted an unfair method of competition with the capacity to mislead and deceive the public.[40]

In another case, *In re A.J. Hollander & Co., Inc.*,[41] the FTC required an importer and two distributors of Japanese baseball gloves to cease representing falsely that a number of prominent baseball players used or endorsed their baseball gloves.[42] Since none of the named players ever used, approved or endorsed the gloves, these advertising practices constituted unfair and deceptive acts and unfair methods of competition within the intent of the Federal Trade Commission Act.[43]

B. Limits on Use of Authorized Testimonials and Endorsements

While the FTC prohibited the use of fictitious testimonials and endorsements, problems remained concerning the need to disclose payments for actual testimonials, endorsement restrictions by non-users and experts, and misrepresentation through testimonials and endorsements. These led to the promulgation of the FTC's latest industry guidelines for authorized endorsement and testimonial issues on January 18, 1980. These latest guidelines, earlier endorsement guides, and various FTC and court decisions, serve as a backdrop for the remainder of this paper.

1. Disclosure of Payment

The well-known *Northam-Warren Corp. v. FTC*[44] decision partially limited the Commission's authority over testimonial advertising. The issue before the court was whether the use of truthful testimonials without disclosing that payment had been made to the endorser was a violation of section 5 of the Federal Trade Commission Act. The FTC argued that the company's failure to disclose the payments made to

39. *Id.*
40. *Id.* at 252.
41. 60 F.T.C. 10 (1962).
42. *Id.* at 12.
43. *Id.* at 13, 14.
44. 59 F.2d 196 (2d Cir. 1932). It should be noted that the *Northam-Warren* decision was handed down in 1932, prior to the Wheeler-Lea Amendments to the Federal Trade Commission Act. *See* note 23 and accompanying text *supra*. These amendments substantially expanded the scope of the FTC's enforcement powers and mandated greater protection of consumers in the matter of unfair or deceptive acts or practices.

various well-known theatrical personalities who endorsed the company's toilet products amounted to a deceptive advertising practice. The court held that there was no presumption that endorsers of commercial goods falsify their testimonials merely because they have received payment.[45] In fact, if the testimonials represented the honest beliefs of the endorsers, then there was no misrepresentation.[46] The court even wondered whether the public was gullible enough to believe that such statements were made without some form of compensation.[47]

In re Procter & Gamble Co.,[48] illustrates the expanded scope of the FTC's enforcement powers following the Wheeler-Lea Amendments to the Federal Trade Commission Act.[49] Procter & Gamble provided washing machine manufacturers with detergent samples for use in machine demonstrations and for distribution as gifts to purchasers of new machines. The accompanying advertisements left consumers with the impression that washing machine manufacturers endorsed the detergents based upon the quality of the product when, in fact, the manufacturers received money for the endorsement. The FTC required those demonstrating the appliances and detergents to disclose that they were being paid for recommending Procter & Gamble's products.[50] Thus, *Procter & Gamble* illustrates that once an advertiser makes a false affirmative representation that the endorsement is free or that an individual or organization voluntarily makes a recommendation, the FTC may compel full disclosure of payment.

The latest FTC guides on endorsements provide that "the payment or promise of payment to an endorser who is an expert or well-known personality does not need to be 'disclosed' as long as the advertiser does not represent that the endorsement was given without compensation."[51] The guides continue to refine *Northam-Warren* by stating that:

> when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.[52]

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45. *Id.* at 198.
46. *Id.*
47. *Id.*
48. *In re* Procter & Gamble Co., 56 F.T.C. 1623 (1960), *modified,* 69 F.T.C. 569 (1966).
49. *See* note 23 *supra.*
50. *In re* Procter & Gamble Co., 56 F.T.C. 1623, 1625-26 (1960).
51. 16 C.F.R. § 255.5 (1980).
52. *Id.*

Two examples accompanying the guides provide further elaboration.[53] In the case of a film star who endorses a food product on the basis of taste and personal preference, neither the fact nor the amount of compensation need be disclosed.[54] In another example, an actual patron of a restaurant, who is neither an expert nor known to the public, is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assuming that the patron had been notified in advance, by a means such as by a sign on the door telling all those who entered that they would be interviewed for a T.V. promotion, this notification would materially affect the weight or credibility of the patron's endorsement necessitating clear and conspicuous revelation to the viewers of the advertisement of the circumstances under which the endorsement was obtained.[55] On the other hand, if the patron had been informed that there was a "hidden camera" only after the interview and the patron had no reason to know or believe that he was being recorded for use in an advertisement, then neither the fact of payment nor the amount of compensation need be disclosed.[56] The guides reflect the FTC's view that the payment of compensation need be disclosed only when the endorser is neither a celebrity nor an expert. Moreover, when the average consumer endorses a product and receives compensation prior to and in exchange for the endorsement and the endorser knew or had reason to know that if the "right things" were said, they would,"appear on T.V.," then disclosure of the connection between the advertiser and the endorser is required.[57]

However, two recent FTC opinions have expanded the disclosure requirements of a celebrity when a material connection exists. In *In re Cooga Mooga, Inc. and Charles E. Boone,*[58] the Commission stated that a "material connection" exists between the endorser — in this case entertainer Pat Boone — and the advertiser when there is "any financial interest in the sale of the product or service which is the subject of the endorsement or any familiial connection between the endorser and the advertiser or its advertising agency."[59] Cooga Mooga was a privately held corporation owned and operated for the purpose of promoting Boone's business interests with Boone serving as president. Cooga Mooga, in conjunction with other parties, marketed and promoted an acne medication product. Boone endorsed the product and received a

53. 16 C.F.R. § 255.5 (Examples 2, 3) (1980).
54. 16 C.F.R. § 255.5 (Example 2) (1980).
55. 16 C.F.R. § 255.5 (Example 3) (1980).
56. *Id.*
57. *Id.*
58. 92 F.T.C. 310 (1978).
59. *Id.* at 321.

share of the product's sales without disclosing his relationship with the advertiser. Pursuant to the FTC ruling, Boone has consented to future disclosure of any "material connection" relationship in those advertisements which contain his endorsement.

In re Leroy Gordon Cooper, Jr.[60] involves a similar but less extensive set of circumstances. The well-known former astronaut, Gordon Cooper, aided the promotion of a device that allegedly improved fuel economy in automobiles. He received remuneration from the manufacturer and distributor in return for endorsing the device. The amount of Cooper's payment, as with endorser Boone, was dependent upon the number of products sold. The FTC required future disclosure of any "material connection" existing between the endorser and advertiser.[61] For purposes of this order, a "material connection" is defined as

> any direct or indirect economic interest in the sale of the product or service which is the subject of this endorsement other than (1) a fixed sum payment for the endorsement, all of which is disseminated, or (2) payment for the endorsement which is directly related to the extent of the dissemination of advertising containing it.[62]

Both of these decisions are consistent with the general FTC policy of disclosing any connection "which might materially affect the weight or credibility of the endorsement."[63] In those situations where the public would not reasonably expect the attendant connection, then it must be disclosed. However, these decisions do alter the general nondisclosure of payment requirement involving celebrity endorsers. Moreover, it is difficult to know exactly what kind of payment consumers ordinarily expect of celebrity endorsers. If audiences do have knowledge of ordinary payment relationships between endorsers and advertisers, and the *Boone* and *Cooper* relationships are out of the ordinary, then disclosure might be beneficial. Otherwise, consumers might be misled to believe that the endorser-advertiser relationship is an ordinary one.

Perhaps a satisfying resolution to the issue of disclosure of payment might be to require disclosure of payments in all instances involving celebrity endorsements. A simple statement that a particular celebrity endorser is paid for a particular commercial message would eliminate any question consumers might have of whether the celebrity endorser payment is "out of the ordinary." While others might argue that this does not address the issue that the form of payment fixed fee versus payment based on number of units sold between endorser and adver-

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60. No. C-2993 (F.T.C., Oct. 4, 1979) (consent order to cease and desist) (summarized at [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21, 591).

61. *Id.* at 5.

62. *Id.*

63. 16 C.F.R. § 255.5 (1980).

tiser affects the weight or credibility of the endorsement, it seems best at this time to require a general affirmative disclosure in a circumstance where material deception may arise.

As for requiring disclosure of a familial relationship between endorser and advertiser or advertising agency, the issue of whether this is a material deception again emerges. In light of the fact that few celebrity endorsers are in a familial relationship with advertisers or advertising agencies, this issue does not have the impact that disclosure of payment has. It does seem that if celebrity endorsers are overzealous in their product claims adequate remedies exist requiring substantiation. However, since familial relationships between endorsers and advertisers are clearly "out of the ordinary" arrangements which are unknown or unsuspected by viewers and consumers, then a definite need for disclosure arises because of this particular "material connection."

2. Recommendations by Users and Non-Users

In general, an advertiser must refrain from falsely stating or implying that a celebrity endorser uses a product when in fact he does not. In view of the recent switch by three endorsers of Miller's Lite beer to Anheuser-Busch's competing Natural Light beer,[64] a further look into what the latest FTC guides require of advertisers and endorsers is in order. The issue arises as to whether Miller's airing of advertisements, containing testimonials by the three defectors to Anheuser-Busch, Joe Frazier, Nick Buoniconti, and Mickey Mantle, just prior to their defection and before their contracts with Miller expired, would be false and deceptive practices with the capacity to mislead the public.

The resolution of this type of problem can be found in the provisions to the final guides which require that the endorser, in any advertisement representing that he uses a product, must have been a bona fide user of it at the time the endorsement was given.[65] Bona fide use means more than actual or casual use; it means that the endorser uses the product because he likes and approves it.[66] The advertiser may use such an endorsement only so long as it has good reason to believe the endorser continues to use the product.[67] The guides require an advertiser to determine at reasonable intervals whether the endorser still endorses the product.[68] The guides suggest that rather than laying down a hard and fast rule, the FTC will take a pragmatic view of what are "reasonable

64. The at times revengeful war between Anheuser-Busch and Miller Brewing Co. appears headed for further confrontation because of Busch's raid of former Miller Lite Beer endorsers. *See* ADVERTISING AGE, Mar. 10, 1980, at 1.

65. 16 C.F.R. § 255.1(c) (1980).

66. 16 C.F.R. § 255.1(b)(c) (1980).

67. 16 C.F.R. § 255.1(b)(c) (1980).

68. 16 C.F.R. § 255.1(b) (1980).

intervals." The guides state that "reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments."[69] According to one of the examples provided in the guide, if an individual endorses an advertiser's paint because of its remarkable quick drying properties and durability and subsequently the advertiser reformulates the paint, then the advertiser must contact the endorser to determine whether the endorser still subscribes to his views.[70] The obligations imposed by the "good reason to believe" requirement apply only to expert and celebrity endorsers and not to the man-on-the-street endorser.[71]

The guides point out that an endorsement of a product does not necessarily require "bona fide use." Take for example the endorser who presents her views in a "blind comparison test" which is not designed to represent that she is a "bona fide user" of the product. This is permitted, and it is only when an endorser is held out as a "bona fide user" that the tests for use requirements and checks on the endorser's views at "reasonable intervals" become issues.[72]

In the case of the three celebrity endorsers who defected to Anheuser-Busch the guides suggest a resolution to the question whether Miller could continue to air the celebrities' endorsements when they no longer use, like and approve Lite beer. It does not appear that Miller ever checked for the endorser's continuing approval at "reasonable intervals"as required by the guides. One of the factors to be viewed in determining whether the reasonableness requirement is met is the advertiser's contractual commitments. For instance, an endorsement that is aired only once does not necessitate further approval inquiry. On the other hand, a two or three year contract between the endorser and advertiser would probably require questioning at "reasonable intervals." Since the three defectors' contracts with Miller have run out and Miller therefore can no longer air the commercials, Miller has probably escaped FTC action. However, similar failure to check with the endorsers at "reasonable intervals" in the future may lead to FTC charges of deception.

While the latest FTC guides do not indicate how frequently advertisers must check with endorsers, at a minimum, once a year for regularly aired commercials would appear reasonable. This is especially true if other advertisers embark on campaigns signing away endorsers from competing advertisers. As for those Miller endorsers who have not

69. *Id.*
70. 16 C.F.R. § 255.1 (Example 1) (1980).
71. 16 C.F.R. § 255.1(b) (1980).
72. 16 C.F.R. § 255.1 (Example 2) (1980).

defected, if Miller were to change their commercial message substantially in retaliation for Anheuser-Busch's actions, immediate approval by the endorsers would be required.

III. MISREPRESENTATION THROUGH TESTIMONIALS AND ENDORSEMENTS

A further modification of *Northam-Warren* is made in the recently promulgated FTC guides. In the past, attempts have been made to use testimonials to circumvent requirements of disallowing deceptive or false advertising under section 5 of the Federal Trade Commission Act. Advertisers would say that the testimonial, no matter how extravagant or outlandish, merely reflected the honest opinions, beliefs, or experiences of the endorser. The guides, speaking directly to this issue, state that endorsements "may not contain any representation which would be deceptive, or could not be substantiated if made directly by the advertiser."[73]

The guides permit some liberty on the part of the advertiser to alter the language of the endorser so long as the endorser is not presented out of context and the language is not reworded so as to distort the original meaning or impression.[74] However, an advertisement that affirmatively represents that the message is phrased in the exact words of the endorser must indeed contain the precise language of the endorser. Otherwise the representation may deceive the consuming public.

A series of cases decided before the guides were issued also address the issue of misrepresentation through testimonials. In *In re American Chemical Paint Co.*,[75] the FTC recognized that testimonials frequently have a strong appeal to the purchasing public. The need to restrict the use of false testimonials, albeit sincerely made, is critical to the prevention of false advertising. The Commission, relying heavily on the earlier decided case of *United States v. John J. Fulton Co.*,[76] held that the testimonials made by satisfied users of a chemical allegedly responsible for increasing crop yield were without basis in fact even though the farmers in good faith claimed it had worked.[77] The Commission relied on expert scientific evidence indicating that there were a number of factors that may have contributed to the better crop yield.

Another case, *R.J. Reynolds Tobacco Company v. FTC*,[78] illustrates this same concept when dealing with well-known athletes in testi-

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73. 16 C.F.R. § 255.1(a) (1980).
74. 16 C.F.R. § 255.1(b) (1980).
75. 45 F.T.C. 9 (1948).
76. 33 F.2d 506 (9th Cir. 1929).
77. *In re* American Chemical Paint Co., 45 F.T.C. 9, 11-12 (1948).
78. R.J. Reynolds Tobacco Co. v. FTC, 192 F.2d 535 (7th Cir. 1951).

monials. The following statements, attributed to the athlete endorsers, were used by the advertiser: "When the pace I go gets me fatigued, a Camel gives me a 'lift' " and, "I like ... Camels for digestion's sake. There's something about a camel that agrees with me — all around."[79] The court found through scientific evidence that Camel cigarettes failed to relieve fatigue and assist digestion.[80] The court went on to note that although a testimonial may not be "factually true in all respects," it still may be permitted if it was "immaterial to the subject matter ... in that it bore no relation to public interest."[81] While it is difficult to imagine many instances in which an honest, yet inaccurate, testimonial does not bear some relation to "public interest," this language appears to leave the door open for some misrepresentation in endorsements.

Perhaps the language in *Reynolds* allowing immaterial yet only partially true endorsements to stand enables advertisers and endorsers today to proclaim, for instance, "Coke adds life." Endorsers are generally free to comment on matters of product taste or price without requiring any substantiation.[82] If the overall net impression of the advertisement is to deceive the audience, then the advertisement is not permissible. Assuming the advertiser crosses this threshold, does *Reynolds* let the advertiser off the hook? Maybe this is just the type of "immaterial to the subject matter ... in that it bore no relation to public interest" testimonial that *Reynolds* allows.

While this area of the law is not settled, and each case must be resolved on its individual facts, public policy requires close scrutiny of any testimonial or endorsement with inaccurate representations. The court in *Reynolds* argued that an absolute prohibition of all testimonial misrepresentations would make advertisers and perhaps endorsers insurers of every statement or claim.[83] Failing to prohibit endorsements containing misrepresentation is an admission that some deception might not materially affect, involve, or interest the public. While this might be an acceptable policy for some products, those involving health or safety or children's products should be beyond this aberration in the law.[84] It is here that the strictest standard on misrepresentation should be applied so as to insure no public deception, however slight, by deceit.

A. Expert Endorsements

A frequent advertising technique is for an advertiser to enlist the testimonial services of an expert. Generally speaking, an expert is one

79. This was the advertisement referred to in *Reynolds*. *Id.*
80. *Id.* at 536-38.
81. *Id.* at 538.
82. *See* 16 C.F.R. § 255.5 (Example 2) (1980); 16 C.F.R. § 255.1 (1980).
83. R.J. Reynolds Co. v. FTC, 192 F.2d 535, 538-40 (7th Cir. 1951).
84. Note that the Commission has adopted special guides on endorsements of the efficacy of drug products. *See* notes 108-14 and accompanying text *infra*.

who, because of his education, training, knowledge or experience, has acquired special skills.[85] The FTC guides provide that, "[w]henever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give him the expertise that he is represented as possessing with respect to the endorsement."[86]

Under the guides, two distinct types of expert endorsements are recognized: organizational and individual. For an organization to endorse a product, it is imperative that a procedure is established that assures that the endorsement reflects the collective judgment of the group.[87] This is necessary because organizational endorsements "are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors which vary from individual to individual."[88] The guides require that when an organization is represented as being expert, it must use "an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relative merits of such products."[89]

An indication of the obligations imposed on organizations who endorse a product is provided by examples in the guides. When an association of professional athletes who as a group state in an advertisement that it has "selected" a particular brand of beverage as its "official breakfast drink" the consumer is left with the impression that the product has nutritional value. This impression arises because of the perceived connection between performance and diet. Therefore the organization holds itself out as an expert in the field of nutrition[90] and must rely upon expert evaluation of the nutritional merits of the beverage prior to endorsement.[91] Moreover, the words "selected" and "official" imply that the endorsement was based on a comparison against competing brands.[92] To avoid an assertion of a deceptive endorsement the organization or its expert, must actually perform side-by-side scientific comparisons and as a result of such tests "must have concluded that, with respect to those features on which he is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products."[93] Additionally, if the net impression created by the endorsement is that the

85. 16 C.F.R. § 255.0(d) (1979).
86. 16 C.F.R. § 255.3(a) (1979).
87. 16 C.F.R. § 255.4 (1979).
88. *Id.*
89. *Id.; See also* 16 C.F.R. § 255.3 (1979).
90. *See* 16 C.F.R. § 255.3 (Example 5) (1979).
91. *Id.*
92. *Id.*
93. *See* 16 C.F.R. § 255.3(b) (1979).

advertised product is superior to competing brands, then the association must have in fact found such superiority.[94]

For an individual expert endorsement the guides require that the expert's opinion "must be supported by an actual exercise of his expertise in evaluating product features or characteristics with respect to which he is expert and which are both relevant to an ordinary consumer's use of or experience with the product and also are available to the ordinary consumer."[95] This does not prohibit an endorser from taking into consideration such factors as price or taste, which might not fall within his expertise, yet might influence his decision as to whether or not to endorse. The FTC guides set forth one example of an individual expert in which an "engineer" endorses a particular automobile.[96] The advertisement implies that the endorser's professional training and experience are in the area of automotive design and performance. If, in fact, the endorser is a chemical engineer, then the endorsement would be deceptive.[97]

The issue of individual expert endorsement arose in a recent FTC decision involving former astronaut Gordon Cooper.[98] In a series of television and newspaper advertisements appearing in 1977 and 1978 Cooper made numerous claims as to how the product in question "increases engine performance, reduces smog emission and clears your engine."[99] The Commission found that Cooper, through his personal assertions as to the product's efficiency, bore the relationship of an endorser to the advertiser.[100] While the Commission recognized the endorser's skill and experience in his chosen field related to the Gemini space mission, it found that he did not have the education, training, and knowledge to qualify as an expert in the field of automobile engineering.[101] Since Cooper was not an expert, he should have sought an expert's opinion. Furthermore, even if Cooper were recognized as an expert, it appears that he failed to comply with the guidelines requiring an examination of the product at least as extensively as an expert with similar skill would conduct.[102] In addition, Cooper's statement as to the benefits of the product were false representations having the capacity and tendency to mislead members of the public.[103]

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94. *Id.*
95. 16 C.F.R. § 255.3 (1979).
96. 16 C.F.R. § 255.3 (Example 1) (1979).
97. 16 C.F.R. § 255.3 (Example 1) (1979).
98. *In re* Leroy Gordon Cooper, Jr., No. C-2993 (F.T.C., Oct. 4, 1979) (consent order to cease and desist) (summarized at [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21, 591).
99. *Id.* at Complaint.
100. *Id.* at 1-3. In the consent order Cooper admitted all the facts in the Complaint.
101. *Id.* at 3.
102. *Id.*
103. *Id.*

The tentative consent order requires Cooper to cease and desist in the future from an endorsement related to product or service unless, when he is an expert endorser "he possesses and relies upon competent and reliable scientific evidence to substantiate any representation made directly or by implication in the endorsement."[104] In those circumstances when he is merely an endorser he shall make "reasonable inquiry into the truthfulness of his endorsement, and possesses and relies upon information resulting from such inquiry which substantiates any representation made directly or by implication in the endorsement."[105] The order defines "reasonable inquiry" as:

> (1) obtaining information from at least two competent and reliable sources independent of the advertiser and anyone with an economic interest in the product or service; or
> (2) having information obtained from the advertiser or anyone with an economic interest in the product or service evaluated by at least two independent, competent and reliable sources.[106]

The standard for expert evaluation of a product's efficacy as stated in *Cooper* is similar to that previously discussed. It is in the area of non-expert celebrity endorsement that *Cooper* breaks new ground. The burden is no longer solely with the advertiser to substantiate testimonial claims. Now the celebrity endorser must independently abstract information upon which he bases his opinions, beliefs or findings; or having received such information from the advertiser or another financially interested party, he must have it independently evaluated. In either situation two competent and reliable independent sources must be used.

B. Non-Expert Endorsements

The additional steps required by non-expert celebrity endorsement will more than likely lead to some confusion among advertisers and endorsers. It seems reasonable to assume that the additional costs for independent testing should and will be borne by the advertiser. At the same time the *Cooper* decision may very well lead to more exact and clear testimonial language leading to less confusion and deception in the marketplace. On the other hand, many advertisers will find that this process will increase the time it takes to prepare endorsements. Furthermore, if advertisers discover that this process significantly impairs their ability to timely respond to competing products or introduce new prod-

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104. *Id.* at 3.
105. *Id.* at 5.
106. *Id.*

ucts, there may be a sharp reduction in the usage of non-expert celebrity endorsements.

The proposed guides dealing with non-expert endorsements of drug products reflect the FTC's belief that lay experience with drugs is unacceptable evidence for showing how such products perform.[107] In the FTC final guides, however, the Commission determined that such an absolute prohibition was unnecessary and that sufficient consumer protection is achieved by requiring the advertiser to have "adequate scientific substantiation for such claims"[108] and making certain that "the claims are not inconsistent with any determination that has been made by the Food and Drug Administration with respect to the drug or device that is the subject of the claim."[109]

In a final settlement recently announced between entertainer Pat Boone and the FTC, many of the endorsement issues related to products of health and safety are explored.[110] Boone and his company, Cooga Mooga, Inc., engaged in the marketing of a mail order acne medication.[111] Boone made statements in television and print advertisements concerning the product's superior performance, a medical evaluation of the product, and his family's satisfaction with the product, which were found to constitute an endorsement.[112] The FTC complaint alleged that the acne treatment was not in fact superior to competing preparations and that not all of Boone's daughters used the medication.[113] In the final consent order Boone agreed not to endorse the efficacy of an acne product or any other product unless he: "make[s] a reasonable inquiry into the truthfulness of a proposed endorsement and possess and rely upon information from reliable sources independent of the advertiser or other parties with an interest in the product or service which is the subject of the endorsement."[114]

Where the "information" includes tests or studies from the advertiser, such information must be independently evaluated by reliable

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107. 16 C.F.R. § 255.2(c) (1980).

108. *Id.*

109. *Id.*

110. *In re* Cooga Mooga, Inc., 92 F.T.C. 310 (1978).

111. Charles E. (Pat) Boone organized and presided over the business affairs of Cooga Mooga, Inc. The firm's primary purpose was to promote and conduct the business interests of Boone. In this instance Cooga Mooga worked in conjunction with Karr Preventive Medical Products, Inc., the company that developed the acne medication product, and National Media Group, Inc., the marketing and sales firm that developed and distributed the product's advertising. Separate cease and desist orders were agreed upon by Karr and National Media Group. *Id.*

112. *Id.* at 311. For instance, in one advertisement Boone stated, "[w]ith four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin.' " *Id.* at 312.

113. *Id.* at 316.

114. *Id.* at 321.

sources in order to provide a basis for an endorsement.[115] For those products or services not related to health or safety the endorser may rely on personal experience, provided the endorsement "requires no professional expertise and such products or services can be reasonably evaluated through lay use."[116] It should be noted that Boone's implication of the medication's superiority triggered the need for side-by-side scientific comparison. In a statement accompanying this agreement, the Chief of the FTC's Bureau of Consumer Affairs said that this agreement, "stands for the principle that an endorser must verify claims about the product before the first commercial goes on the air or appears in print, or risk FTC action."[117] It was this last clause, when read in conjunction with the consent agreement, that sent shock waves through the advertising industry.

According to the final order as elaborated by the Bureau Chief, Boone not only agreed to cease and desist from making the alleged false, misleading and deceptive endorsements, but also agreed to personally make partial restitution for those purchases made during the advertising campaign and on all reorders made within a two month period after his final endorsement.[118] Boone's arrangement with the advertiser was somewhat unique, although certainly not the first of its kind. In return for Boone's endorsement the advertiser paid the entertainer and his company twenty-five cents for every $9.50 bottle of the acne medication sold.[119] According to the consent agreement Boone's restitution was limited to a maximum of twenty-five cents per bottle.[120] Because partial, not full, restitution would be required, the celebrity was held liable for an amount not to exceed $5,000.[121]

For many years advertisers and even advertising agencies have been held liable for false, misleading or deceptive claims.[122] Never before has

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115. *Id.*

116. *Id.*

117. *See* ADVERTISING AGE, May 15, 1978, at 1, 113.

118. *In re* Cooga Mooga, Inc., 92 F.T.C. 310, 321-22 (1978).

119. Boston-Herald American, July 2, 1979, at 5, col. 2.

120. *In re* Cooga Mooga, Inc., 92 F.T.C. 310, 321 (1978).

121. The other parties connected to the advertising and sale of the product were Karr Preventive Medical Products, Inc. and National Media Group, Inc. *See* note 110A *supra*. For Karr's allegedly false claims that the product cured acne, was scientifically tested, was superior to other acne products and penetrated skin pores and eliminated bacteria and fatty acid that cause acne, it agreed to establish a restitution fund of $175,000. Similarly, National Media Group agreed to refund $60,000. Also, the parties were ordered to place notices in newspapers and magazines announcing the availability of refunds and conditions for receipt. Before any future claims about the product's "efficacy" can be made, two well-controlled, independent clinical studies by dermatologists must be conducted. *See* [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21, 588.

122. For a case dealing with advertiser liability, *see* ITT Continental Baking Co., No. C-2958 (F.T.C., Aug. 24, 1979) (consent order to cease and desist) (summarized at [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21, 546). For a case dealing with advertising agency liability, *see In re* Bristol-Meyers Co., 46 F.T.C. 162 (1949), *aff'd* 185 F.2d 58 (4th Cir. 1950) (without

an endorser been held personally liable for false, misleading and deceptive representations. Boone was held accountable in his role as a non-expert celebrity endorser of a drug relating to the health and safety of consumers. His financial arrangement was not unlike Cooper's method of payment. However, unlike Cooper, Boone had personal control over the operations of the advertiser. It may have been this close and virtually inseparable relationship between advertiser and endorser that led the FTC to "pierce the advertiser veil" and hold the endorser financially liable for his deception.

IV. IMPLICATIONS

It may well be that, when celebrity endorsers attempt to avoid liability for false, misleading, or deceptive claims by organizing an advertising business solely for the benefit of the endorser, both the business and endorser will be treated as one, thereby rendering the endorser liable for the misrepresentations of each or both. Another scenario envisions application of vicarious liability principles whereby the endorser is held liable for the torts of the advertiser.[123] Picture the endorser who disparages "the leading brand as having one-half the cleaning power of the advertiser-endorser brand." Might not the endorser be liable for any defamation action brought against the advertiser? According to *Boone* it seems plausible.

Even given the close endorser-advertiser relationship in *Boone,* a similar result may be avoided by paying the endorser a fixed fee or a fee based on the number of times the endorsement-advertisement is shown. *Boone* may also have limited application because it dealt with a drug product. Generally, stricter scrutiny by the FTC occurs in matters of advertising for the purpose of inducing the purchase of foods, drugs, cosmetics or devices under Section 12 of the Federal Trade Commission Act and the relevant guidelines thereto.

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discussing this point); *In re* Colgate-Palmolive Co., 59 F.T.C. 1452 (1961), *rev'd and remanded,* 310 F.2d 89 (1st Cir. 1962), 62 F.T.C. 1269 (1963), *rev'd* 326 F.2d 517 (1st Cir. 1963), *rev'd and remanded,* 380 U.S. 374 (1965).

In J. Walter Thompson Co., Dkt. 9104 (F.T.C., Aug. 23, 1979) (consent order to cease and desist) (summarized at [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21, 555), the F.T.C. required an advertising agency not to make claims about a product (in this instance, claims that a dishwasher could remove baked-on food without prior rinsing) unless it had a reasonable basis for such claims. This included competent and reliable scientific tests or objective materials such as the opinion of experts who are qualified by professional training and experience to make judgments on the subject.

123. *See* Note, *The Liability of the Product Endorser,* 45 MISS. L.J. 1022 (1974); Note, *Liability of Advertising Endorsers to Third Parties for Negligent Misrepresentations,* 31 OHIO STATE L.J. 571 (1970); Note, *Liability of the Product Endorser — Developing a New Perspective,* 15 N.Y.L.F. 835 (1969); Note, *Liability of Advertising Endorsers,* 2 STAN. L. REV. 496 (1950); Comment, *Negligent Misrepresentation — Product Endorsements,* 4 SUFFOLK U.L. REV. 969 (1970).

Cooper can be distinguished from *Boone* in two broad ways. The astronaut did not own the advertiser who assisted in the promotion of the product. Secondly, he endorsed a consumer product related to improving fuel efficiency, not preventing acne. The FTC did not elaborate on whether it relied upon both or only one of these factors in reaching its conclusion. It seems likely that both factors influenced the Commission's decision. It is not unreasonable to hold the owner and chief officer of an organization personally responsible for the company's failure to adequately substantiate or carry on testing or documentation of any medical claims. Furthermore, the product in issue, acne medication, historically has been prone to misstatements as to product benefits. The consuming public, generally teenaged boys and girls, seem particularly ripe and susceptible to believing such overt claims, especially when the wholesome entertainer, Pat Boone, and his star daughter, Debbie, appear in such endorsements. While celebrity endorsers in the future must tread carefully to avoid personal liability for false or deceptive claims when they find themselves juxtaposed with these facts, perhaps the real issue is the extent to which the FTC will extend endorser liability.

In an era of budget cuts, congressional disapproval of many past practices of the Commission, and a virtual Senate and House agreement permitting Congress veto power over unfavorable Commission actions,[124] it appears that personal liability for false or deceptive endorsement claims will not likely be expanded beyond the facts in *Boone*. It may also be of some solace for celebrity endorsers to know that FTC consent orders are for settlement purposes only and are not admissions by the advertiser and endorser that they have violated the law.[125] However, the final agreement carries the force of law for Boone's future actions.[126] If Boone violates the agreement, he faces a penalty of up to $10,000 for each such violation.[127]

As a practical matter, after *Boone* and *Cooper* almost all celebrity endorsers are requiring indemnification from advertisers in the event of personal financial liability from deceptive claims. Perhaps the soundest way for the celebrity to avoid claims for a misleading, false or deceptive endorsement is to personally substantiate any opinions, beliefs, findings, or experiences appearing in the advertising message and make certain to disclose the fact of compensation whenever a "material connection" exists.

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124. *See* ADVERTISING AGE, Mar. 10, 1980, at 1; The Wall Street Journal, Jan. 15, 1980, at 1, col. 1.

125. Fed. Reg. 11-25-77, pp. 60137-60138.

126. 15 U.S.C. § 45(m)(1) (1976).

127. *Id.*

CONCLUSION

While celebrity endorsers have caught the fancy of the purchasing public their claims and assertions have not gone without scrutiny. Advertisers have become more selective when matching athletes and entertainers to products and when constantly searching for the proper "hook." At the same time the Federal Trade Commission has developed hooks of its own in ferreting out false, deceptive or misleading endorsement claims.

Generally the FTC's enforcement power has occurred at two levels: regulation of advertisements and regulation of endorsers. In the past the FTC prohibited the dissemination of product approval by endorsers when in fact the testimonials were fictitious. Where endorsements were authorized, the Commission required disclosure of compensation for celebrity endorsers when a "material connection" arose. Recently promulgated federal endorsement guidelines require "bona fide use" whenever the celebrity endorser is held out to approve and like the product. In addition, the advertiser must make inquiry of the celebrity endorser at "reasonable intervals" to insure that the product still receives user approval. Sections 5 and 12 of the Federal Trade Commission Act together with the FTC guides forbid any unsubstantiated or deceptive representations made by the celebrity endorser in any form of advertisements.

For those celebrity endorsers who fall within the "expert" category, scientifically controlled experiments validating any alleged superior benefit must be carried out. The *Cooper* decision partially expands the substantiation requirement to non-expert endorsers. In *Boone,* a special case dealing with unsubstantiated and false medical claims by a non-expert celebrity endorser who had personal control over the advertiser and received remuneration on the basis of the number of product units sold, the FTC found the celebrity endorser personally and financially liable.

The ramifications arising from the FTC's latest endorsement guides, the *Boone* and *Cooper* opinions, sections 5 and 12 of the Federal Trade Commission Act, and earlier decisions are just beginning to be felt among endorsers, advertisers, and the celebrity-adoring public.

NOTES

Agents of Professional Athletes

Player agents have been referred to as "the most destructive force in sports today,"[1] and the prime cause of escalating operating costs which have resulted in higher ticket prices.[2] The agents are generally distrusted by owners and disliked by fans.[3] However, it is generally recognized by athletes and management that an athlete should not negotiate his own contract.[4] Athletes generally lack the skills to negotiate effectively on their own behalf. Thus, the agent has been "accepted as a permanent, highly visible and at times positively beneficial element in the sport labor relations process."[5]

Within the last decade considerable problems have arisen in the field of agent-athlete relations.[6] The problems have been principally caused by agents taking advantage of the instability in the field and the inexperience of athletes in business affairs. Some agents have been guilty of "executing poor contracts ...; of managing clients' money with disastrous results; of not delivering what they promise; of deserting the kids they sign; of having personal interests which work against their clients' interest; [and] of charging unfair fees."[7] Although agents have been primarily responsible for creating these problems, some athletes

1. *Hearings Before the House Select Committee on Professional Sports,* 94th Cong., 2d Sess. 165 (1976) (statement of Harrison Vickers of the Houston Aeros) [hereinafter cited as *Hearings*].

2. *Id.* at 89, where Joseph Robbie of the Miami Dolphins states "agents who solicit do inform dozens of players and then through every kind of device cause management to pay much higher salaries than actually are justified.... This causes an increase in ticket prices."

3. In a poll conducted by Sports Illustrated Magazine, fans were asked whether they thought players should have agents to negotiate for them. Fifty-three percent said they should not. When asked if they thought agents had a good effect on sports, forty-five percent said no. Kennedy & Williamson, *Money in Sports: Part 3, The Fans Are Up in Arms,* SPORTS ILLUSTRATED, July 31, 1978, at 42.

4. *See* S. GALLNER, PRO SPORTS: THE CONTRACT GAME 50 (1974), where the author states: "While there is wide agreement that an athlete ought not negotiate his own pro contract, considerable concern exists as to whom an athlete should select as his legal representative. The importance of choosing a skilled, reliable, and ethical representative cannot be over emphasized."

5. FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H. R. REP. NO. 1786, 94th Cong., 2d Sess. 70 (1977) [hereinafter cited as FINAL REPORT].

6. The main reason that the problems have arisen only in recent history is that it is only in recent times that salaries have risen dramatically and agents are now taking an active part in contract negotiations. *See* Kennedy & Williamson, *Money, The Monster Threatening Sports,* SPORTS ILLUSTRATED, July 17, 1978, at 46-51. *See also* Black, *A Hard Look At Agents,* SPORT, Nov. 1979, at 81, where the author states: "Football, basketball and hockey were discovered by agents when inter-league war pushed salaries up."

7. Black, *A Hard Look At Agents,* SPORT, Nov. 1979, at 81.

have also taken advantage of the situation, moving from agent to agent, breaking contracts. However, much of this movement is instigated by competing agents.[8]

Recently, courts have begun to explore the relationship between professional athletes and agents because of lawsuits brought by displaced agents, against both athletes and their new agents, seeking compensation from athletes for whom they purport to have fulfilled their obligations.[9] Issues raised concerned when compensation is due agents, the effects, if any, of current law, and what safeguards exist to protect athletes from unscrupulous agents.[10] More important than the outcome of the various cases is the need for an effective regulatory system capable of policing a field whose deviants have been the cause of serious damage to individual athletes and have been a cause of grave concern to the whole sports industry.[11]

Section I of this Note examines the relevant law defining the relationship between the athlete and the agent and provides an analysis of why it is ineffective to curb abuses in the field. Section II discusses the effect of the rules regulating agent-athlete relations of the National Collegiate Athletic Association (NCAA), the American Bar Association (ABA), and the Association of Representatives of Professional Athletes (ARPA), not for what they have accomplished but for what they are unable to do. Prominent case law is presented in section III. This section analyzes cases addressing recurrent abuses such as overreaching and the invasion of college campuses by agents, and how courts have dealt with actual situations. Finally, the Note concludes with a discussion of possible safeguards to protect the athlete and regulate this field.

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8. *See* Johnson & Reid, *Some Offers They Couldn't Refuse,* SPORTS ILLUSTRATED, May 21, 1979, at 35, describing Ottis Anderson's activity in signing with three different agents. *See also* Axthelm, *Marvin Barnes and the Work Ethic,* NEWSWEEK, Dec. 2, 1974, at 61.

9. Professor Robert Shepherd noted three such instances in *Establishing the Contractual Relationship Between the Representative and the Athlete,* in M. JONES, CURRENT ISSUES IN PROFESSIONAL SPORTS, 14 (1980). *See, e.g.,* [1978] 1 SPORTS L. REP. no. 3, at 1 & no. 8, at 4, *discussing* International Artists and Athletes Management, Ltd. v. Parker, 78 Civ. 2877 (S.D.N.Y., filed June 23, 1978), *settlement, entered into* 10/17/78 (agent's action against Dave Parker for improper dismissal); [1979] 1 SPORTS L. REP. no. 11, at 4, *discussing* International Artists and Athletes Management, Ltd. v. Randolph, 79 Civ. 0896 (S.D.N.Y., filed Feb. 16, 1979) (agent's suit for premature dismissal); Johnson & Reid, *Some Offers They Couldn't Refuse,* SPORTS ILLUSTRATED, May 21, 1978, at 28 (regarding lawsuit by agent of football player Ottis Anderson, charging breach of contract).

10. *See generally* C. Lowell & J. Weistart, THE LAW OF SPORTS, §§ 3.17-3.19 (1979); Black, *A Hard Look At Agents,* SPORT, Nov. 1979, at 81; *Final Report, supra* note 5.

11. *See* Kennedy & Williamson, *Money in Sports: Part 2, For The Athlete How Much Is Too Much,* SPORTS ILLUSTRATED, July 24, 1978, at 48, where the author suggests that many of the fraudulent practices which occur are due to the fact that agents need not be "licensed or bonded." *See also Final Report, supra* note 5, at 78-79, where the committee discusses the possibility of using Federal regulation of farm labor contractors or stockbrokers as a precedent for regulating agents.

I. THE RELEVANT LAW

A. General Overview

An overview of the relevant law that controls the agent-athlete relationship is necessary to understand the restraints that exist to prevent abuse. Although the problems in the area have been highly publicized, there has been very little litigation. In fact, the body of reported decisions is quite small.[12] Most conflicts which arise concern questions of agency and contract. Case law in these areas provides the relevant precedents for resolving the agent-athlete controversies.[13]

The single factor which causes the most difficulty in the field is the ease of entry into the occupation of agents of professional athletes.[14] Agents exhibit vastly different levels of experience and expertise.[15] Due to a lack of any nonjudicial regulation of the activities in this field, both agents and athletes must look to the courts to remedy wrongful activities by either party.

Typically, the sports agent will promise to perform services in three areas: "contract negotiation, investment advice, and promotional services."[16] Athletes' complaints generally allege that these promised serv-

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12. *See* C. LOWELL & J. WEISTART, *supra* note 10, at 323. The authors maintain that even when the relevant precedent is expanded to include representation of entertainers in general, the number of decisions is small. *See, e.g.*, Campos v. Olson, 241 F.2d 661 (9th Cir. 1957); George Foreman Associates, Ltd. v. Foreman, 389 F. Supp. 1308 (N.D. Cal. 1974), *aff'd*, 517 F.2d 354 (9th Cir. 1975); Burrow v. Probus Management, Inc., Civil No. 16840 (N.D. Ga., Aug. 9, 1973) (unpublished order); Russell-Stewart, Inc. v. Birkett, 24 Misc.2d 528, 201 N.Y.S.2d 687 (Sup. Ct. 1960); Trammell v. Morgan, 158 N.E.2d 541, 80 Abs. 251 (Ohio App. 1957); and cases cited in Annot., 175 A.L.R. 617 (1948).

13. C. LOWELL & J. WEISTART, *supra* note 10, at 323.

14. W. SEAVEY, AGENCY § 14, at 26 (West 1964), states "Any person can hold an agency power for another." *See, e.g.*, Sims v. Slovin, 42 Del. Ch. 216, 207 A.2d 597 (1965) (one not clearly mentally ill may act as agent for others even though incapable of acting for himself); May v. Ken-Rad Corp., 279 Ky. 601, 131 S.W.2d 490 (1939) (one under a legal disability, whose contracts may not be binding on him, may nevertheless as agent, by contract otherwise unexceptional, bind his principal).

15. The sole requirement for becoming the agent of a professional athlete is that the athlete grant the agent permission to act on his behalf. No special expertise to assume agent status is required. For example, one commentator has stated:

> [L]ook at Randy Hundley, now with the Minnesota Twins, who used his father, a builder, as his representative; or Duane Thomas of the Washington Redskins, who used former football player Abner Haynes. Others who have become athletic agents include a dry-cleaning manager, a building contractor, a college professor, a stockbroker, a college athletic trainer, and an accountant.

S. GALLNER, *supra* note 4, at 51.

16. C. LOWELL & J. WEISTART, *supra* note 12, at 326. The "contract" used by agent Michael Trope, discussed in notes 119-34 and accompanying text *infra*, provided that:

> MLT shall provide to me the following services:
> (a) Professional Football contract negotiations;
> (b) Consultation with and liaison with my business manager;
> (c) Recommendations as to qualified tax and investment counselors with whom I may consult.

ices either were not delivered or were severely inadequate. On the other hand, the most common scenario compelling the agent to initiate litigation is when he is dismissed prior to the expiration of the term of the agency agreement.[17] The agent will primarily seek to be compensated for services rendered and for any commissions to which he would otherwise have been entitled.

B. Agency and Contract Law

1. Generally Applied Principles

"Agency is a consensual, fiduciary relation between two persons, created by law by which one, the principal, has a right to control the conduct of the agent, and the agent has a power to affect the legal relations of the principal."[18] The principal-agent relationship usually arises from a contractual agreement between the parties,[19] although it may arise by operation of law or by one acting gratuitously.[20] In the sports context the relationship is almost exclusively contractual and the contract is customarily a written document.[21] The law of agency allows the principal the absolute power to revoke the agency relationship at will.[22] Likewise, the agent has the authority at any time to renounce the agency.[23] These powers to revoke and renounce exist despite any contractual

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Exhibit attached to complaint of Trope v. Anderson, No. C 280119 (Cal. Super. Ct., filed Apr. 12, 1979).

A sample contract utilized by Probus Management, Inc., discussed in notes 101-18 and accompanying text *infra*, states:

> During the term of this agreement, Probus shall manage the Athletes' business affairs, finances and matters related thereto including investments in consultation with the Athlete. Probus shall prepare the Athlete's tax returns and render periodic accountings to the Athlete. In addition, Probus shall participate, assist and advise in all business negotiations for the Athlete.

Appendix III b-7, FINAL REPORT, *supra* note 5, at 541.

17. This was the main basis for Trope v. Anderson, No. C 280119 (Cal. Super. Ct., filed Apr. 12, 1979). For a general discussion of *Trope*, *see* notes 119-34 and accompanying text *infra*.

18. W. SEAVEY, AGENCY § 3, at 3 (West 1964).

19. *See, e.g.*, Investment Co. Institute v. Camp, 274 F. Supp. 624 (D.D.C. 1967); Baumgartner v. Burt, 148 Colo. 64, 365 P.2d 681 (1961); Monohan v. Grayson County Supply Co., 245 Ky. 781, 54 S.W.2d 311 (1932).

20. *See, e.g.*, Allen v. Minnesota Loan & Trust Co., 68 Minn. 8, 70 N.W. 800 (1897) (agency may arise by statute); Groh v. Shelton, 428 S.W.2d 911 (Mo. App. 1968) (payment of compensation to agent is not essential to creation of principal-agent relationship; agency may be wholly gratuitous).

21. *See* W. SEAVEY, AGENCY § 18, at 32 (West 1964), which states: "Except for transactions required to be authorized in writing or by seal, authority or apparent authority can be created in any way in which a person can manifest consent to another." There is no requirement that there be a written document.

22. *See, e.g.*, Burger Brewing Co. v. Summer, 261 F.2d 261 (4th Cir. 1958); Ireland v. WynKoop, 36 Colo. App. 205, 539 P.2d 1349 (1975); Wilson Sullivan Co. v. International Paper Makers Realty Corp., 307 N.Y. 20, 119 N.E.2d 573 (1954).

23. *See, e.g.*, Rockwell Engineering Co. v. Automatic Timing & Controls Co., 559 F.2d 460 (7th Cir. 1977); Preszler v. Dudley, 153 Cal. App.2d 120, 314 P.2d 138 (1957).

agreement to the contrary. However, the powers to renounce or revoke do not relieve the parties of liability for possible breach of the contract. Although both parties may effectively terminate the agency at will, either will be liable in damages if his actions are in breach of the contractual agreement.[24]

In the sports context, the issues center on whether the agency contract has been breached. When an agent sues an athlete based on premature dismissal the first question to be resolved is the length of the contract. Parties are generally given broad latitude in forming the terms of their agreement, including the term which specifies the duration of the contract. If the period of time that the agency is to exist is specified in the contract, it will be enforced.[25] However, if no such time is specified, "authority terminates at the end of a reasonable period."[26] In order to determine what is reasonable, consideration must be given to "the nature of the act specifically authorized, the formality of the authorization, the likelihood of changes in the purposes of the principal and other factors."[27] The agreement between the athlete and the agent would have to be analyzed to determine what services were contemplated, and whether the agent was retained solely for contract negotiation or was expected to remain past that stage for investment and/or promotional advice.[28] If the agreed purpose of retaining the agent was only for contract negotiations, then the agency will terminate on completion of those negotiations.[29] If further services were contemplated, whether termination was reasonable will depend on the facts and circumstances of the particular case.[30] The courts have, however, held that since agency is consensual and either party may withdraw at will, where the length of the term of agency is not fixed, a withdrawal at any time

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24. *See, e.g.*, NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961); Montgomery Ward & Co. v. Tackett, 163 Ind. App. 211, 323 N.E.2d 242 (1975).

25. A sample contract used by Probus Management, discussed in notes 101-18 *infra*, contained the clause: "This agreement shall become effective on the date herein above first set forth and shall become in effect until ____ day of _____, 19 ____, and shall be automatically renewed from year to year thereafter unless either party notifies the other to the contrary by Certified Mail, Return Receipt Requested, sixty (60) days before the end of any annual termination date." FINAL REPORT, *supra* note 5, at 541-42.

26. RESTATEMENT (SECOND) OF AGENCY § 105 (1958). *See also* Beaucar v. Bristol Federal Savings and Loan Ass'n, 6 Conn. Cir. Ct. 148, 268 A.2d 679 (1969); Rutter v. Rutter, 74 N.M. 737, 398 P.2d 259 (1965).

27. RESTATEMENT (SECOND) OF AGENCY § 105, Comment b (1958). *See* Beaucar v. Bristol Federal Savings and Loan Ass'n, 6 Conn. Cir. Ct. 148, 169, 268 A.2d 679, 687 (1969).

28. *See* C. LOWELL & J. WEISTART, *supra* note 10, at 331. The Trope contract discussed in notes 119-34 *infra*, was basically for contract negotiation. *See* note 16 *supra*.

29. C. LOWELL & J. WEISTART, *supra* note 10 at 331. *See also* Weichel v. Lojka, 185 Neb. 819, 179 N.W.2d 112 (1970); Dunlap v. Dean, 109 Cal. App. 300, 292 P. 991 (1930); RESTATEMENT (SECOND) OF AGENCY § 106 (1958).

30. *See generally* Annot. 89 A.L.R. 252 (1934); Annot. 52 A.L.R. 546 (1928); 32 A.L.R. 209 (1924).

will not be a breach of contract unless there is at least some understanding that it was to continue.[31] The one seeking to claim under the contract will have the burden of proving that there was an expectation that the relationship was to continue for some period of time.

A further issue that the judiciary must decide is whether the agent was meant to be the only person who could provide the services for the athlete. This will depend on whether the agent was considered the exclusive representative of the athlete. Typically, written contracts between agents and athletes contain a clause specifying the agent as an exclusive representative.[32] This has important ramifications for the athlete. Under agency law the principal is allowed to compete with the agent "either in person or through another agent, to accomplish the result without compensation to the first agent,"[33] unless either the specific terms of the contract or the surrounding circumstances indicate otherwise. Where the contract specifies that the named agent is to be the only one to perform these services and indicates that even the athlete is precluded from performing the services for himself, if the services are then provided by someone else or the athlete himself, there is a breach of contract. In the absence of such specification the inference is that there is a privilege to compete.[34] It is important to look at the terms of

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31. *See, e.g.*, Magness v. Madden, 212 Ark. 646, 207 S.W.2d 714 (1948) (court found agency had a five year term because a clause in the contract gave employee an opportunity to buy part of the business in five years).

32. C. LOWELL & J. WEISTART, *supra* note 10, at 323. *See* S. GALLNER, *supra* note 4, at 124-26, containing a standard contract used by some sports management firms. A typical provision reads: "You authorize us and we agree to serve you as exclusive personal representatives and business advisor." *Id.*

The contract used by M.L. Trope, discussed *infra* notes 119-34 contained a similar provision:

> I hereby engage and employ you as my sole and exclusive business and personal representative and advisor in connection with the negotiation of my professional football contract.... This is an exclusive agreement between MLT and me, and accordingly, during the term of this agreement, I agree that I will not enter into any agreement or other arrangement with any other person or firm to perform the services to be performed by MLT hereunder or which would be inconsistent with, or in any other way detract from the terms of my agreement with MLT.

Trope v. Anderson, No. C 280119 (Cal. Super. Ct., filed Apr. 12, 1979), Exhibit A, at 1-2.

33. RESTATEMENT (SECOND) OF AGENCY § 449, Comment b (1958). *See also* Potts v. Thompson, 61 N.J. Super. 424, 161 A.2d 284 (App. Div. 1960). However, it should be noted that customs of the trade, the particular language of the contract and other indicia of the parties' intent must be considered. Thus, if it can be established that it was the custom of the trade in sports management contracts or that it was generally understood to be an exclusive agency contract, the court may consider it as such, even though it was lacking the term "exclusive." *See* C. LOWELL & J. WEISTART, *supra* note 10, at 325.

34. RESTATEMENT (SECOND) OF AGENCY § 449, Comment b (1958) states:

> *Inference that principal can properly compete in person or otherwise.* Whether or not a principal who has contracted to pay an agent compensation if the agent is successful in accomplishing a definite result promises that he will not compete with the agent, either personally or through another agent, depends upon the manifestations of the parties, interpreted in the light of the circumstances in which the manifestations are made. In the absence of specific terms in the contract or of circumstances indicating otherwise, the

the actual contract and the customs of the sports agent trade to determine what was intended by the parties at the time of the agreement.[35]

The agent's right to compensation in the event of dismissal is determined by whether the agency is deemed exclusive. If the agency is nonexclusive, the athlete has the right to employ another agent to negotiate his contract or provide other services,[36] and the first agent will only be entitled to compensation if he completes the task for which he was employed.[37] In the event the agency is deemed exclusive, if the athlete employs another agent to provide the services, the first agent will be entitled to damages for breach of contract. Often the agency contract will specify the damages in the event the athlete employs another agent.[38] These damages will be applied provided they meet the rule as to

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principal is privileged to compete with the agent and, either in person or through another agent, to accomplish the result without compensation to the first agent.

See, e.g., Schwob v. International Water Corp., 136 F. Supp. 310 (D.Del. 1955); Dahath Electric Co. v. Suburban Electric Development Co., 332 Pa. 129, 2 A.2d 765 (1938).

35. It would seem that for an agent employed solely to negotiate the professional contract, in the absence of a term to the contrary, the agreement was probably meant to be exclusive. The situation seems analogous to one described in RESTATEMENT (SECOND) OF AGENCY § 449, Comment b (1958):

> On the other hand the customs of the business or profession or the circumstances surrounding the making of the contract may indicate that the agent is to be compensated if the result which he was employed to accomplish is achieved by another. Thus in most states an attorney employed to compromise a claim upon a contingent fee basis and promising to act therein ordinarily has a cause of action against the client if the client immediately employs another attorney to effect the compromise, or if he effects it himself.

See also, Tonn v. Reuter, 6 Wis.2d 498, 95 N.W.2d 261 (1959) (where attorney employed on contingent fee contract is discharged, proper measure of damages is the amount of contingent fee minus cost of services which would have been expended); Berry v. Nichols, 227 Ark. 297, 298 S.W.2d 40 (1958) (Attorney entitled to recover agreed percentage of amount ultimately received less expenditures); *but see* Sohn v. Brockington, 371 So.2d 1089 (Dist. Ct. App. 1979) (Attorney discharged without cause by his former client before he had accomplished contingency stated in his contingency fee contract, was not entitled to recover under the contract but only on quantum meruit basis).

36. He may also do so himself. Note that with some courts, even if the contract specifies that one is given an "exclusive agency" to deal with specific property, that is interpreted only as precluding the principal from appointing another agent, not from accomplishing the result himself. *See, e.g.*, Stahlman v. National Lead Co., 318 F.2d 388 (5th Cir. 1963); Ballard v. Tingue Mills, Inc., 128 F. Supp. 683 (D. Conn. 1954).

37. A noted commentator states that:

> An agent whose compensation is dependent upon the accomplishment by him of a specified result is entitled to the agreed compensation only if he achieves the result within a reasonable time or the time specified, unless the principal terminates the relation in bad faith, or, if the agent had the exclusive right to act, the result is achieved by the principal or another agent.

W. SEAVEY, AGENCY § 171, at 274 (West 1964).

38. The contract form used by M.L. Trope, discussed in notes 119-34 *infra*, contained such a provision: "[T]he fees provided for in paragraph 7 shall be due and payable to MLT in respect to any contract negotiated and/or entered into for my services as a professional football player, irrespective of the effective date of such contract, and whether or not MLT participated in the negotiation or execution...." Trope v. Anderson, No. C 280119 (Cal. Super. Ct., filed Apr. 12, 1979), Exhibit A, at 4.

liquidated damages.[39] The general rule of damages will otherwise apply. The agent would then be entitled to the net amount of losses caused and gains prevented in excess of savings made possible by termination of the agreement.[40] In the sports context, the agent should recover the value of his commission minus any expenses he would have incurred in performing the designated services for the athlete. In order to recover, the agent will have to prove with a showing of reasonable certainty that he could have performed the services.[41] This should present no difficulty if the agent bases his claim on the contract that the athlete eventually negotiates with the professional team, since it will be available as proof that a contract could have been negotiated. It will be more difficult if the agent attempts to sue for commissions he would have received from endorsement contracts and investments.[42]

Thus, the agent appears adequately protected by contract and agency law from being deprived of his lawful commissions. However, the athlete is not similarly protected from overreaching practiced by agents. The problem is strikingly clear in the case of college athletes preparing to enter the professional ranks, who often have insufficient business acumen and are easily preyed upon by fast-talking agents.[43] The athlete,

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39. Liquidated damage clauses, where enforced by the court, determine the measure of damages the court will award. In order to be enforceable, however, the liquidated damage clause must usually meet two requirements: 1) It must reasonably forecast the amount of damages as of the time of contracting, and 2) the harm caused by the breach must generally be difficult or impossible to calculate accurately even after the fact. *See* Southwest Engineering Co. v. United States, 341 F.2d 998 (8th Cir. 1965); Gorco Construction Co. v. Stein, 256 Minn. 476, 99 N.W.2d 69 (1959); RESTATEMENT OF CONTRACTS § 339 (1932). The courts will not enforce a liquidated damage provision that is a penalty. *See, e.g.,* Priebe and Sons v. United States, 332 U.S. 407 (1947); J. Weinstein & Sons, Inc. v. City of New York, 264 A.D. 398, 35 N.Y.S.2d 530 (1942).

40. *See* RESTATEMENT OF CONTRACTS § 329 (1932). *See also* American Air Filter Co. v. McNichol, 527 F.2d 1297 (3rd Cir. 1975); Northern Helex Co. v. United States, 524 F.2d 707 (Ct. Cl. 1975).

41. *See* C. LOWELL AND J. WEISTART, *supra* note 10, at 325. *See, e.g.,* North American Pump Corp. v. Clay Equipment Corp., 199 N.W.2d 888 (N.D. 1972); John B. Robeson Assoc. v. Gardens of Faith, Inc., 226 Md. 215, 172 A.2d 529 (1961); Wilson Sullivan Co. v. International Paper Makers Realty Corp., 307 N.Y. 20, 119 N.E.2d 573 (1954).

42. *See* C. LOWELL & J. WEISTART, *supra* note 10, at 325. This is a mere extension of the "reasonable certainty" rule of damages. It will be more difficult to show just how many indorsement contracts and successful investments could have been obtained if the agency had been allowed to continue. The principle has been stated as follows:

> The amount of damages must be established with reasonable, but not with absolute certainty ... absolute certainty is not required; it is sufficient if a reasonable basis or computation is afforded, although the result be only approximate.... However, where actual pecuniary damages are sought there must be evidence of their existence and extent, and some data from which they may be computed.

Thrower v. Coble Dairy Products Co-Operative, 249 N.C. 109, 113, 105 S.E.2d 428, 431 (1958). *See also* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Dowling Supply & Equipment, Inc. v. City of Anchorage, 490 P.2d 907 (Alaska 1971).

43. Apparently the greatest talent some of the agents possess is the ability to exploit college athletes. Sam Gilbert, the representative who negotiated contracts for professional basketball stars Kareem Jabbar and Sidney Wicks has said, "I dislike super agents. They prey on unsuspecting

in contracting with someone to be his exclusive agent puts his future into the hands of that agent. He has limited his right to seek assistance from other sources and may be wholly dependent on his agent to obtain a contract, for investment and tax advice, and possibly for future endorsements.[44]

2. Sports Agents' Duties

To decide whether the athlete is adequately protected by law in his dealings with agents, it is important to determine what duties the agents owe the athletes and to what standards they will be held. Agency is described as a fiduciary relation between prinicipal and agent.[45] This defines the primary aspect of the relationship. Agents must exercise the utmost good faith, loyalty and honesty toward their principals.[46] The agents obviously are obligated to fulfill the terms of their contractual agreements. In addition, there are a number of duties imposed on them by general agency law.[47]

The first function that the athlete normally seeks to have the agent perform is the negotiation of his professional contract. An agent who claims that he is capable of representing an athlete in the complicated negotiations necessary in professional sports contract talks impliedly represents that he has knowledge and skills which are standard to the sports agent profession,[48] unless he represents that he has greater skill

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black athletes with ghetto backgrounds. Agents like that ought to be paid an hourly fee, not on percentage. After all no one is worth ten percent of a player's earnings." Adams, *Agents Due Thinner Cuts, More Slices of Pro Basketball Pie After Merger,* The Louisville Courier-Journal and Times, Aug. 11, 1971 (*quoting* Sam Gilbert), *reprinted in* Hearings, *supra* note 1, at 435.

44. For a discussion of a sample contract *see* note 16 *supra.*

45. W. SEAVEY, AGENCY § 3 (West 1964); RESTATEMENT (SECOND) OF AGENCY § 1 (1958). Justice Cardozo gave a classic expression to the meaning of fiduciary:

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.... Only thus has the level for fiduciaries been kept at a level higher than that trodden by the crowd.

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

46. *See, e.g.,* Klein v. Twentieth Century — Fox International Corp., 201 Misc. 132, 108 N.Y.S.2d 767 (1951); McKeehan v. Wittels, 508 S.W.2d 277 (Mo. App. 1974).

47. These include a duty of good conduct, a duty to give all relevant information to the principal, a duty to account, a duty not to disobey, a duty of loyalty to act solely for his employer in the area of his employment, a duty to account for his own profits, a duty not to have any unrevealed conflicts of interest, a duty not to compete with the principal, a duty not to disclose confidential information, and a duty to act in the principal's name. *See generally* W. SEAVEY, AGENCY §§ 140-154 (West 1964).

48. *See* W. SEAVEY, AGENCY § 140 B. (West 1964). *See also* U.S. Liability Ins. Co. v. Haidinger-Hayes Inc., 1 Cal.3d 586, 594, 463 P.2d 770, 774, 83 Cal. Rptr. 418, 422 (1970) (a professional agent is required to possess the knowledge and to exercise the skill and diligence expected

or the athlete has reason to know that he possesses less.[49] The agent is not under an obligation to get the best possible contract for his client; he is, however, under a duty to be adequately acquainted with the customs and practices of the trade and must act in conformance with those customs.[50] The agent will be judged against the standards existing at the time the contract was negotiated. In the area of contract negotiations the standards should be easy to ascertain since there will be other agents negotiating for other athletes with similar abilities. The agent must have performed the negotiations with the same expertise generally possessed by others in the field.[51] If he fails to perform with the standard degree of expertise, he will be liable for losses the athlete suffers due to his lack of such skills.

The agent has similar responsibilities in giving investment advice or making investments for the athlete. If the agent agreed to perform such services the athlete has a right to insist on this performance. When the agent contracts to provide investment advice, he puts himself in the position of a trustee in a traditional trust arrangement.[52] Moreover, the representative must be aware that there are various federal and state securities laws which govern the area of investment advice.[53] The agent has the responsibility of knowing the applicable laws and how they might pertain to his client, the athlete.

Finally, the situation is more complex in regard to the agreement by an agent to promote the athlete and procure endorsements. The number of promotional contracts that an athlete will obtain may, to some extent, depend on the amount of time put in by his representative.[54] The

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of him); Rickertsen v. Carskadon, 172 Neb. 46, 48, 108 N.W.2d 392, 394 (1961) (one undertaking for a consideration to do work requiring skill, impliedly represents that he possesses and will exercise such skill as the nature of the service may require); Malone v. Gerth, 100 Wis. 166, 171, 75 N.W. 972, 974 (1898) (an attorney must use a reasonable degree of care and skill and possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession).

49. If the agent represents that he has greater than the general skill of other agents in the field, he will be held to this greater standard. If he represents that he has less or the principal knows he has less, then he is held to a reduced standard. *See generally* RESTATEMENT (SECOND) OF AGENCY § 379 (1958); Nixon & Webster v. Bogin, 26 S.C. 611, 2 S.E. 302 (1887).

50. C. LOWELL & J. WEISTART, *supra* note 10, at 327. *See also* note 48 *supra.*

51. *See, e.g.,* U.S. Liability Insurance Co. v. Haidinger-Hayes Inc., 1 Cal.3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970); O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W.2d 507, (1949); Isham v. Post, 141 N.Y. 100, 35 N.E. 1084 (1894).

52. LOWELL & WEISTART, *supra* note 10, at 327. Unless otherwise agreed, an agent employed to make or to manage investments has a duty to the principal:

(a) to use care to invest promptly;
(b) to invest only in such securities as would be obtained by a prudent investor for his own account, having in view both safety and income, in the light of the principal's means and purposes; and
(c) to change investments in accordance with changes in the security of the investments or the condition of the principal, if his duties include management.

RESTATEMENT (SECOND) OF AGENCY § 425 (1958).

53. The Investment Advisors Act of 1940 will most probably apply to the sports representative in many situations. 15 U.S.C. §§ 80b-1 - 80b-21 (1971).

54. *See* C. LOWELL & J. WEISTART, *supra* note 10, at 327.

standard used to judge the agent is, at a minimum, the duty to perform at a level of skill possessed by others in the field.[55] This is more difficult to measure in the field of promotions where there is a question of how much time an agent should spend promoting a second rate athlete as opposed to a superstar. Where an exclusive contract exists, there is unquestionably some duty on the part of the agent to attempt to secure placements for the athlete.[56] The courts have defined this duty as an obligation to use "best efforts" to promote the client.[57] In determining whether this standard was observed, the courts will look to the facts and circumstances of the individual case. If the agent is deemed not to have used his best efforts, the athlete will have an action for damages. In the area of promotional services the agents must be aware of the existence of state statutes, especially those of California and New York,[58] which regulate agency contracts whose goals are to procure employment for their principal. These statutes may have the effect of voiding the contract between the athlete and the agent.[59] Additionally, notice must be taken of state statutes and regulations that specifically govern managers' or agents' contracts in certain sports, particularly boxing.[60]

3. Inadequate Legal Protection For Athletes

Agency and contract law adequately protect the agent from being deprived of the compensation to which he is entitled. The majority of complaints will stem from the fact that another agent negotiated a contract in place of the plaintiff agent. The agent is therefore assured recovery of damages from the existing contract. More serious doubts are raised concerning the adequacy of the protections for an athlete who has been duped into signing with an incompetent agent. There is

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55. *See generally* note 48 *supra*.

56. *See* C. LOWELL & J. WEISTART, *supra* note 10, at 327. *See also* North American Pump Corp. v. Clay Equipment Corp., 199 N.W.2d 888, 894, (N.D. 1972) (in exchange for plaintiff's right to purchase defendant's equipment and to sell it in the exclusive area assigned to it, the plaintiff was bound to do a certain amount of advertising and to exercise its best efforts to sell the defendant's equipment); Wood v. Lucy, Lady Duff-Gordon 222 N.Y. 88, 92, 118 N.E. 214, 215 (1917) (plaintiff's "promise to pay one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence").

57. *See, e.g.*, HML Corp. v. General Foods Corp., 365 F.2d 77 (3d Cir. 1966) (where owner of a product gives exclusive agency, solely in return for royalties but no promise is expressed by the agent to use his best efforts to promote it, such promise will be implied); Vacuum Concrete Corp. of America v. American Machine & Foundry Co., 321 F.Supp. 771 (S.D.N.Y. 1971); Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

58. *See* CAL. LABOR CODE §§ 1700-1700.46 (West 1971); N.Y. GEN. BUS. LAW §§ 170-190 (1968 McKinney).

59. *See, e.g.*, Russell-Stewart Inc. v. Birkett, 24 Misc.2d 528, 201 N.Y.S.2d 687 (N.Y. Sup. Ct. 1960) (contract deemed an "exclusive agency contract" was declared void in violation of New York's General Business Law).

60. *See, e.g.*, MASS. GEN. LAWS ch. 147 § 35 (West Supp. 1979); CAL. BUS. & PROF. CODE § 18674 (West 1964); N.Y. UNCONSOL. LAWS § 8907 (McKinney 1974).

nothing to prevent an underqualified agent from invading college campuses, offering money and other benefits and inducing athletes to sign agency contracts which are not in their best interests. For example, many agents charge a fee of ten percent of the gross contract merely for conducting negotiations with the professional team. "Most agents agree ... that ten percent is excessive unless very special services are provided."[61] Not realizing this fact, many athletes will sign such contracts; the courts will probably enforce them because they are not so grossly outrageous as to be unconscionable.

The opportunity for abuse in the field is great and the occurrence of it is not uncommon. A typical situation involves an agent who is employed to negotiate a contract, his commission being ten percent of the negotiated value.[62] He then negotiates a $50,000 contract with a $5,000 bonus payable immediately. The contract will not have a no-cut clause,[63] and if the athlete does not make the team he does not receive his salary. On the other hand, the agent will collect his fee out of the bonus leaving the athlete with nothing.[64]

On May 18, 1976, the United States House of Representatives formed a Select Committee on Professional Sports for the purpose of investigating the apparent instability prevailing in this area and reporting on the need for any remedial legislation.[65] One of the areas investigated by the committee was that of athletes' agents.[66] The testimony demonstrated that the agents themselves conceded, "there are problems with fee gouging, breach of fiduciary relations, conflict of interest and outright fraud."[67] Representatives of the players associations confirmed that they had come across these and other unethical practices.[68] Nevertheless, no witness called for any form of federal regulation. Most felt that the profession was small and self-policing and that unethical or incompetent agents would eventually be weeded out by word of

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61. Black, *supra* note 10, at 89.

62. This situation is discussed in length by S. GALLNER, *supra* note 4, at 67.

63. A player's agent stated, "the no-cut is a guaranteed contract in the sense that a player will get the compensation provided in his contract whether or not he demonstrates the skill to make the team...." *Hearings, supra* note 1, at 289 (statement by Jack Mills, player's agent).

64. S. GALLNER, *supra* note 4, at 67.

65. H. R. RES. 1186, 94th Cong., 2d Sess. (1976).

66. The committee's final report stated:

> The Committee heard as witnesses three full-time player agents; an executive director of a players' association who also acted as an agent for member players (as well as other players); and three player association executives who did not represent individual players. Testimony on this subject also came from club owners and league officials. Two other player association executives, who also represented large numbers of agents, were unable to appear because of prior commitments, but one subsequently submitted a statement for the record.

Final report, supra note 7, at 71.

67. *Id.* at 73.

68. *Id.*

mouth.[69] This method has not been very effective in ending the controversy.[70] The House committee decided not to recommend any action on the federal or state level but advised that a successor committee undertake an investigation to further determine the nature and scope of abuses of the agent-client relationship in professional sports and the appropriateness and need of federal involvement.[71] The end result was that nothing was done. The hope apparently was that the situation would remedy itself.

II. CURRENT RULES GOVERNING AGENT PRACTICES

A. The National Collegiate Athletic Association

The National Collegiate Athletic Association (NCAA) is an unincorporated association of more than eight hundred member colleges and universities and is the principal regulatory board for intercollegiate athletics.[72] One of its stated purposes is "[t]o legislate through bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics."[73] A fundamental policy of the NCAA is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports."[74] The NCAA is a powerful organization with control over the

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69. *Hearings, supra* note 1, at 290. Agent Jerry Kapstein stated: "[W]e are an extremely small industry; a small amount of clients and even a smaller amount of representatives.... It does not take very long for the grapevine to weed out the bad apples among us." *Id.*

70. In July, 1978, a year and a half after the Final Report of the Committee, it was reported:

> Most agents are reputable, but a shocking percentage are not, and a whole new NFL — National Fish League — could be started with the athletes who have been ripped off by the muscle merchants. Because agents need not be licensed or bonded, the field has attracted fast-buck artists who take money under the table from teams, use the wallop of one player to gain leverage in bargaining for another and engage in double billing and other fraudulent practices. Some agents con players into signing long-term contracts in which the agent gets 10% of *all* the player's income, including inheritances. And while much of the athlete's money may be deferred when he signs with a team, the agent takes his cut of the total package right away. 'Anyone can pick up a brief case and call himself an agent,' says Nick Buoniconti, an agent, lawyer and former Miami Dolphin Linebacker. 'A kid can absolutely be taken to the slaughter house before he realizes what has happened.'

Kennedy & Williamson, *Money in Sports Part II, For The Athletes How Much Is Too Much,* SPORTS ILLUSTRATED, July 24, 1978, at 48. *See also* New York Times, April 29, 1980, § B, at 19, col. 1.

71. FINAL REPORT, *supra* note 5, at 79. The Committee also urged that "representatives of all player associations, league officials, national and local bar associations and other interested parties, arrange to meet and initiate the process of establishing uniform professional standards and mechanisms for industry self-enforcement of such standards." *Id.*

72. *See* Dickerson & Chapman, *Contract Law, Due Process and the NCAA,* 5 J. C. AND U. L. 108 (1978).

73. NCAA CONST. art. II, sec. 1(h) (1979).

74. NCAA CONST. art. II, sec. 2(a) (1979).

activities of many athletes prior to their joining the professional ranks.[75] The organization is in the best position to educate collegiate athletes regarding the process and problems of turning professional.[76]

The NCAA has legislated on agents' practices, particularly that of invading the college campus and signing students to contracts while the athlete still has remaining eligibility. An NCAA rule states that any athlete who signs with an agent to represent him in a sport will no longer be eligible to participate in that sport.[77] That is the only NCAA rule on the practice of agents dealing with college athletes. This rule would be beneficial to the operation of the industry if it were actually obeyed. If agents remained off campus until the student's eligibility expired, then they could at that time openly approach the athletes and present their offers of representation. The athlete could then seek advice as to which agent would be most beneficial to him. A major problem is that this rule is being virtually ignored by agents. One agent stated that, "[t]he rules are ridiculous and they're not being followed by anybody.... Why should I honor the NCAA rules when I'm not even bound by them? And I don't intend to honor them, not ever, unless Congress says that all the rules of the NCAA are the laws of the United States, and you can go to prison for ten years if you break them."[78] This statement exemplifies the problem the NCAA has in dealing with agents. The agents are in no way bound by NCAA rules. Therefore, they approach an athlete while he still has remaining eligibility and come to an agreement which they keep secret until the athlete's eligibility expires. The whole process is conducted in secrecy due to the athlete's fear of losing his eligibility. Thus, the athlete has no opportunity to seek counsel. Due to the confidentiality of the entire process, the NCAA's lone sanction against the athlete, i.e., the threat of removing his eligibility, is effectively nullified.[79]

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75. Note that the NCAA has no control whatever over athletes who are not competing in collegiate athletics. The majority of professional hockey players to date have come out of the Canadian junior leagues and have had no contact with the NCAA.

76. It should be noted that the NCAA functions by acting directly against member schools not the athletes themselves. (based on discussion with Steve Morgan, Executive Assistant of NCAA, on April 23, 1980). The NCAA could then pressure the schools through the athletic departments to warn and advise collegiate athletes.

77. NCAA CONST. art. III, sec. 1(C) (1979). The NCAA attempts to magnify this point in its manual by providing the following question: "May the student-athlete agree to be represented by an agent without jeopardizing his eligibility for the intercollegiate sport when the negotiations are to take place after he has completed his eligibility." The question is answered thus: "No. A student athlete who agrees or has ever agreed to be represented by an agent or an organization in the marketing of his athletic ability or athletic reputation, no longer shall be eligible for the intercollegiate sport." NCAA, MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 188 (March 1979).

78. Johnson & Reid, *supra* note 8, at 30, *quoting* M.L. Trope.

79. *Id.* In a discussion with an NCAA enforcement official he stated: "I don't agree with Trope one hundred percent. It is an over-generalization that all agents ignore the rules. But it is a

Looking to the NCAA to provide a check on agent practices is probably misguided. The NCAA is powerless to act against anyone not a member of its organization; as non-members, agents are therefore free to ignore NCAA rulings. The NCAA seeks only to protect its limited interest of governing intercollegiate athletics; its concerns with the athlete will terminate once an athlete leaves college. The transition from amateur to professional is a matter outside of its scope.

B. American Bar Association: Code of Professional Responsibility

Many representatives of professional athletes are lawyers. In 1976, Edward Garvey, executive director of the National Football League Players Association (NFLPA), stated that he was considering registering a formal complaint with the American Bar Association (ABA) regarding the unethical conduct of some lawyer agents representing NFL players.[80] The ABA influences the conduct of its members through its canons of professional ethics. The canons are enforceable "by the courts and must be respected by members of the bar...."[81] The Disciplinary Rules are considered mandatory in nature, and disciplinary measures may be brought for violations of the code.[82]

There are, however, two major deficiencies regarding the restraints available to the ABA to prevent abusive agent practices. The first concern stems not from the ABA itself but involves the range of its powers. ABA canons have no effect on non-lawyers, who comprise a substantial percentage of players' agents. The other problem is that the restraining effect of the ABA canons on lawyers themselves is questionable.

There are a number of ABA rules that have a direct bearing on a lawyer acting as an athlete's agent. Perhaps the most relevant of these rules are Disciplinary Rule 2-103(A)[83] which provides that a lawyer shall not recommend himself or his organization to a client who has sought

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problem in the system of enforcement that we have no jurisdiction over agents. The problem being that one of the two people involved in the commitment, the agent and the athlete, the agent is totally outside the jurisdiction of the NCAA." (statement by Steve Morgan, Executive Assistant of the NCAA made in a conversation with the author on April 23, 1980).

80. GLOBE AND MAIL (Toronto), Feb. 6, 1976, at 32, col. 1.

81. In re Meeker, 76 N.M. 354, 357, 414 P.2d 862, 864 (1966), appeal dismissed, 385 U.S. 449 (1967).

82. The ABA Code of Professional Responsibility states: "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE AND PRELIMINARY STATEMENT, at 4 (1979).

83. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (A) (1978) provides: "A lawyer shall not, except as authorized in DR 2-101(b), recommend employment as a private practitioner, of himself, his partner or associate to a layperson who has not sought his advice regarding employment of a lawyer."

his advice, and Disciplinary Rule 2-103(B)[84] which states that a lawyer may not give anything of value to any person or organization to recommend or secure his employment. These two rules should have the effect of banning the solicitation of athletes as legal clients and prohibiting the payment of money to athletes, their coaches, or family to induce them to retain the lawyer as the athlete's agent. These two practices are vital in the operation of some agents' businesses; they also tend to invite abuse.[85] However, when the Select Committee[86] questioned lawyer-agents on how they dealt with the ban on solicitation, they found that Rule 2-103(A) had been avoided. Witnesses responded that either they no longer practiced law,[87] although none had relinquished his license to practice, or that those who still wished to continue practicing law had apparently set up corporations which employed non-lawyers to solicit athlete clients.[88] Although the disciplinary rules should have restrained the agents from soliciting on college campuses, methods were found to negate their effect.

Many of the other canons, ethical considerations and disciplinary rules have a similar bearing on the relationship between the athlete and the lawyer-agent. DR 6-101(A)(1) states that, "A lawyer shall not (1) [h]andle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it."[89] This rule should prohibit negotiations for athletes by a lawyer-agent who knows or should know of his inadequacies in certain areas. A lawyer should recognize that in negotiating a professional sports contract there are numerous considerations besides money. A common complaint by athletes is that agents negotiate the largest contract possible in terms of dollars, take a percentage off the top as their compensation and leave. DR 6-101(A)(1) would require lawyer-agents, under threat of disciplinary action, to be competent to handle negotiations to the athlete's best advantage or to engage the assistance of one capable of doing so.

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84. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (B) (1978) states:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103 (D).

85. *See* S. GALLNER, *supra* note 4, at 53, where the author states:

Other agents known in the trade as 'leeches' make loans to players in return for their consent to let them serve as their agents. It is reported that some athletes receive up to three hundred dollars per month until their pro contracts are consummated when the collegiate season is finished.

86. *See* note 1 *supra.*

87. *Hearings, supra* note 1, at 297.

88. *Id.* at 297-98. Note that this action probably violates DR 1-102(2) of the ABA code which provides that "[a] lawyer shall not [c]ircumvent a Disciplinary Rule through actions of another." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(2) (1979).

89. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101 (A)(1) (1979).

Other rules may have a similar effect on curbing some problems in the field. One rule requires that a lawyer may not engage in any "conduct involving dishonesty, fraud, deceit or misrepresentation."[90] Although the particular actions of the agent may not be reprehensible enough to allow the athlete to prevail in a civil action for fraud, perhaps the threat of disciplinary action by the bar will restrain the agent from engaging in such borderline activities. DR 2-106 should have the effect of helping to restrain the collection of excessive compensation by agents.[91] Finally, Canons[92] should provide guidance for the lawyer-agent on how to proceed in a conflict of interest situation which might possibly occur when an agent represents more than one athlete.

The presence of lawyers in the sports agency field undoubtedly has a positive effect. In order to be licensed as an attorney a person must, at a minimum, possess a degree from an approved law school which guarantees a level of training which does not necessarily exist in lawyer-agents. The ABA Code provides some enforceable ethical standards to a field which is otherwise void of them. The Code, however, may be too vague to provide effective guidance.[93] Also, the ABA is powerless to exercise substantial control over the athlete-agent relationship due to the fact that agents need not be lawyers.

C. The Association of Representatives of Professional Athletes

The final organization purporting to have some effect on the sports agency profession is the Association of Representatives of Professional Athletes (ARPA). The ARPA is an organization of agents that was

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90. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(4) (1979).

91. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106 (1979). This provision states:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Id. (citations omitted).

92. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5 (1978) provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

93. *See generally* Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C.L. REV. 671 (1979).

founded in 1978. Its purpose is to improve the standards regarding the representation of professional athletes. However, the organization has encountered problems in implementing its purpose. The shortcomings of the organization in regulating the sports agency field stem mainly from the fact that membership is voluntary.

Since agents need not be members of the ARPA in order to represent professional athletes, the rules promulgated by the organization are not binding on them. Among these rules is a Code of Ethics. One of the major reasons an agent would join the ARPA is to claim that he subscribes to this Code. The Code has attempted to establish ethical standards in a profession that has no other organization specifically established for this purpose. The ability of the ARPA to impose its standards on the profession has yet to be proven; its rules may, however, serve a purpose in establishing the standards that should be considered in future litigation between athletes and their agents.

Despite its apparent ineffectiveness, the existence of the ARPA Code of Ethics demonstrates that many agents perceived a need for self-regulation. The Code deals with areas in the agent-athlete relationship that have been the source of a number of problems. The ARPA Code is similar to the ABA Code of Professional Responsibility[94] in format in that it contains five canons with a number of rules for each canon. All of the rules deal directly with areas that have been mentioned by critics of the sports agent profession.[95] The rules attempt to prohibit practices by agents who are not qualified or able to act in the best interest of the athlete.[96] Certain canons concern an agent's integrity, ability and professional conduct.[97] Another rule prohibits the agent from giving loans or payments in order to secure the representative's employment by the athlete.[98] In addition, the Code attempts to deal with the problems mentioned by the agents who testified before the Select Committee on Professional Sports, including fee gouging, breach of fiduciary relations, conflict of interest and fraud.[99]

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94. Discussed in notes 80-93 and accompanying text *supra*.

95. *See* note 7 and accompanying text *supra*.

96. ARPA CODE OF ETHICS, Rule 1-103(A) (1-2) (1979), provides:

> A Representative shall refrain from accepting the representation of a professional athlete when (1) [t]he Representative does not possess the competence through training by education or experience in a particular area, (2) [t]he Representative's representation of the athlete will create differing or unresolveable conflict of interest with an existing client or with an existing financial enterprise.

97. ARPA CODE OF ETHICS, Canon One provides that "[a] Representative shall maintain the highest degree of integrity and competence in representing the professional athlete." Canon Two provides "A Representative shall be dignified in the conduct of his profession." ARPA CODE OF ETHICS, CANONS ONE AND TWO (1979).

98. ARPA CODE OF ETHICS, Rule 2-103(A) (1979).

99. Rule 2-104(B) provides: "A Representative shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." This is followed by standards for determining if the

The problem with the ARPA Code is that it establishes standards for ideal conduct but does not set up any enforcement mechanism. If the Association becomes a strong, effective organization, the guidelines it establishes will have a concrete beneficial effect on the profession. As long as the Association is in its present voluntary stage, the Code of Ethics will remain ineffectual.

Thus, there are three organizations with varying degrees of influence on the profession. However, there are still no agents' associations or other organizations that set up and effectively enforce minimum standards for the profession. The ARPA Code is basically an unenforceable statement of ideals. The ABA Code of Professional Responsibility provides somewhat effective standards of ethics and competence which apply only to lawyers. The National Collegiate Athletic Association (NCAA) has virtually no effect on the practices of agents other than to force the negotiations between themselves and eligible athletes to be conducted in secrecy. The result is that "the only formal oversight of the profession is left to the independent and varying efforts of the players' associations and the workings of the marketplace."[100] In many situations this has not been enough to prevent athletes from suffering serious financial loss.

III. EXISTING CASE LAW

There have been very few cases in the agent-athlete area. A few of the cases that have been litigated provide insight into the methods utilized by professional sports agents and how courts deal with disputes between the parties. The courts have been willing to deal with conflicts and to provide remedies where one party took advantage of the other. However, in those situations where an athlete is damaged through the incompetence of his agent, legal remedies often come too late.

A. Burrow v. Probus Management, Inc.

The case that best documents some of the areas of agent mishandling of athletes' affairs is *Burrow v. Probus Management, Inc.*[101] Norman Young, an accountant, set up Probus to act as agent and business manager for professional athletes. His method of operation was to sign college athletes who were prospective draft picks to contracts naming

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fee is excessive. Rule 1-104(B) states: "A Representative shall act in the best interest of the professional athlete, bearing in mind the high degree of trust and responsibility reposed in him as fiduciary." Rule 1-101(A)(4) holds that: "A Representative shall not [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." For a discussion of the rule regarding conflicts of interest, *see* note 96 and accompanying text *supra*.

100. FINAL REPORT, *supra* note 5, at 72.

101. Civil No. 16840 (N.D. Ga., Aug. 9, 1973) (unpublished order).

him as their agent.[102] The contracts provided that Young handle the athlete's money and negotiate the terms of his professional contract. All salary payments were sent to Young, who was to pay the player's bills, provide living expenses, and invest the remainder. In return for these services Probus received a specified percentage, usually ten percent of the athlete's income from whatever source derived.[103]

While still a student at San Diego State University, Ken Burrow, the plaintiff in this civil action, was approached by Young for the purpose of representing Burrow as his agent and manager.[104] Probus obtained from Burrow, while he was otherwise ineligible to sign with an agent, a management contract dated in blank prior to his senior year.[105] Subsequently, on January 28, 1971, Burrow was drafted by the Atlanta Falcons.[106] Young negotiated an NFL contract for Burrow which provided for an initial lump sum bonus of $25,750, a first year salary, and several contingent bonuses.

Young represented to Burrow that he would provide a total financial service package for him.[107] Based on these representations, Burrow authorized the Atlanta Falcons to turn over his bonus and to deliver his twenty thousand dollar yearly salary to Probus.

It soon became apparent to Burrow and other athletes represented by Probus that Probus was not satisfying its obligations.[108] Several players found that access to their accounts was so restricted that they could not get their money on demand. They all "found that their bills were not being paid, promises of off-season employment and endorsement contracts were not being kept, and phone calls of inquiry were not being answered."[109] Some players alleged that Young took his ten percent commission on their new contracts even though he failed to respond to

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102. *See* FINAL REPORT, *supra* note 5, at 73.

103. *Id.* at 73-74.

104. Civil No. 16840 (N.D. Ga., Aug. 9, 1973) (unpublished order), at 1.

105. The Northern District Court of Georgia commented upon the signing of college athletes while they were still eligible to play amateur ball in the following manner:

> The evidence also shows that this practice was utilized in signing numerous other college football players during their senior year when they were likewise ineligible to sign professional football player contracts.
>
> This Court, as a sidelight, finds this as a corrupting factor in the youth of today, in a practice which this Court has observed with other collegiate ballplayers, not only in the field of football but also in basketball in which those things are often done, corrupting their morals in business ethics and doing improper and otherwise unethical acts.

Id. at 2.

106. *Id.*

107. *Id.* at 2-3. Young represented to Burrow that he would prepare income tax returns to his best advantage, manage his funds, render tax advice, establish tax shelters, make investments, pay his bills and living expenses and maintain a good credit reputation for Burrow. *Id.*

108. "Starting in 1970 Probus had signed contracts with at least eleven then prominent NFL players." FINAL REPORT, *supra* note 5, at 74.

109. *Id.*

their request to negotiate them.[110] He apparently took his commission based on newspaper accounts of the player signing on his own.[111] Three players alleged that "Young prepared tax returns or withheld money for income taxes without actually paying the taxes due to IRS."[112] Burrow began to receive inquiries from creditors concerning delinquent bills and had other problems with his financial affairs.[113] Confronting Young, he was continually reassured that there was no problem. Additionally, Young attempted to deliver a false Federal tax return for Burrow and failed to pay any state tax.[114]

The National Football League Players Association (NFLPA) brought action on behalf of some of the players represented by Probus. The *Burrow* case was brought principally for damages based on fraud and misrepresentation. The Northern District Court of Georgia found in *Burrow* that Young made the alleged representations and that Burrow reasonably relied on them to his detriment.[115] The court determined that, in addition to other misuse, Young's advice that Burrow accept all the bonus in one lump sum was not in Burrow's best interest but was for Young's benefit and created additional tax liability for Burrow.[116] The court found that Burrow had been damaged to the extent of $30,000. It was further found that Probus had acted in bad faith in its dealings with Burrow, and that the false and fraudulent acts constituted aggravating circumstances sufficient to authorize additional punitive damages of $60,000.[117]

On the surface, it appeared that in this case legal remedies were sufficient to protect the athlete. In actuality, however, the remedies proved inadequate. The NFLPA brought suit in behalf of some of the players and found that at the time of the suit "[i]nvestigation revealed that Young and Probus had court judgments totalling hundreds of thousands of dollars against them and that there were no discoverable assets. To date there has been no recovery by the players. Their collective loss is estimated by NFLPA to be in excess of $150,000."[118] The court was receptive to Burrow's claim and returned a favorable, but essentially uncollectable, judgment totaling $95,000.

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110. Young, it was alleged, was requested to renegotiate new contracts when the originals had expired. He failed to respond to these requests but took his standard ten percent fee despite his lack of participation.

111. FINAL REPORT, *supra* note 5, at 74.

112. *Id.*

113. Burrow v. Probus Management, Inc., Civil No. 16840 (N.D. Ga., Aug. 9, 1973) (unpublished order), at 3.

114. *Id.* at 4.

115. *Id.* at 5.

116. *Id.* at 4-5.

117. *Id.* at 6.

118. FINAL REPORT, *supra* note 5, at 74.

B. *Trope v. Anderson*

The criticism of the sports agent profession is not limited to charges of agents defrauding athletes. The area is clearly one in total turmoil. Some of the practices used by agents in inducing college athletes to employ them as representatives have recently been brought to light.[119]

Michael Trope is an agent who brought actions against fourteen players for several thousand dollars in lost commissions and loans.[120] Trope contended that Ottis Anderson, the defendant in one of these suits, *Trope v. Anderson,*[121] dismissed him after he had been retained to negotiate Anderson's professional football contract.[122] Trope claimed that on January 29, 1979, he entered into a contract with Anderson[123] under the terms of which he was to be the exclusive agent in connection with the negotiation of Anderson's professional football contract.[124] Trope sued for breach of contract following his dismissal by Anderson.

Trope's method of operation is of particular interest in light of the National Collegiate Athletic Association (NCAA) rule which prohibits an athlete from contracting to be represented by an agent.[125] Trope or one of his representatives would approach a college student, while the student was still eligible to play college football, and discuss the possibility of the athlete retaining Trope as his agent in the upcoming draft. An athlete's contracting to be represented by an agent is an act prohibited by the NCAA rules. Trope drew up an "offer sheet" which he had the athlete sign, consisting of a statement of all the terms of the agency agreement between the athlete and Trope. The agreement remained signed by the athlete alone until some time after the athlete's college eligibility expired. At that point Trope would sign the agreement. Trope's theory was that during such time as the agreement contained only the signature of one of the parties (the athlete), it was merely an offer, and not a valid contract. Trope's signing it after the college eligibility of the athlete had expired would then constitute an acceptance of the offer, thereby creating a contract; and the NCAA rule forbidding student athletes from contracting with an agent while still ineligible to play would not be broken.[126]

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119. For a summary of some of the methods used by agents to obtain college athletes *see* Black, *A Hard Look at Agents, Part II,* SPORT, Dec. 1979, at 75-82.

120. For an indepth discussion of the Trope situation, *see generally* Johnson & Reid, *supra* note 8, at 28-35.

121. No. C 280119 (Cal. Super. Ct., filed Apr. 12, 1979).

122. *Id.*

123. *Id.*

124. *Id.*, Exhibit A attached to complaint.

125. NCAA CONST., art. III, sec. 1(C) (1979). *See* notes 72-79 and accompanying text *supra.*

126. The NCAA disagrees with Trope despite his legal analysis. They maintained that by merely signing the offer sheet, an athlete would be agreeing to be represented at some future time in violation of their rules. Johnson & Reid, *supra* note 8, at 30. However, there is a discrepancy be-

The NCAA claimed that the offer sheet broke their rules, while Trope claimed that it did not.[127] While the offer sheet may have violated NCAA rules, the fact is not of great legal importance. Trope admitted that prior to the 1978 season he did not bother to use an offer sheet at all.[128] The reason he invented the offer sheet was because competition in the profession had grown intense, and he was looking for a legally enforceable contract which would not technically violate the NCAA rule. This method would serve to protect both the athlete from NCAA ineligibility and Trope himself.

There unquestionably existed an agency contract between Trope and the athletes even though there may be some question as to the time of its formation.[129] A lawyer defending an athlete in one of Trope's suits maintained that his athlete had a defense to the breach of contract charge. He claimed that "[t]he agreement is clearly voidable because it doesn't exist in the eyes of the law. It was made under fraudulent representation because it would jeopardize Jerry's (athlete's) amateur standing under NCAA rules."[130] Fraud invalidating a contract is a false representation of a material fact made with knowledge that it was false or in culpable ignorance of its truth with the intention that it be acted on by the party deceived, inducing him to contract to his detriment.[131] Raising the defense of fraud may prove difficult for athletes who signed with Trope. To make a contract void for fraud, the athletes had to rely

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tween the NCAA constitution and the rule published in a book, printed by the NCAA, which was distributed to students. *See* NCAA, A GUIDE TO THE COLLEGE-BOUND STUDENT ATHLETE, *reprinted in* M. JONES, CURRENT ISSUES IN PROFESSIONAL SPORTS 36 (1980) which states that an athlete cannot enter into an "agreement" to be represented by an agent. The NCAA CONST. art. III, sec. 1(C) states that an athlete may not "contract" to be represented by an agent. Trope's argument may be valid if the offer sheet is in fact not a contract until Trope signs it.

127. *See* Johnson & Reid, *supra* note 8, at 30.

128. *Id.* Trope admitted "I just signed him early and broke the NCAA rule outright." *Id.*

129. The time of formation will depend on the intent of the parties. An agency contract, like any other contract, need not be in writing; and even if there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent and as a condition modifying their assent. *See* Harwood Package Co. v. Courtney Co., 253 F. 929 (4th Cir. 1918); Reynolds v. Johnson, 199 Iowa 1055, 202 N.W. 881 (1925).

If a court is convinced that they intended to be bound without a writing, their contract is formed without it and the formal document is nothing more than a memorandum of the contract. If the parties did not intend that the writing be signed then the contract was created when they originally came to terms. If, on the other hand, the court finds that there was no intent to be bound unless both parties sign the instrument, then the athlete's signature was merely an offer. In that situation the offer was revocable until accepted by the agent. Since Trope ultimately signed the offer sheet himself, and the athlete did not revoke prior to his doing so, a contract was formed.

130. Johnson & Reid, *supra* note 8, at 35. One of the athletes filed a counter suit against Trope, charging Trope "with misleading Robinson (student athlete) by claiming that he could sign without jeopardizing his amateur status. Additionally, the suit charged that the solicitation and signing ... interfered with his existing agreements with the NCAA and UCLA." Black, *A Hard Look at Agents, Part II*, SPORT, Dec., 1979 at 77.

131. *See, e.g.*, Pence v. United States, 316 U.S. 332 (1942); Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976); Podlasky v. Price, 87 Cal. App.2d 151, 196 P.2d 608 (1948).

on the false statement. Most of these athletes knew that a problem existed in the context of a possible violation of NCAA rules despite any alleged misrepresentation by Trope. Additionally, there may have been no misrepresentation by Trope if his contention is correct and the offer sheet does in fact circumvent the NCAA rule.

The Trope cases may never be resolved in court. Many will be or have been settled. It is unusual that Trope initiated these cases at all since sports agents will often forego litigation for fear of the adverse effects that the publicity of such aggressive tactics might have on their business.[132] Since Trope opted to initiate these suits, his rights will be protected by contract law. If the courts determine that the contracts are valid and that there are no viable counterclaims, he will receive damages for breach of contract. The athlete will probably be available and solvent since someone will have negotiated a professional contract for him.[133] The cases demonstrate that the area is one of considerable confusion. Agents pursue athletes, procure contracts, and subsequently other agents will urge these athletes to break their original contracts and re-sign with them. Many agents will loan money to athletes, the loans then becoming consideration for contracts with the agent. However, the agents are not always the only ones exploiting the uncertainty in the area; some of the athletes have taken advantage of the uncertainty and unethical practices themselves.[134]

C. *Information of Richard Sorkin*

An embezzlement case, *Information of Richard Sorkin,*[135] involving an agent for professional athletes also points out the need for stricter control in the area.[136] Richard Sorkin became a sports agent in 1971, by representing Western Hockey League players at the height of the competition between the National Hockey League and the World Hockey League. He signed players to contracts by which he was to represent

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132. *See* C. LOWELL AND J. WEISTART, *supra* note 10, at 324. Note that Trope v. Anderson, No. C 280119 (Cal. Super. Ct. filed Apr. 12, 1979), was subsequently dismissed by plaintiff's attorney on July 23, 1979.

133. *See* notes 41-42 and accompanying text *supra.*

134. The following is an apparent example of another athlete taking advantage of the confusion in the field:

> Otis Anderson, the University of Miami's premier running back and the first-round choice of the St. Louis Cardinals also signed a Trope offer sheet last July and, according to Trope, accepted a loan of $600. Anderson, who denies receiving any money from Trope, later dropped him and signed with a Houston agent named Clifford Paul. Anderson accepted a $4,000 loan from Paul as a down payment on a 1979 Buick Regal, repaid the loan, dropped Paul and also is currently being represented by Bennett. Johnson & Reid, *supra* note 8, at 35.

135. People v. Sorkin, No. 46429 (Nassau County, N.Y. Ct. Nov. 28, 1977), *sentence aff'd,* 407 N.Y.S.2d 772 (App. Div.2d Dept. July 24, 1978).

136. *See* Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pros Agent,* N.Y. TIMES, Oct. 9, 1977, § 5, at 1, col. 1.

them in their contract negotiations and to provide a complete financial service to the players. All paychecks were sent directly to Sorkin; and after deduction of his fees he would keep the money in trust and pay all of the athlete's bills.[137]

Sorkin, it was disclosed, was a compulsive gambler. He had talked his clients into investing not only their sports income but all of their assets. According to a lawyer who knew Sorkin and many of his clients, "[h]e was the greatest talker in the world .... Remember, you're talking about kids who had done nothing but play hockey since the ninth grade. He totally dominated them mentally. It was no match."[138] Sorkin lost $626,000 at the track and to bookmakers, and $271,000 in the stock market. Any other money he had was also misappropriated.[139] He pleaded guilty to seven counts of grand larceny.[140] Some players lost everything they had earned. One hockey player lost $145,000.[141] One athlete who was forced into bankruptcy due to his dealings with Sorkin stated, "He took every cent I had .... The other guys can keep playing and earn some more money. He's ruined my life."[142]

The aftermath of the Sorkin affair has renewed debate regarding the imposition of controls in the agent-athlete area. The National Basketball Association commissioner stated, "The potential for danger for all sports is extreme. At some point, somewhere, someone is going to realize there are people walking around with briefcases in sports who nobody knows and who are accountable to no one."[143] The case dramatically pointed out the need for investigation into the background of people who become agents. An inquiry into Sorkin's background may have revealed his gambling tendencies. If Sorkin had been required to annually present income statements and balance sheets for his clients, discrepancies would have been noted and some money could perhaps have been retrieved before total bankruptcy occurred.

IV. NEED FOR REGULATORY MEASURES TO PROTECT ATHLETES' RIGHTS

The method most frequently suggested to regulate the agent-athlete area is to require agents to be licensed and/or bonded. The system which would be most effective would be one similar to Federal or state regulations currently in effect with regard to stock brokers.[144] Under the

137. *Id.* at 15, col. 4.
138. *Id.* at 15, col. 3.
139. *Id.* at 15, col. 6.
140. *Id.* at 1, col. 1.
141. *See* Kennedy & Williamson, *supra* note 11, at 48.
142. *Id.* (statement by Dennis Duval, ex-Washington Bullet).
143. Montgomery, *supra* note 136, at 15, col. 1.
144. *See, e.g.*, Federal Securities Act of 1934, 15 U.S.C. § 78a *et seq.* (1976).

Federal Securities Act[145] all applicants must register with the Securities and Exchange Commission in order to qualify as a broker. They must present for examination by the Securities and Exchange Commission their past business history, affiliations and whether they have been subject to any statutory disability that would disqualify them from dealing in securities.[146] All employees of the brokerage firm must also supply basic information. The registered broker is required to keep his books in a specified manner and must file a certified balance sheet and income statement annually.[147] Brokers are additionally required to "pass an examination from which their qualifications for entrance into the securities field may be determined."[148] In addition to the requirements mandated by the Act, brokers are also subject to bonding requirements by either self-regulatory organizations to which they belong, i.e., New York Stock Exchange, or state or Federal government.[149]

A similar system for the licencing and registration of sports agents would unquestionably curb a great deal of abuse in the field. The problem posed by such a program is that the expense of putting this legislation into effect may not be justified by the extent of agent malpractice. The House Select Committee on Professional Sports[150] had available to them the regulation of stockbrokers as a precedent for making suggestions in this area but was not sure that the problems in this field warranted federal intervention on that scale. Professional athletes constitute a very small percentage of the workers in this country, the total number of agents is much smaller still, and the number of incompetent or unscrupulous agents even fewer. Setting up a bureaucracy to police the field may not be a viable solution to the problem.

Uniform state licensing requirements may be a more desirable alternative. In some states, such as New York and California, it may mean merely an extension of the employment agency acts already in existence.[151] In the remaining states minimum requirements could be established to allow an individual to be an agent of professional athletes. The states could require that agents be bonded at a rate set at a percentage of the value of the athlete's present professional contract. This would serve the function of guaranteeing the athlete some minimal amount of recovery in the event of agent mishandling.

Probably the most realistic solution, and possibly least effective, is a system of educating the athlete. While the athlete is in college much of

145. *Id.*
146. *Id.* at § 78(o)(b)(4).
147. *Id.* at § 78(q)(a) & (e).
148. JAFFE, BROKERS-DEALERS AND SECURITIES MARKETS 16 (1977).
149. In JAFFE, *supra* note 148, at 17 n. 14, in referring to such requirements the author states: "*See* 32 N.A.S.D. Rules of Fair Practice; Rule 319 N.Y. Stock Exchange Rules 15b-10(11) of the Securities and Exchange Commission pertaining to nonmember broker-dealers."
150. *See,* note 1 *supra.*
151. *See,* note 58 and accompanying text *supra.*

this responsibility could fall on the National Collegiate Athletic Association (NCAA). Once the athlete turns professional, the players associations could serve this function. One business manager currently in the field suggested a check list of questions that the athletes should ask before signing a contract with anyone to be a representative.[152] The suggested questions would allow the athlete to determine the types of services he would receive and the amount of his agent's compensation. Following this discussion, the athlete should be instructed to procure a copy of the agreement before he signs it. He should then procure legal advice regarding the proposed contract.

The NCAA strives to keep amateur athletics as disassociated from professional sports as possible. It cannot, however, ignore the fact that the colleges are serving as training grounds for professional sports. More effective steps should be taken to insure that the athletes have the ability to affect the transition between college sports and the professional ranks. Many collegiate athletes are presently changing their

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152. Tom Collins, a highly respected business manager for Kareem Abdul-Jabbar, among other clients, suggests that athletes ask the following key questions before signing anything:

1. Ask the representative whether he is: A. a business manager; B. an attorney; C. an agent; D. an accountant.
2. What service does the person or firm provide?
Some people will provide just negotiating services; others will also provide: A. income tax preparation; B. bookkeeping (paying bills); C. sophisticated investments; D. tax planning.
3. How does he charge for his services? A. percentage of gross income; B. hourly rate for all services; C. handshake basis. A *percentage* may be in order if the person/firm is to provide total personal financial management.
If he is only serving you in contract negotiations, then you should be charged an *hourly rate*. This can range anywhere from $40 to $100 per hour. You should always be given a stated minimum and maximum limit.
The *handshake* usually is an enticement to make you feel obligated to use other services at higher percentages. Always have stated in writing what services are being provided, and more importantly, what you must pay for those services.
4. Ask the person to list other clients he has provided with negotiation services and/or personal financial management.
5. If the prospective representative says he can get you a specified amount, ask how much will be cash and how much will be benefits or incentives.
The majority of large contracts that you read about and which are supposedly worth one million dollars are almost never worth that many dollars in cash, but are a combination of financial vehicles, such as deferred income, insurance policies, bonus money and other incentives. Clubs often use these incentives to make a contract appear to be worth more than its actual annual value. Be careful and understand fully the cash value of your contract.
6. How many clients does the person represent?
If the person currently represents too many clients, how much personal attention will you get?
7. What are his qualifications to serve you?
Always remember that the persons you choose to represent you will determine your financial future and security. The total money you will receive is only a portion of your contract. More important is how you will receive that money (tax planning).
8. Ask the representative to furnish you with a copy of the contract he expects you to sign with him.
9. Ask if you can terminate the contract with the representative *whenever you want.*
This is probably the most important point because it will insure that the representative does the kind of job you want done, not just what the representative feels is good enough.

Black, *supra* note 130, at 80.

status from that of poor college kids to businessmen with real money problems which they are not capable of handling themselves.

Additionally, the NCAA could help take the pressure off some athletes by trying to eliminate many unscrupulous agent practices on college campuses. One method of doing this would be to bring lawsuits against agents for interferring with contractual relations between the athlete, his school and the NCAA.[153]

On the professional level, the players associations could greatly benefit athletes in their relationships with agents. Currently some players associations will investigate the background of agents if requested. A compilation by these associations of agent lists which detail individual agents' qualifications to act as representatives would serve a useful function. An agent could apply to be listed by the various organizations; athletes could then make a reasonably informed decision as to employing an agent.

Conclusion

The area of agent-athlete relations needs an effective regulatory mechanism in order to protect athletes fully. Present judicial remedies are inadequate. As indicated by the *Probus* case,[154] and the circumstances surrounding the prosecution of Richard Sorkin,[155] legal remedies were inadequate because the damage had already been done and could not be effectively repaired. Athletes may find that the courts agree with their claims but cannot provide any restitution. The athletes need some assurance that the agents they deal with have at least a minimal level of competence. Ideally, there should be some method of reviewing the background of agents to determine whether they have the necessary qualifications for negotiating contracts and providing promotional and investment advice.

Realistically such a system may be difficult to construct and expensive to maintain. The extent of the problem with its parameters still undefined, may not justify such costs. The most realistic answer would appear to be educating the athlete to understand the services he needs and the methods necessary to obtain them.

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153. *See, e.g.*, Begley v. Corporation of Mercer University, 367 F. Supp. 908 (E.D. Tenn. 1973) where the court treats the relationship between the student athlete and the school as one of contract.

154. *See* notes 101-18 and accompanying text *supra*.

155. *See* notes 135-43 and accompanying text *supra*.

Title IX and Intercollegiate Athletics: HEW gets Serious About Equality in Sports?

Women as a class have been discriminated against throughout history. Traditional patterns of discrimination persist in employment, education, and social status.[1] In 1970, concern over women's rights heightened when it became clear that women were losing ground in educational opportunities.[2] Congress reacted swiftly by initiating hearings on the status of women within the educational system.[3]

The 1970 hearings documented the discrimination which had prompted congresssional action. Women had been discriminated

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1. *See* 43 Fed. Reg. 58071 (1978), where the Department of Health, Education, and Welfare [hereinafter cited as HEW] cites disparities in athletic funding, sport participation rates, and scholarship disbursement as motivating factors for its 1978 proposed policy interpretation of regulations regarding athletics implementing 20 U.S.C. § 1681 (1976). Athletics are just one of many activities symptomizing women's disparate treatment in society. Fewer qualified women go on to college than do men. *See* 117 CONG. REC. 39258 (1971). Moreover, if they do decide to further their studies, women are required to meet more rigid academic standards to gain admission into educational institutions and receive less financial aid once admitted. *See* 118 CONG. REC. 5805-06 (1972). Although men and women have the same financial needs, men receive per capita approximately 25 percent more financial aid. *Id.* at 5808-09.

Data on women's employment illustrates much the same treatment. Women receive less pay and fill lower positions than their male counterparts in the academic community. *See* Young, *Sex Discrimination in Higher Education,* 5 CIV. LIB. REV. 41, 41-43 (1978). Women comprise 70 percent of the educators in American institutions; however, they represent only 10 percent of the top administrators in those institutions. Boston Globe, Sept. 4, 1979, at 5, col. 5.

Gender continues to be the most salient determinative factor in one's income throughout the entire employment spectrum. *See* Equal Times, Nov. 4, 1979, at 14, col. 2 and 3, where a survey of statistics of the U.S. Department of Labor revealed that although the income of minority males is substantially less than white males ($15,230 for white men, $11,053 for minority men), race is significantly diminished as a factor when comparing the income of women, who earn substantially less than either minority or white males ($8,787 for white women, $8,383 for minority women).

2. Alan Pifer, president of Carnegie Corporation of New York introduced into the Senate Record the following statement:

> If we compare the participation of women in higher education today with the situation of 40 years ago we find, rather surprisingly, that it has considerably worsened. In 1930, 47 percent of undergraduates, as opposed to today 38 percent, were women; 28 percent of the doctorates were won by women as against today's 13 percent, and at many institutions, the proportion of women faculty members was higher than today.

118 CONG. REC. 5804 (1972).

3. *See Discrimination Against Women: Hearings on Section 805 of H. R. 16098 Before a Special Subcommittee on Education and Labor,* 91st Cong., 2d Sess., pts. 1 and 2 (1970), for documentation of the 1970 hearings. *See generally* Murray, *Economic and Educational Inequality Based on Sex: An Overview,* 5 VAL. U. L. REV. 237 (1971), for a summary and organization of the 1970 congressional hearings on women.

against in admissions through administrative policies at every level of academia.[4] Once admitted into America's colleges and universities, women received disparate treatment by the faculty.[5] Not surprisingly, women employed in academia did not receive equal pay or opportunities for career advancement.[6] In response to the discriminatory patterns confirmed by these hearings, Congress enacted Title IX of the Education Amendments of 1972 (Title IX).[7]

Title IX is a prohibition against discrimination on the basis of sex in any educational program receiving Federal funds. Originally, Title IX was intended to protect employees as well as participants in educational programs; but, judicial interpretation has subsequently excluded employment practices from regulation by the Department of Health, Education and Welfare (HEW).[8] Consequently, Title IX, as enforced

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4. *See* 118 CONG. REC. 5806 (1972); H. R. REP. NO. 554, 92d Cong., 2d Sess. 3, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS. 2462, 2511, where testimony was elicited which indicated that women had to meet higher standards than men to gain admission into educational facilities.

5. A report on higher education by the Ford Corporation, introduced into the House Record, found that "[d]iscrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community." 118 CONG. REC. 5803 (1972). Faculty in educational institutions continue to openly practice discriminatory treatment of women. *See* 117 CONG. REC. 39250 (1971).

6. Among all post-secondary educational institutions only 9.4 percent of women faculty members are full professors, substantially less than the 24.5 percent of men. This disparity also holds true for associate professors who constitute 15.7 percent of the women faculty members compared to 21.9 percent of men. The discrepancy reverses as the status of the job decreases: assistant professors constitute 28.7 percent of women faculty compared to 28.2 percent of men; instructors constitute 34.8 percent of women faculty compared to 16.3 percent of men; and, lecturers constitute 4.6 percent of women faculty compared to 3.3 percent of men. 118 CONG. REC. 5804 (1972).

A comparison of faculty salaries for both men and women in the post-secondary educational system shows similar inequitable treatment:

Salary	*Women*	*Men*
below $7,000	17 percent	6.2 percent
$7,000-9,999	45.6 percent	21.7 percent
$10,000-11,999	17.6 percent	20.6 percent
$12,000-13,999	9.9 percent	17.4 percent
$14,000-16,999	6.1 percent	15.5 percent
$17,000-19,999	2.0 percent	9.1 percent
$20,000-24,999	1.2 percent	6.3 percent
$25,000-	0.5 percent	3.1 percent

Id.

7. 20 U.S.C. § 1681 (1976) states: (a) "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

8. The HEW regulations governing employment can be found at Public Welfare, 45 C.F.R. §§ 86.51-86.61 (1979).

See Romeo Community Schools v. United States Department of Health, Education and Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S.Ct. 467 (1979), invalidating HEW's employment regulations on the grounds that Congress' enactment of Title IX as relating to employment was intended to confer regulatory power on the Department of Labor.

by HEW, is limited to discrimination against women participants of Federally funded educational programs.

The regulations formulated by HEW to implement Title IX apply to all educational programs receiving federal financial assistance.[9] It has been estimated that the total number of institutions subject to Title IX includes over sixteen thousand public school systems and two thousand seven hundred colleges and universities.[10] For post-secondary schools, compliance with Title IX was required by June, 1978.[11] The Act provides for termination of funds by the particular Federal agency funding the educational program which fails to comply.[12]

Although the number of institutions subject to Title IX is substantial, HEW's enforcement of its provisions has been negligible.[13] As of the end of July, 1978, HEW had received nearly one hundred complaints alleging discrimination against more than fifty institutions of higher education.[14] However, not one institution of higher education has been denied Federal funds for noncompliance with Title IX.[15] Clearly, Title IX's mandate of equality is far from a reality.

Laggardly enforcement by HEW may not be due to a lack of enthusiasm over women's rights. Enforcement of Title IX is lengthy, and subject to numerous procedural safeguards.[16] Moreover, the regula-

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9. Public Welfare, 45 C.F.R. §§ 86.1-86.71 (1979). *See* note 32 an accompanying text *infra* for the text of HEW's definition of financial assistance.

10. Koch, *Title IX and the NCAA,* 3 WEST. ST. L. REV. 250 (1976).

11. *See* Public Welfare, 45 C.F.R. § 86.41(d) (1979). Compliance for secondary schools under Title IX was required by June, 1978 and elementary schools were required to comply by June, 1976. *Id.*

12. *See* 20 U.S.C. § 1682 (1976), for the enforcement provision of Title IX.

13. A possible explanation for the low enforcement rate is the absence of a private right of action under Title IX. *See* Cannon v. University of Chicago, 559 F.2d 1063, 1071-75 (1976). In *Cannon,* the court rejected the plaintiff's argument that despite the absence of explicit provisions for a private right of action under Title IX, Congress did not intend to exclude private judicial remedies. The court held that there was no private right of action under Title IX. However, it declined to decide whether a remedy would be available under Title IX in a class action or individual action alleging a violation of the rights of a substantial number of women. *Id. See also* Cape v. Tennessee Secondary School Athletic Association, 563 F.2d 793, 794 n.1 (6th Cir. 1977), where the court noted that no private right of action existed under Title IX. In Jones v. Oklahoma Secondary School Activities Association, 453 F. Supp. 150, 152-53 (W.D. Okla. 1977), the court held that no private right of action existed under Title IX and expressly cited *Cannon* as support. *See generally* Comment, *Implication of a Private Right of Action Under Title IX of the Education Amendments of 1972,* 73 NORTH. U. L. REV. 772 (1978).

14. *See* 44 Fed. Reg. 71413 (1979).

15. *See* Underwood, *Odd Way to Even Things up: HEW Application of Title IX,* SPORTS ILLUS., February, 1979, at 18-19, where the author states that to date HEW has not denied funds to a single institution of higher education for noncompliance with Title IX. A telephone interview with Ms. Rosa Weiner of the Office of Civil Rights, Department of HEW, Chief of Sex Discrimination Branch in Washington, D.C. on November 15, 1979, [hereinafter cited as *Interview*] revealed that the lack of enforcement continues.

16. HEW has a multi-level appellate structure. Once a complaint is issued against an institution a compliance review is initiated. The review may, and usually does, involve more than one area of compliance. If an institution is determined not to be in compliance, a hearing is provided

tions concerning Title IX have confused institutions attempting to determine exactly what is expected of them.[17] The most nebulous area of the HEW regulations governing educational institutions is in the field of intercollegiate athletics.

This note considers the policy interpretation issued by HEW on December 11, 1979.[18] The policy interpretation is an attempt by HEW to clarify the standard of equality in athletics for colleges and universities. The interpretation deals with athletics, both intramural and intercollegiate, but was specifically intended to answer questions concerning intercollegiate sports. The policy statement will first be analyzed with regard to the appropriatenesss of including athletics within Title IX's mandate. Second, its effectiveness in dealing with the problems women encounter in intercollegiate athletics will be examined.

I. ATHLETIC INCLUSION UNDER TITLE IX: STATUTORY INTENT AND INTERPRETATION

A. Statutory History

Title IX was first proposed by Senator Bayh of Indiana as an amendment to the Elementary and Secondary Education Act of 1965.[19] The major difficulties encountered by Senator Bayh were generally unrelated to the question of equality for women or enforcement. Rather, the problems encountered by the original proponents of Title IX centered

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before an administrative law judge. The findings of the hearing may be appealed and reviewed by a panel of lawyers appointed by HEW. If the panel finds against the federally funded recipient, the institution may seek review by the Secretary of HEW. Finally, if the Secretary does not overturn the findings of the panel, he or she must file a report with the committees in the House and Senate with jurisdiction over the program or activity thirty days before fund termination. *Interview, supra* note 15. *See* 44 Fed. Reg. 71418-19 (1979), setting out the various methods and procedural steps in the enforcement of Title IX. *See also* 5 U.S.C. §§ 551-59 (1976) and 20 U.S.C. § 1683 (1976), providing for judicial review of administrative decisions; and 20 U.S.C. § 1682 (1976), for the enforcement provision of Title IX, authorizing a hearing and notification of the congressional committees before final fund termination.

17. There has been much confusion resulting from the regulations (Public Welfare, 45 C.F.R. § 86.41 (1979)) issued by HEW to establish guidelines for the compliance of college athletics with Title IX. *See, e.g.*, Comment, *Colleges Fight Proposed Title IX Compliance,* 65 A.B.A.J. 885, 886 (1979) (suggests that the proposed policy interpretation was issued due to the confusion resulting from the 1975 athletic regulations); Underwood, *supra* note 15, at 18-19 (the author notes that colleges are confused over HEW's 1975 athletic regulations); Hogan, *From Here to Equality: Title IX,* WOMENSPORTS, September, 1977, 16, 17 (indicates that compliance with Title IX is slowed because many colleges and universities do not know the substantive requirements for compliance).

18. *See* 44 Fed. Reg. 71413-23 (1979), for text of the final policy interpretation of the 1975 regulations implementing Title IX. The policy interpretation was issued on December 11, 1979. *See also* notes 69 to 83 and accompanying text *infra* for a discussion of the policy interpretation.

19. *See* 117 CONG. REC. 30155-57 (1971), where Senator Bayh proposed Title IX as an amendment to the *Elementary and Secondary Education Act of 1965,* 20 U.S.C. §§ 236-244 (1970).

on the question of determining which recipients of Federal aid would be required to comply with the Act.[20] In its final form, Title IX applies to the admission policies of "institutions of vocational education, professional education, and graduate vocational education, and . . . public institutions of undergraduate higher education."[21] More importantly, Title IX applies to policies and practices other than admissions in all educational programs, including athletic programs, which receive Federal funds except military training institutions and those religious institutions discriminating due to religious tenet.[22]

Although the legislative history is clear with regard to the institutions which must comply with Title IX, with respect to athletics it is virtually nonexistent. Sports were mentioned only twice in the debates on Title IX, and not at all in any House, Senate, or Conference Reports.[23] It would appear that the question of whether athletics should be included was not given significant consideration by Congress at the time of Title IX's enactment in 1972. However, in the limited instances when sports were mentioned, the topic was considered in an effort to define the scope of the Act.[24] Discussions took place on the effect of Title IX on extracurricular activities. The discussions included the topic of sports without explicitly stating that sports were subject to Title IX. Such discussions suggest that Congress assumed Title IX would apply to

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20. *See* 117 CONG. REC. 39248-59 (1971), for debate and passage in the House of an amendment to Title IX excluding all undergraduate institutions from Title IX's provisions. H.R. 7248, 92d Cong., 1st Sess., § 1001 (1971). The House amendment was eventually deleted and a more moderate Senate version was accepted. The Senate version, S.659, 92d Cong., 2d Sess. § 901 (1972), subjected institutions of vocational education, professional education, graduate level education, and public undergraduate institutions which did not have a policy of admitting students of one sex to an open admissions requirement. CONF. R. NO. 798, 92d Cong., 2d Sess. 2, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS, 2608, 2671. *See also* 118 CONG. REC. 5812 (1972), for the debate on one sex schools and the applicability of Title IX.

21. *See* 20 U.S.C. § 1681 (a)(1)(1976). Title IX does not apply to the admission policies of public institutions with a traditional and continual policy of one sex admissions. 20 U.S.C. § 1681 (a)(5) (1976).

22. 20 U.S.C. § 1681 (a)(3)(4) (1976).

23. *See* 118 CONG. REC. 5807 (1972); 117 CONG. REC. 30407 (1971). *See also* note 24 *infra* for the content of the comments relating to athletics in the congressional debates. *But see Hearings Before the Special Subcommittee on Education of the Committee on Education and Labor House of Representatives,* 91st Cong., 1st Sess., pt. 2, 752 (1970), where the president of the Association of Intercollegiate Athletics for Women [hereinafter cited as AIAW] spoke before the committee expressing concern over the pervasive discrimination in academic institutions. Sports were not specifically mentioned. This hearing is the only one even remotely touching upon athletics.

24. The only legislative history relating to sports were two comments by Senator Bayh. He stated that differential treatment of men and women would be allowed only in unusual circumstances. Such an unusual circumstance might be "in sports facilities or other instances where personal privacy must be preserved." 118 CONG. REC. 5807 (1972). Senator Bayh also stated that the purpose of the bill was "[t]o provide equal access for men and women students in the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated." 117 CONG. REC. 30407 (1971).

athletics.[25] If indicative at all, the sparse legislative history supports the inference that Congress intended to regulate sports programs.[26]

In 1974, the inclusion of sports under Title IX was directly addressed by Congress. Initially, attempts were made to exclude revenue producing sports from regulation under the Act. One such amendment was proposed by Senator Tower of Texas. Although the amendment passed in the Senate, it was deleted in a Senate-House Conference committee.[27] Instead, the Conference committee chose to adopt the less restrictive Javits Amendment authorizing the regulation of all intercollegiate athletic programs.[28] The broader Javits Amendment was limited only by the addition of a provision that any regulations issued by HEW "shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports."[29] Despite the explicit requirement that HEW promulgate regulations for intercollegiate athletics, the controversy continues over the inclusion of sports under Title IX.[30] Moreover, the requirement of the Javits Amendment that regulation of athletics be reasonable in light of the nature of the sport has added to the controversy by leading some com-

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25. *Id.* These comments appear to explain the absence of sport discussion in relation to Title IX. Sports were assumed to come under the Act.

26. *Contra,* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction,* 65 GEORGETOWN L. J. 49, 62 (1976), for a discussion of Title IX's sparse legislative history regarding athletics. Relatively no legislative history might support a contention that sports were not intended to be regulated under Title IX. Ms. Kuhn argues that the absence of direct discussion might support the inference that Congress assumed sports would not come under Title IX. *But see* notes 24 and 25 and accompanying text *supra* for an opposite conclusion using the same legislative history.

27. S.1539, 93d Cong., 2d Sess. § 535 (1974). The Tower Amendment was proposed and passed by voice vote in the Senate. *See* 120 CONG. REC. 15322-24 (1974).

28. *See* CONF. R. NO. 93-1026, 93d Cong., 2d Sess. 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4206, 4271, where the Tower Amendment was deleted and the less restrictive Javits Amendment accepted. The Javits Amendment states:

> The Secretary shall prepare and publish not later than 30 days after the enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Pub. L. No. 93-380, Title VIII, § 844, 88 *Stat.* § 612 (1974) (amending 20 U.S.C. § 1681 (Supp. 1974)).

29. *Id.*

30. For discussions arguing against athletic inclusion under Title IX, *see* Kuhn, *supra* note 26, at 63; Underwood, *supra* note 15, at 18. *But see* Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX,* 88 YALE L. J. 1254, 1255-56 (1979). The commentator discusses athletic inclusion under Title IX, concluding that athletics should be regulated under Title IX.

Although several resolutions were proposed to strike down the controversial HEW regulations concerning athletics, none were passed. Congress may veto regulations published by HEW if it acts within 45 days but failure to do so does not equate with Congressional approval. *See generally* Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenge,* 1976 B.Y.U.L. REV. 133, 147-48.

For the statutory provision providing for Congressional veto of HEW regulations, *see* 20 U.S.C. § 1232 (d)(f) (1976).

mentators to argue for the exclusion of athletic programs "unreasonably" regulated by HEW.[31]

B. *Statutory Interpretation*

For an educational program to be subject to Title IX it must be a "recipient" of " Federal funds."[32] In defining both "recipient" and "Federal funds," Congress has expressed an intent to include athletics within the scope of Title IX. A 1972 statement of purpose in a House Report refers to Title IX as a prohibition of "discrimination on the basis of sex in education programs or activities receiving financial support from the Federal government."[33] "Financial support" connotes a benefit conferred rather than a specific account of money given to an educational program. Some commentators disagree with this interpretation of financial support since the athletic departments themselves are

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31. *See* SPORTS L. RPTR., March, 1979, at 8, 9, where the National Collegiate Athletic Association [hereinafter cited as NCAA] argues that equal per capita funding may be illegal as applied to football. The NCAA suggests that "reasonable provisions considering the nature of particular sports" requires that HEW exempt revenue producing sports from equal per capita funding because such funding is unreasonable as applied. *Id.* A liberal estimate of the revenue producing sport programs that actually produce funds is 28 percent. Comment, *supra* note 17, at 885.

32. A recipient is defined by HEW as

> any State or political subdivision thereof or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

Public Welfare, 45 C.F.R. § 86.2(h) (1979).

Federal financial assistance is defined by HEW as

> any of the following, when authorized or extended under a law administered by the Department:
>
> (1) A grant or loan of Federal financial assistance, including funds made available for:
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> (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
>
> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment of that entity.
>
> (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
>
> (3) Provision of the services of Federal personnel.
>
> (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
>
> (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Public Welfare, 45 C.F.R. § 86.2 (g) (1979).

33. H. R. REP. NO. 554, 92d Cong., 2d Sess. 3, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2462, 2467.

not "recipient programs."[34] It is argued that the institution itself is the recipient of Federal funds, not the athletic department.[35]

The logic of this analysis has two major weaknesses. First, the fact that a specific account is not delegated to athletics does not preclude Congress from regulating the programs. Congress's power to regulate its spending is plenary, and the authority of Congress to place reasonable restrictions upon a school's use of Federal financial assistance has been held sufficient to support regulation of sports programs.[36] Thus, the 1974 Javits Amendment authorizing HEW regulation of intercollegiate athletics is enforceable. Second, notwithstanding the Javits Amendment, courts considering Title IX claims involving sports have found athletics to be "programs or activities"receiving Federal funds.[37] Moreover, HEW has defined Federal financial assistance broadly. Scholarships, grants, and loans that are given to an institution directly or indirectly through the student's payment of

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34. *See* Kuhn, *supra* note 26, at 63, where the commentator urges that "program" designates those projects federally funded under specific statutory power, not agencies receiving benefits from the funds. *See also* Koch, note 10 *supra* where the author argues that HEW is beyond its congressional grant of authority in defining federal funds broadly.

35. *See* note 34 and accompanying text *supra.*

36. *See* Bob Jones University v. Johnson, 396 F. Supp. 597, 606 (D. S. C. 1974), *aff'd,* 529 F.2d 514 (4th Cir. 1975). In *Bob Jones* the court dealt with a question of defining Federal funds, among other issues, as applied to Title VI of the 1964 Civil Rights Act. "In extending financial assistance, Congress has plenary authority to impose such reasonable conditions on the use of the granted funds or other assistance as it deems in the public interest." 396 F. Supp. at 606. *But see* TIME, March 24, 1980, at 70, col. 1-3. Grove City College in Pennsylvania challenged the validity of characterizing Basic Educational Opportunity Grants and Loans as federal aid. A federal district court agreed with Grove City College and held the College exempt from Title IX's provisions. *Id.*

37. *See* Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association, 443 F. Supp. 753 (S.D. Ohio 1978), where the court held the Athletic Association subject to Title IX. The court stated, "Because the Board uses three-quarters of this latter sum [Federal] to run general programs, including athletics, the Board is subject to the requirements of Title IX of the Education Amendments of 1972." *Id.* at 755. *See also* Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), *aff'd,* 529 F.2d 514 (4th Cir. 1975), for a discussion of "Federal funds."

Although some courts have declined to apply Title IX, the rationale for such decisions has not been based on the conclusion that athletics are not recipient educational programs. *See* note 13 and accompanying text *supra. Contra,* Dodson v. Arkansas Activities Association, 468 F. Supp. 394 (D. Ark. 1979). The court in *Dodson* stated in regards to a Title IX claim involving athletics that "[t]here is no evidence in this record that any 'education program or activity' involved here received 'Federal financial assistance. . . .' " *Id.* at 396 n.1. *Dodson* appears to be the only case holding that an athletic department does not receive Federal financial assistance and is not a recipient subject to Title IX.

Athletics are minimally subjected to the requirements of equal protection after a finding of sufficient governmental action either through regulation or funding. *See* Leffel v. Wisconsin Interscholastic Athletic Association, 444 F. Supp. 1117 (E.D. Wis. 1978), where the court applied an equal protection analysis to the Athletic Association's governing rules. The action was brought by a female high school student who attempted to join a men's varsity team but was barred from doing so by the Association's rules. The court held the Association's action unconstitutional. *Id.* at 1120.

Federally subsidized tuition are included.[38] Therefore, the indirect benefits derived from Federal funding are sufficient to allow athletic departments to be characterized as recipients within the meaning of Title IX.

The intent of Title IX, as well as the explicit statutory enactment of athletic regulation by HEW through the Javits Amendment, places athletics squarely within the Act's intended scope.[39] However, concluding that athletics are subject to HEW regulation does not clarify the requirement of equality. Equality has proven to be difficult for HEW to define and for institutions to understand.

II. SPORT EQUALITY: HEW'S SOLUTION

A. 1975 Regulations

In 1975, HEW issued regulations concerning intercollegiate athletics designed to implement Title IX.[40] The regulations are divided into several sections. The two most controversial sections of the regulations deal with separate teams for contact sports and the "laundry list" of factors used to determine equal athletic opportunity.[41]

The provision relating to separate teams sets out the criteria which allow an athletic department to sponsor separate teams and to deny one sex participation in a particular sport. The regulations permit a recipient to maintain separate teams for each sex if selection for that team is based upon competitive skill or the sport involved is a contact sport.

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38. For the text of HEW's definition of financial assistance, *see* note 32 *supra*. *See also* note 36 and accompanying text *supra* for the court definition of federal funds.

39. For discussion of court treatment of the arguments against athletic regulation under Title IX, *see* notes 36 and 37 and accompanying text *supra*.

It is worthy of note, but beyond the scope of this article, that Title IX may be compared with a similar provision in Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000 d (1976). For a favorable comparison, *see* Note, *supra* note 30, at 1256; Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. J. 34, 38-40 (1977). *See also* University of Toledo v. United States Department of HEW, 464 F. Supp. 693, 694-95 (N.D. Ohio 1979), where the court makes a favorable comparison between Title IX and the 1964 Civil Rights Act. *But see* Note, *Title IX of the Education Amendments of 1972: Issues Reach the Courts*, 18 WASH. L.J. 310, 312-16, 323-24 (1979) for an unfavorable comparison.

40. Public Welfare, 45 C.F.R. § 86.41 (1979).

41. The HEW regulations provide for separate teams in certain situations:

> *Separate Teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

Public Welfare, 45 C.F.R. § 86.41 (b) (1979).

The competitive skill exception applies to most programs because athletics, by their very nature, are based on individual skill. Therefore, separate teams are permissible for most sports. If no team is sponsored for one sex in a particular sport, and the excluded sex has a history of limited opportunities in that sport, the excluded sex must be permitted to try out for that team.[42]

The contact sport exception refers to a specific class of sports. The regulations define a contact sport as one in which the purpose or major activity involves bodily contact.[43] Included in this definition are such sports as hockey, football, and basketball.[44] If the sport is a contact sport, the recipient is neither required to sponsor a separate team nor obligated to allow the excluded sex to try out for the available team. The only instance in which an athletic program is *expressly* forbidden from excluding one sex is when the sport involved is *not* a contact sport.[45] The exception permits the school to maintain separate teams, and, when only one team is available, permits the exclusion of one sex altogether. Although not explicit, this exception may allow an institution to continue to deny opportunities for participation in contact sports.[46]

The inequities in the contact sport exception are obvious. Most athletic departments spend considerable sums of money on contact sports such as football, basketball, and hockey. More money is spent on these sports than the noncontact sports traditionally available to

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The HEW regulations also provide a list of factors indicative of "equality":

Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determing whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(ii) The provision of equipment and supplies;
(iii) Scheduling of games and practice time;
(iv) Travel and per diem allowance;
(v) Opportunity to receive coaching and academic tutoring;
(vi) Assignment and compensation of coaches and tutors;
(vii) Provision of locker rooms, practice and competitive facilities;
(viii) Provision of medical and training facilities and services;
(ix) Provision of housing and dining facilities and services;
(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Public Welfare, 45 C.F.R. § 86.41 (b) (1979).

42. Public Welfare, 45 C.F.R. § 86.41 (1979).

43. *Id.*

44. *Id.*

45. *Id.* For HEW's treatment of contact sports in its final policy interpretation, *see* note 77 and accompanying text *supra*.

46. *See* Public Welfare, 45 C.F.R. § 86.41 (1979).

women.[47] Thus, the regulation permits exclusion of women from these more heavily funded and traditionally more popular sports. This inequity has been criticized by numerous commentators as well as the courts.[48]

The regulations also set out a "laundry list" of factors to examine in judging compliance with the equal opportunity requirement of Title IX. The list sets out ten salient factors ranging from the provision of supplies and equipment to publicity.[49] The list of factors has been criticized by numerous commentators for its vagueness and failure to provide institutions with a fair estimate of the requirements imposed.[50]

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47. *See* Hogan, *supra* note 17, at 20-24, which cites gross discrepancies in the funding of athletic departments. For instance, at Vanderbilt University the women's athletic department received $5,220 as its yearly funding while the men's department received 2.8 million dollars, 1 million of which went to football. *Id.* at 24. It is not unusual to have "contact sports" both predominantly male and heavily funded. *See* Underwood, *supra* note 15, at 19, where a representative of the AIAW complains of heavy football funding by the University of Michigan.

48. For criticism of the contact sport exception, *see* Note, *supra* note 30, at 1268-69, where the commentator argues that the regulations are discriminatory in effect.

See J. WEINSTART & S. LOWELL, THE LAW OF SPORTS 70, 84 (1978), for details on the classic rationale for separatism in sports. The authors state that the regulations are less stringent than those required by the constitutional equal protection standard for classifications based on sex and, as such, may be less effective than Congress intended in enacting Title IX. Other commentators agree with this analysis. *See* Comment, *Implementing Title IX: The HEW Regulations,* 124 U. PA. L. REV. 806, 833 (1976).

For court criticism of the contact sport exception, *see* Leffel v. Wisconsin Interscholastic Athletic Association, 444 F. Supp. 1117 (E.D. Wis. 1978); Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976). The decisions criticize the contact sport exception in the HEW regulations. The regulation is unconstitutional because it falls below the equal protection standard that must be met to sustain a classification based on sex. The analysis used by the courts is a "two tier" approach. This standard requires a rational relationship between the sex based classification and a legitimate state purpose. The relationship must be based in fact. Leffel v. Wisconsin Interscholastic Athletic Association, 444 F. Supp. at 1121; Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. at 571.

In Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association, 443 F. Supp. 753 (S.D. Ohio 1978), the court invalidated the contact sport exception for slightly differing reasons. Two women had been chosen for participation on an otherwise all-male high school basketball team. The local Board of Education excluded these women in compliance with rules established by the state athletic association and instead created a separate girl's team. The court rejected the two justifications advanced for prohibiting mixed gender competition in contact sports: that injuries to women would be minimized and opportunities for participation maximized. The court found that these justifications were based upon an irrebuttable presumption that women were athletically inferior. In holding the regulation invalid the court stated, "[a] permanent presumption is unconstitutional in an area in which the presumption might be rebutted if individualized determinations were made." *Id.* at 758. *See also* Note, *supra* note 30, at 1265. Although women are physiologically weaker than men, in most cases this is not an adequate rationale to deny them access to contact sports. Women are not particularly prone to injury in athletics. The reason "women athletes sustained more injuries than men in the past was due to poor coaching, improper training and inadequate equipment. Now injuries are decreasing to levels comparable to men's." Boston Globe, Sept. 30, 1979 (Parade Magazine) at 30, col. 3.

49. *See* note 41 *supra* for the text of HEW's "laundry list." The list is not exhaustive.

50. *See, e.g.,* Flygare, *HEW Guidelines on Sex Discrimination in Collegiate Athletics,* 60 PHI DELTA KAPPAN 529 (March, 1979) (the 1975 regulations are vague and unclear); Hogan, *supra* note 17, at 17 (colleges and universities are confused over the 1975 HEW regulations); Note, *supra* note

B. Proposed Policy Interpretation

The ambiguities and criticism of the 1975 regulations led HEW in 1978 to publish a policy interpretation of those regulations in a proposed form for public comment. The proposed policy interpretation was an effort by HEW to explain the 1975 regulations, not to supersede them. The proposed policy interpretation consisted of two parts: part one was designed to eliminate inequalities between men and women athletes while part two was designed to eliminate the effects of past discriminatory practices over a period of time.

1. Eliminating Inequalities

The major mechanism employed in the proposed policy interpretation to eliminate then existing discrimination was the requirement that institutions provide equal per capita funding in financially measurable benefits.[51] The benefits considered in measuring compliance with the requirement for equal per capita funding were obtained from HEW's 1975 "laundry list." The specific areas considered were financial scholarships, recruitment, equipment and supplies, living and travel expenses related to competitive events, publicity, and all other financially measurable benefits.[52] The calculation for comparative figures was achieved by dividing total expenditures on financially measurable benefits for each sex by the total number of participating athletes of each sex. The recipient was required to allocate substantially equal funds to male and female athletes.[53]

Once an institution was determined to be in compliance with the equal per capita funding requirement, it was presumed to be in compliance as to each of the individual categories which constituted the total group of benefits. If equality of funding was not met, the institution could still meet the requirements set out in the policy interpretation by showing that any discrepancies in funding were caused by nondiscriminatory factors.[54] However, the burden was always upon the government to demonstrate that the institution was engaging in unlawful discrimination.[55]

30, at 1268-69 (the list of factors set out by HEW does not adequately deal with discrimination). *See also* 43 Fed. Reg. 58070-76 (1978) for HEW's proposed policy interpretation issued in response to heavy criticism of the 1975 HEW regulations.

51. 43 Fed. Reg. 58072-73 (1978). For a discussion of another measure of compliance, *see* notes 59 and 60 and accompanying text *infra*.

52. 43 Fed. Reg. 58073 (1978).

53. *Id.* "Substantial" was not defined but it may be inferred that proportionally small discrepancies would be permissible.

54. *Id.* at 58073.

55. 44 Fed. Reg. 71414 (1979). *See* note 58 and accompanying text *infra* for further discussion of the presumption of compliance in the proposed policy interpretation.

In recruiting and financial assistance, HEW attempted to give maximum flexibility to the institution. Program policy decisions, extra tuition costs of certain students, and differing levels of expenditures for recruiting due to the locale were cited as examples of nondiscriminatory factors justifying unequal funding under the proposed policy interpretation.[56]

In areas of financially measurable benefits other than recruiting and financial assistance, HEW listed two possible justifications for discrepancies in funding: differences caused by the nature of the sport, such as variations in the cost of equipment and supplies; and, differences resulting from the scope of competition (*e.g.*, local, regional or national), such as cost of travel, living expenses, and publicity.[57] These two justifications had the greatest potential for limiting the expansion of women's sports. They could conceivably have allowed heavier funding of national football and basketball programs and lesser funding of certain women's sports. The exceptions permitted the recipient to maintain its funding system as long as it was not actively discriminating.[58]

Part one of the proposed policy interpretation also dealt with benefits and opportunities that were not financially measurable. Under this section, HEW listed criteria that were not related to specific dollar amounts. Included were the opportunity to compete and the scheduling of practice time, the opportunity to receive coaching and academic tutoring, the provision of locker rooms, practice and competitive facilities, the provision of medical and training services and facilities, and the provision of housing and dining services and facilities.[59] This portion of the proposed policy interpretation required benefits to be apportioned in a manner convenient to participants of each sex.[60]

2. Correcting The Effects of Past Discrimination

Part two of the proposed policy interpretation dealt with correcting the effects of a long history of discrimination against women. The policy interpretation called for institutions to encourage the participation of women in sports, to increase the number of sports offered to

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56. 43 Fed. Reg. 58073 (1978).

57. *Id.* at 58073.

58. An institution would not be deprived of the presumption of compliance with the law even if it could not demonstrate justifications for disparities in per capita expenditures. "[A] failure [to provide proportionally equal funds] would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was engaged in unlawful discrimination." 44 Fed. Reg. 71414 (1979).

59. 43 Fed. Reg. 58073 (1978). The list is not exhaustive.

60. *Id.* Institutions of higher education traditionally emphasize male sports. Sports are traditionally emphasized more heavily for men than for women at institutions of higher education and the institutions are slow to "root out old habits." *See* Hogan, *supra* note 17, at 17, 18-22.

women, to publicize athletic opportunities for women, and to elevate the scope of women's intercollegiate competition.[61] These requirements were waived if a school could demonstrate that the interests of both men and women were effectively accommodated or if there was a pattern of increased participation of women at all levels of sports within the school. Alternatively, the institution was excused if its women's athletic program demonstrated growth and interest comparable to that of women's athletics in the geographic area or region as a whole.[62]

Part one of the proposed policy interpretation required no radical changes; rather, it permitted some of the effects of past discrimination to temporarily persist. On the other hand, part two required schools to gradually correct the effects of past discrimination. The differing emphasis of these two parts allowed an institution to methodically advance toward equality, minimizing the damage to men's sports while requiring the development of women's sports.

Despite the apparent attempt to balance the interests of men and women athletes, the proposed policy interpretation has been heavily criticized. The equal per capita funding requirement has been challenged by some as being grossly unfair to male athletics.[63] Other commentators have suggested that the proposed policy interpretation may not go far enough towards correcting discrimination.[64] Numerous other criticisms of the interpretation's legality and fairness have been advanced.[65] Due to criticisms of the policy interpretation, HEW chose to make substantial revisions in the final form of the policy interpretation.

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61. 43 Fed. Reg. 58074 (1978).

62. *Id.*

63. *See* SPORTS L. RPTR., Mar., 1979, at 8, where the NCAA strongly criticizes the proposed policy interpretation. Its comments focus on the equal per capita funding section and on the affirmative action components of the interpretation. The NCAA calls equal per capita funding grossly unfair and complains that in the original regulations equal funding was explicitly not required. *See* note 41 *supra* for the text of the relevant portions of the 1975 HEW regulations.

64. *See* SPORTS L. RPTR., Mar., 1979, at 9. The AIAW is not as critical of the interpretation as the NCAA. It states that it is congruent with the 1975 regulations. However, the AIAW claims that the affirmative action portion of the interpretation may be legally dubious unless it is clearly understood to deal with methods of accommodating future developing interests of women and not used to justify an institution's failure to have fully accommodated in the past.

The AIAW also takes exception to the so-called "nondiscriminatory factors" that may justify discrepancies in funding. They view these factors as being unfair, vague, and the result of past discrimination. *Id.*

65. *Id.* at 9. The NCAA calls the affirmative action component illegal because the requirements it imposes can only be mandated in individual cases where actual discrimination has been established. The NCAA also cites the fact that in the 1974 proposed regulations affirmative action was included but subsequently deleted before the final regulations in 1975. *See* 39 Fed. Reg. 22228-40 (1974), for the proposed rules. According to the NCAA, this action indicates HEW's intent not to use affirmative action in the implementation of Title IX.

Other criticism centers on the legality of equal per capita funding. A number of the nation's leading institutions, led by Duke University, claim equal per capita funding distorts the purpose of

C. Final Policy Interpretation

HEW's final policy interpretation of Title IX is divided into three sections: athletic scholarships, equivalence in other athletic benefits and opportunities, and accommodating the interests of male and female athletes.[66] The first section, scholarships, does not significantly vary from the proposed policy interpretation. The final interpretation calls for equal per capita funding in athletic scholarships for male and female athletes. Like the proposed interpretation, discrepancies in funding are justified if an institution can demonstrate that the discrepancy is due to nondiscriminatory factors.[67]

The second section of the final interpretation deals with compliance in program areas other than scholarships.[68] This section is completely rewritten from its proposed form. Equal per capita funding is not required. The interpretation calls for equivalency in kind, quality, and availability in the athletic services extended to male and female athletes.[69] The justifications for unequal treatment cited in the proposed policy interpretation are retained in the interpretation's final form.[70]

Title IX and will not adequately measure athletic opportunities. *See* SPORTS L. RPTR., June, 1979, at 5.

See Flygare, *supra* note 50, where the author claims that the policy interpretation by HEW is illegal. According to Mr. Flygare, the policy interpretation attempts to circumvent the necessity for presidential and congressional approval of new rules implementing Title IX. *See also* 20 U.S.C. § 1682 (1976), where presidential approval is required for any regulations implementing Title IX; and 20 U.S.C. § 1232 (d)(f) (1976), which provides for congressional approval of HEW regulations. *See generally* Note, *supra* note 30, for discussion of the regulations and the proposed policy interpretation.

66. 44 Fed. Reg. 71413-23 (1979).

67. *Id.* HEW cites two examples of "nondiscriminatory factors." The factors are the same as the ones listed in the proposed interpretation; higher tuition cost of out of state students and program development. *Compare* the factors cited at 44 Fed. Reg. 71415-16 (1979) *with* those listed at 43 Fed. Reg. 58073 (1978).

The regulation under examination by the policy interpretation states: "[Institutions] . . . must provide reasonable opportunities for such awards [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." Public Welfare, 45 C.F.R. § 86.37 (c) (1979).

The equal per capita funding requirement of scholarship aid also applies to work related aid or loans. 44 Fed. Reg. 71415 (1979). HEW explains the retention of equal per capita funding in this area by pointing to the financial nature of the benefit conferred. Since financial aid is best measured in dollar amounts, it is logical that in examining compliance dollar figures should be used. *Id.* at 71414.

68. *Id.* at 71415. *See* note 41 and accompanying text *supra* for the text of HEW's 1975 "laundry list" of factors. It is this list, with the exception of the first factor dealing with the interests and abilities of male and female students, that part II of the interpretation addresses. The policy interpretation specifically states that the list is not exhaustive and is subject to revision at the Director's discretion. HEW addresses recruitment and support services in their interpretation even though these factors are not contained in the 1975 regulations.

69. 44 Fed. Reg. 71415 (1979).

70. *Compare* 44 Fed. Reg. 71415-16 (1979) *with* 43 Fed. Reg. 58073 (1978).

The final interpretation expands on what "equivalency in services" entails by detailing nine factors contained in the list of services set out in the 1975 "laundry list." The interpretation specifies the various elements of each service that HEW will examine to determine compliance with the regulations.[71] It is considerably more detailed than the 1975 regulations.

The applicability of the regulations to football and basketball are also addressed in this section of the policy interpretation. Citing the "reasonableness as to the particular sports" language in the Javits Amendment, HEW's policy interpretation states that nonequivalent funding of football and other large spectator sports will be permissible provided that differences are the result of nondiscriminatory factors. HEW gives several examples of nondiscriminatory factors in its reference to football such as rules of play, nature and replacement of equipment, rates of injury resulting from participation, nature of the facilities required for competition, and the maintenance and upkeep requirements of those facilities.[72]

The last section of the policy interpretation deals with effectively accommodating the interests and abilities of male and female athletes.[73] An institution may demonstrate its compliance with this last section of the final policy interpretation by showing that opportunities for participation are proportionate to the respective enrollments for men and

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71. 44 Fed. Reg. 71416-17 (1979).

72. The policy interpretation directly examines football and basketball in relation to their heavy funding:

> a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment" to Title IX, which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.
>
> Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable. . . .
>
> . . .
>
> c. At many schools, for example, certain sports — notably football and men's basketball — traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

Id. at 71415-16 (1979) (footnotes omitted).

73. *Id.* at 71417. *See* Public Welfare, 45 C.F.R. § 86.41 (c) (1) (1979), for the regulation supporting this portion of the interpretation. *See* note 41 and accompanying text *supra* for the text of the regulation.

women or, where women have been underrepresented in the past, by showing that it has a history of athletic program development for women. Alternatively, if the institution lacks a program of development for women's sports, it may nonetheless comply with Title IX if it fully and effectively accommodates the interest and abilities of each sex.[74] Institutions need not initiate the further development of women's sports as required by the proposed policy interpretation.[75] However, if opportunities for one sex in a particular sport have been historically limited, the institutions are required to meet the interests of that sex and to encourage sport program development.[76]

The last section of the final policy interpretation also addresses the issue of contact sports. HEW continues to permit a single one-sex contact sport team to exist under Title IX.[77] However, if there is sufficient interest and ability among the members of the excluded sex to sustain a viable team with a reasonable expectation of intercollegiate competition, a team for the excluded sex must be made available.

At first glance, it would appear that HEW is retreating from an aggressive stand on discrimination in sports with its final policy interpretation. While the final interpretation in many ways falls short of the requirements proposed in the initial policy interpretation, it may represent a more realistic expectation of equality in the collegiate athletic arena.

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74. 44 Fed. Reg. 71418 (1979).

75. *Id.* In the proposed policy interpretation HEW required the recipient to affirmatively act to elevate the quality and scope of women's sports. 43 Fed. Reg. 58073-74 (1978).

76. 44 Fed. Reg. 71418 (1979).

77. The interpretation sets out those instances when separate contact sports teams are permissible:

> Contact sports — Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:
>
> (1) The opportunities for members of the excluded sex have historically been limited; and
>
> (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

Id.

HEW also deals with non-contact competitive skill sports:

> Non-Contact Sports — Effective acommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:
>
> (1) The opportunities for members of the excluded sex have historically been limited;
>
> (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and
>
> (3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

Id. See also notes 43-48 and accompanying text *supra* for a discussion of the contact sport exception and constitutional considerations.

III. ANALYSIS

The most striking difference between the proposed and final policy interpretations is equal per capita funding. In the proposed policy interpretation HEW set out an equal per capita funding requirement for all financially measurable benefits.[78] If the aggregate funding of financially measurable benefits for male and female athletics was proportionate to the participation rates for the respective sexes, then the institution was presumed to be in compliance as to each benefit constituting the total.[79] If the funding was not proportionally equal, then the institution lost the benefit of the presumption of compliance; however, HEW was still required to prove active discrimination before any fund termination.[80]

The final policy interpretation requires equal per capita funding only for those benefits that are financial in nature, such as grants, loans, or work related aid.[81] All other benefits or services provided to athletes are excluded from the equal per capita funding requirement. Instead, the final policy interpretation calls for equivalency in the athletic services for men and women in quality, nature, and availability.[82] To supplement the ambiguous requirement of "equal in effect," HEW breaks down each service or factor to be examined when it is reviewing for compliance.[83] This list provides recipients of Federal funds with an estimate of what is required of them under Title IX as it relates to intercollegiate sports.

Although the final interpretation seems to provide less for women, the proposed policy's equal per capita funding scheme had serious drawbacks. Theoretically, equal per capita funding is the only solution

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78. *See* 43 Fed. Reg. 58072-73 (1978).

79. *Id.*

80. 44 Fed. Reg. 71414 (1979). *See* note 16 and accompanying text *supra* for the enforcement procedure of Title IX. *See also* note 58 and accompanying text *supra* for a discussion of HEW's presumption of compliance.

81. *See* 44 Fed. Reg. 71414 (1979).

82. *Id.* at 71415. HEW states that "[u]nder this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible." *Id.*

83. An example of such an analysis of the athletic service to be examined is equipment and supplies:

> *Equipment and Supplies* (§ *86.41* (*c*) (*2*)).
> Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.
>
> Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
>
> (1) The quality of equipment and supplies;
> (2) The amount of equipment and supplies;
> (3) The suitability of equipment and supplies;
> (4) The maintenance and replacement of the equipment and supplies; and
> (5) The availability of equipment and supplies.

Id. at 71416.

to a grossly unfair athletic system.[84] However, since HEW was willing to permit discrepancies for "nondiscriminatory factors," equal per capita funding was no closer to a reality in the proposed interpretation than it is in the interpretation's final form. The nondiscriminatory factors HEW suggested were the result of a long history of discrimination.[85] These factors, nature of the particular sport and scope of competition, were undoubtedly slanted towards men, who traditionally have had more programs available and more programs on a national level than have women. Consequently, it would have been permissible for men to receive more funding than women even under the equal per capita funding scheme of the proposed interpretation.[86] Thus, the seemingly potent equal per capita formula would have done little to rectify sport inequality.

A second major change in the proposed policy interpretation is the treatment of affirmative action. In its proposed form, the policy interpretation required recipients to actively encourage the development of women's sports.[87] This requirement was deleted from the final interpretation. Instead, a recipient must effectively accommodate the interests and abilities of each sex. The effective difference between the two requirements is not significant. The proposed version contained an alternative to affirmative action: if the institution could demonstrate that it effectively accommodated the interests and abilities of women,

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84. *See* Hogan, *supra* note 17, at 16-17, 22. Although high school participation in interscholastic sports has increased by 460 percent and college intercollegiate sport participation has soared comparatively, funding by colleges and universities is slow to respond. In 1974, an average of 2 percent of the college and university budgets were allocated to women; for 1977, the estimate was 4-8 percent. "Parity [is] farthest away at the college and university level, perhaps because sex bias is more deeply rooted there." *Id.* at 17.

Typical of gross disparities in funding are the "big ten" colleges and universities:

SEVEN BIG-TEN BUDGETS, 1976-77

*SCHOOLS	WOMEN'S ATHLETICS	MEN'S ATHLETICS	WOMEN'S % OF TOTAL
Indiana	$218,000	$3,500,000	5.868%
Iowa	250,000	2,000.000	11.11%
Michigan	180,000	5,000,000	3.47%
Michigan State	256,000	4,500,000	5.38%
Minnesota	400,000	3,400,000	10.53%
Ohio State	300,000	5,700,000	5.00%
Wisconsin	209,000	2,217,000	8.62%
Average	259,000	3,759,714	7.14%

*Figures unavailable for Illinois, Purdue, and Northwestern. Budgets listed may not include the total money spent since some salaries and administrative costs may be reflected in other budgets.

Id. at 24. *See also* Note, *supra* note 30, at 1268-79, where the commentator reaches a similar conclusion. The author urges that if equal per capita funding is utilized, revenue producing sports should be included. The statute supports a broad reading and aggressive action by HEW is appropriate considering the legislative history of the Act.

85. *See* note 64 and accompanying text *supra*.

86. *See* 43 Fed. Reg. 58073 (1978).

87. *Id.* at 58074 (1978).

no expansion of women's athletics was required. The final interpretation simplifies the requirement, but does not change it. In the final interpretation, expansion will be required only if necessitated by an increase in women's interest in sports. Thus, similar to the proposed interpretation, the finalized version does not require affirmative action if the recipient is "effectively accommodating" the present interests of women.[88] Unfortunately, interest in sports is not likely to grow if schools are not required to expand opportunities for women to participate in athletics.

The equivalency in effect provision of part two in the final interpretation affords women little benefit unless institutions are required to elevate the scope of women's athletics. The "nondiscriminatory factors," nature of the sport and scope of competition, will continue to favor the maintenance of men's programs at current levels and will allow inequities to persist. However, women have exhibited an increasing interest in sports. Institutions may find it difficult to effectively meet the requirement of accommodating women's interests and abilities without expanding their athletic programs.[89]

Despite the retention of the exceptions resulting from "nondiscriminatory factors," HEW's interpretation may present a more workable policy in its final form by moving away from the rigid guidelines of equal per capita funding.[90] This attempt to devise a manageable criterion to enforce Title IX is more likely to bring positive results in the field of intercollegiate athletics than a definitive requirement with numerous exceptions. Unfortunately, the requirements contained in the new policy interpretation will not eliminate the problems of discrimination in intercollegiate athletics. The true test of HEW's resolve in finding an answer to this problem will come if and when it begins to enforce the 1975 regulations implementing Title IX.[91]

In its entirety, the final policy interpretation represents a compromise between those with an interest in preserving male sports and the goal of equality for women. Even if the final interpretation is a more pragmatic approach to the problem of discrimination, its balancing of interests seriously distorts one of the original purposes of Title IX: the elimina-

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88. 44 Fed. Reg. 71418 (1979). *See* notes 61 and 62 *supra* for discussion of the affirmative action requirement contained in the proposed policy interpretation.

89. *See* 43 Fed. Reg. 58071 (1978), for documentation of women's expanding interests in sports. *See generally* Hogan, *supra* note 17.

90. *See* 43 Fed. Reg. 58073 (1978).

91. *See* note 15 and accompanying text *supra*. To date HEW has not denied any institution federal funds, nor has it judged an institution in noncompliance with Title IX. *Interview, supra* note 15.

tion of sexual stereotypes.[92] Senator Bayh stated during debates on Title IX on the floor of the Senate:

> We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again. The desire of many schools not to waste a "man's place" on a woman stems from such stereotyped notions.[93]

Such stereotypic treatment must be addressed if Title IX's mandate of equality is to become a reality.

Since discriminatory practices and beliefs involve the entire educational system, remedies must be broad.[94] In achieving the equality of opportunity for women intended by Title IX, it is critical that HEW deal aggressively with discrimination in athletics not only because athletics represent an important facet in the educational system, but also because sports are a means of creating and maintaining the ideals, attitudes, and role models necessary to support a more realistic view of women.[95]

Traditionally, sports have provided men with a medium for communicating positive role models. This has not been true for women.[96]

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92. *See* Note, *supra* note 30, at 1266-68 for a similar conclusion in analyzing the intent of Title IX. The commentator used stereotypic treatment of women to support a broad interpretation of Title IX, centering [mainly] on the 1970's hearings as a basis for the proposition that Congress intended to eradicate sex stereotypes.

93. 118 CONG. REC. 5804 (1972).

94. *See* notes 1-6 and accompanying text *supra*.

95. *See* Wilkerson & Dodder, *What Does Sport Do for People?*, 50 J. PHYS. ED. & REC. 50 (Feb., 1979). The author lists 7 functions of sport: (1) emotional release; (2) affirmation of identity; (3) social control; (4) socialization; (5) social change; (6) collective conscience; and (7) success. They then state that although there are different views on the function of athletics "[m]ost, however, seem to agree that sport in modern day society is an institution of considerable importance and reflects society's values, belief systems, and needs as well as prescribes acceptable behavior patterns for attaining and fulfilling these values and needs." *Id.*

A former football player and coach, David Auxter, stated:

> In America we use athletics extensively to teach, not fact so much as attitudes. Above all, we value athletics because they are competitive. That is, they teach that achievement and success are desirable, that they are worth disciplining oneself for. By keeping girls out of sports, we have denied them this educational experience.

Gilbert & Williamson, *Women in Sport, Part 3: Programmed to be Losers*, SPORTS ILLUS., June 11, 1973, 60, at 68.

96. Coverage of sporting events in the media is biased toward male sports.

> Boys are bombarded with daily stories about how much fun male athletes are having, how important, dashing and rich they are. The suggestion is made that getting out and playing games — and playing them well — is an exciting and constructive thing to do. Girls have few such role models and seldom receive such subliminal messages advertising athletics.

Gilbert & Williamson, *Women in Sport, Part 1: Sport is Unfair to Women*, SPORTS ILLUS., May 28, 1973, 88, at 96.

Women continue to be underrepresented in sports and are usually visible only in supplemental capacities.[97] Undoubtedly, this underrepresentation affects women beyond the field of athletics. The role of women in sports functions to reaffirm society's perception of them as passive individuals.[98] Compromise in the enforcement of Title IX only serves to perpetuate such a stereotype.

The fundamental criticism of Title IX's application to athletics continues to center on its effect on men's sports. The National Collegiate Athletic Association (NCAA) argues that Title IX will bring about the demise of men's intercollegiate athletics.[99] While HEW's attempt to accommodate this concern is understandable, it is factually unjustified. The participation rate of women in college athletics increased between 1971 and 1976 by one hundred and two percent.[100] Despite the phenomenal increase in women's participation in recent years, the number of sports available to men remained constant, their participation increased slightly and funding for men's programs at the college

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97. Dr. Kathryn Clarenback, a professor of political science at the University of Wisconsin explained:

> The overemphasis on protecting girls from strain or injury, and underemphasis on developing skills and experiencing teamwork, fits neatly into the pattern of the second sex. Girls are the spectators and the cheer leaders. They organize the pepclubs, sell pompoms, make cute, abbreviated costumes, strut a bit between halves and idolize the current football hero. This is perfect preparation for the adult role of women — to stand decoratively on the sidelines of history and cheer on the men who make the decisions. Women who have had the regular experience of performing before others, of learning to win and to lose, of cooperating in team efforts, will be far less fearful of running for office, better able to take public positions on issues in the face of public opposition. By working toward some balance in the realm of physical activity, we may indeed begin to achieve a more wholesome, democratic balance in all phases of our life.

Gilbert & Williamson, *supra* note 95, at 73. *See also* Sage & Loudermilk, *The Female Athlete and Role Conflict,* 50 RESEARCH Q. 88 (1979). A study done on female athletes revealed that 26 percent of women athletes experience great or very great role conflict. Female athletes participating in traditional male sports experience a greater degree of role conflict than those in more socially approved sports. The reasons behind this role conflict are not discussed, but it is plausible that it is due to women's underrepresentation and stereotypic role depiction in athletics.

98. David Auxter, former football player and coach stated that sport functions to solidify women's role in society. "Our male dominated society prefers females to be physically and psychologically dependent. Denying them athletic opportunities has been a good way of molding girls into the kind of humans we want them to be." Gilbert & Williamson, *supra* note 95, at 68.

The need for the creation of positive role models for women is reflected throughout all aspects of life, not just in athletics. For example, statistics from the U.S. Department of Labor reveal that "[w]omen workers are concentrated in low paying dead end jobs. . . . Women were 80 percent of all clerical workers in 1978 but only 6 percent of all craft workers. . .; 63 percent of service workers but only 43 percent of professional and technical workers; and 64 percent of retail workers. . . ." Equal Times, Nov. 4, 1979, at 14, col. 3.

99. *See* Koch, *supra* note 10, at 258, where the commentator states: "Absolute equality within our present economic and legal framework can only be achieved, it seems, with a corresponding loss of stature now enjoyed by collegiate athletics." *See also* Underwood, *supra* note 15, at 19, where equality for women is alleged to cause a decrease in recruitment for collegiate athletics. Consequently, it is maintained that football and the programs they fund will be hurt.

100. 44 Fed. Reg. 71419 (1979).

level increased from an average of 1.2 million to 2.2 million dollars.[101] In 1977, men were offered ten sports for every six offered to women.[102] Men constituted approximately seventy-four percent of participants in college athletics and received eighty-two percent of all athletic funding.[103] Men are by no standard suffering due to an improvement in women's athletics.

From all available data it appears that men's athletics have not been harmed by progress for women in sports. Even if Title IX were to result in a reduction in the scale of men's athletics, such a reduction is a concern to be addressed and not a justification for denying equality to women athletes.

CONCLUSION

The mandate of Title IX is explicit. It requires equal treatment of men and women in Federally funded education programs.[104] This goal is complicated and compromised when a government enforcement agency attempts to circumvent the congressional mandate that Title IX imposes. Equality is not a goal to be compromised, it is an attainable goal that should be methodically brought closer to reality. Women's athletic growth has not been at the expense of men's sports.[105] Moreover, there is no indication that a requirement of true equality, including equal funding and equal opportunities, would bring about the ruination of men's athletics. The fear of destruction of the sport empire

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101. *Id.*

102. 43 Fed. Reg. 58071 (1978). Although women constituted 47.7 percent (4,065,282) of the student population, they represented only 26 percent (105,000) of all athletic participants at the collegiate level. Comparatively, men constituted 52.3 percent (4,448,028) of the student population and represented 74 percent (290,000) of all the athletic participants at the college level. Men also competed on a much larger scope than did women. These figures were for the academic year 1976-77. *Id.*

103. *Id.*

104. 20 U.S.C. § 1681 (1976). *See* 118 CONG. REC. 5807 (1972). Senator Bayh, Title IX's sponsor, stated in the debates on Title IX, "The amendment is designed to expand some of our basic civil rights and labor laws to prohibit the discrimination against women which has been so thoroughly documented." *Id.* Senator Bayh also stated:

> [W]hile the impact of this amendment will be far reaching, it is not a panacea. It is, however, an important first step in the effort to provide for women what is rightfully theirs — an equal chance to attend the schools of their choice, to develop those skills with the knowledge they will have a fair chance to secure the jobs of their choice with equal pay for equal work.

Id. at 5808.

See generally Boyer, *Government and Education: The University as a Regulated Industry*, 1977 ARIZ. ST. L. J. 569 (1977), where the author persuasively argues that since the percentage of the population going on to college is substantial, it is not unreasonable to expect them to exhibit a social conscience.

105. *See* notes 100-03 and accompanying text *supra*.

men have created is not a rationale for altering the intended purpose of Title IX: equality.

HEW's final policy interpretation of its regulations is difficult to assess given the enforcement rate. Despite the passage of two years from the effective date of Title IX and eight years from enactment, Title IX is not being enforced.[106] Title IX is of little benefit to women athletes when disparate funding and inequalities are allowed to persist without interruption.[107]

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106. *See* note 15 and accompanying text *supra*.
107. *See* notes 15 and 84 *supra*.

The NCAA, Amateurism, and the Student-Athlete's Constitutional Rights Upon Ineligibility

The recent congressional investigation of the National Collegiate Athletic Association[1] (NCAA) brought attention to the amateur status of student-athletes across the nation who participate in collegiate athletics. Many commentators have suggested that student-athletes are not playing as amateurs at all, but rather as professionals or semi-professionals.[2] In this regard, major collegiate football and basketball teams can be viewed as being in the business of professional sports.[3] These major colleges reap substantial profits from teams invariably comprised of student-athletes who receive athletic scholarships; scholarships often resembling play-for-pay arrangements violative of the concept of amateurism.[4] Moreover, there is a disturbing regularity of allegations of student-athletes receiving under-the-table money and other benefits in exchange for their performance on the playing field.[5]

The acceptance of prohibited benefits leads to frequent instances of student-athletes losing their eligibility to participate in collegiate

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1. *See* NCAA Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978).

2. *See* J. MICHENER, SPORTS IN AMERICA 173-223 (1976); K. DENLINGER & L. SHAPIRO, ATHLETES FOR SALE 22-26 (1975); J. DURSO, THE SPORTS FACTORY (1975); Koch, *A Troubled Cartel: The NCAA,* 38 LAW & CONTEMP. PROB. 135 (1973).

3. *See* note 2 *supra.* As far back as 1929, a study on collegiate athletics concluded that "college sports have been developed from games played by boys for pleasure into systematic professionalized athletic contests." Carnegie Foundation for the Advancement of Teaching, American College Athletics, *quoted in* N.Y. Times, Mar. 10, 1974, § 1, at 1, col. 1. The New York Times Sports Department made a thorough investigation of the recruiting violations and widespread corruption of the intercollegiate sports industry in a six part series of articles. *Athletic Recruiting: A Campus Crisis,* N.Y. Times, Mar. 10, 1974, § 1, at 1, col. 1. In K. DENLINGER & L. SHAPIRO, note 2 *supra,* the intense recruiting practices detailed indicate how very importantly schools view the acquisition of talented athletes. "Every blue chip prospect in the fold means a step closer to sold-out arenas, national attention, television gold, and, best of all for the coaches, security. There is money, big money, to be made. . . ." *Id.* at 67.

4. *See* notes 2 and 3 *supra.*

5. *See* W. CHAMBERLAIN, WILT (1973), where the author explained his financial situation in college: "I rarely had to ask for anything. . . . The team won so many games and I scored so many points, they were always coming up to see me afterward and shoving wads of bills into my hands or pockets. It might be $5 or $10 or $100, and it just kept coming. I guess I got about

athletics. In the typical case, the NCAA will make the finding of ineligibility after investigating and determining that the student-athlete violated an NCAA regulation. The NCAA then directs its member school to ban the student-athlete from participation in the school's intercollegiate athletic program. Once barred from participation, many of these student-athletes have resorted to the courts hoping to regain the opportunity to participate. In recent years, the amount of litigation arising from NCAA ineligibility rulings has been increasing, and this trend promises to continue in the future.[6]

This plethora of litigation can be seen as springing from the tension that exists between the NCAA's underlying philosophy on collegiate amateur athletics, and the pressure in collegiate athletics to win. The NCAA, a voluntary association of more than 860 schools, conferences and organizations, is responsible for the administration of intercollegiate athletics in all of its phases. The NCAA has stringent guidelines pertaining to the amount and nature of assistance student-athletes may receive before losing their amateur status.[7] An "amateur" is defined by

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$15,000 or $20,000 while I was there. . . ." *Id.* at 48. Matt Snell, the former N.Y. Jet and Ohio State running back, stated that he "had offers of everything from girls to wardrobes to freezers stocked with food." N.Y. Times, Mar. 14, 1974, at 46, col. 6. In K. DENLINGER & L. SHAPIRO, note 2 *supra,* the authors wrote: "Escrow accounts, no work jobs, the promise of several complimentary tickets that could be sold at ten and twenty times their face value, 'weekend women,' charge cards, cars, clothes, and that time honored staple — hard cash — are the most popular inducements." *Id.* at 48. *See also* D. MEGGYESY, OUT OF THEIR LEAGUE 38-40 (1970); Looney, *Deep in Hotwater in Stillwater,* SPORTS ILLUSTRATED, July 3, 1978, at 18; Hannon, *Too Far, Too Fast,* SPORTS ILLUSTRATED, Mar. 20, 1978, at 34; Jones, *Playing the Payroll Game,* SPORTS ILLUSTRATED, Apr. 23, 1973, at 20.

6. *See, e.g.,* Wall Street Journal, Dec. 5, 1979, at 41, col. 2.

7. NCAA CONST. art. 3, § 1(g)(5), *reprinted in* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1979-80 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 13 (1979) [hereinafter cited as NCAA MANUAL], which excludes as prohibited benefits:

> Special arrangements designed to provide a student-athlete, his relatives or other friends with extra benefits not made available to members of the student body in general or their relatives or other friends. Special arrangements specifically prohibited include, but are not limited to:
> (i) Special discounts or payment arrangements on purchases,
> (ii) Loans without interest,
> (iii) Guarantees of bond,
> (iv) Regular or periodic use of an automobile without (or at a reduced) charge,
> (v) Transportation to or from the site of a summer job without (or at a reduced) charge,
> (vi) The provision of special services (*e.g.,* laundry, dry cleaning) without (or at a reduced) charge,
> (vii) Material benefits connected with on-campus or off-campus student-athletes' housing if such benefits are not available on the same basis to the student body in general (*e.g.,* individual television sets and stereo equipment, specialized recreational facilities and room furnishings and appointments of extra quality and quantity),
> (viii) The signing or co-signing of a note with an outside agency by an athletic staff member or representative of the athletic interests of the institution to arrange a loan for a student-athlete, whether for his benefit or the benefit of anyone else.

Id.

the NCAA as "one who engages in a particular sport for the educational, physical, mental and social benefits he derives therefrom and to whom participation in that sport is an avocation."[8] Conversely, it follows that student-athletes who pursue their sports as vocations or for pay would not be considered amateurs. Furthermore, the NCAA views amateurism as being instrumental in keeping collegiate athletics as part of the overall collegiate educational process. This is reflected in the NCAA's statement of "Fundamental Policy" in its constitution:

> The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and, by doing so, retain a clear line of demarcation between college athletics and professional sports.[9]

The NCAA's commitment to segregate amateurism from professionalism in sports has proved to be a gargantuan task in light of the strong motivations to attract and reward student-athletes through financial means.[10]

The financial assistance a student-athlete receives is often motivated by a college or university's desire to attract talented young athletes to the school's sports program in order to upgrade the caliber of its teams. Pressures from the alumni, student body and general public create a tremendous need to build a winning team.[11] Unfortunately, this need to win often manifests itself in the form of illicit payments or other unethical practices designed to procure the services of an athlete for the school team.[12] Moreover, it is axiomatic in the sports world that losing teams do not draw wide audiences.[13] Inasmuch as many schools, particularly the larger ones, rely on revenues generated by their football and basketball teams to support their entire athletic program, it is imperative that these schools develop competitive teams.[14] Thus, it can

8. NCAA CONST. art. 3, § 1, *reprinted in* NCAA MANUAL, *supra* note 7, at 9.

9. NCAA CONST. art. 2, § 2(a), *reprinted in* NCAA MANUAL, *supra* note 7, at 7-8.

10. *See, e.g.*, White, *Sports Recruiting: Odds Against NCAA Policing Unit*, N.Y. Times, Mar. 14, 1974, at 46, col. 2, where the author states that "sports recruiting has forced the National Collegiate Athletic Association into the predicament of a man fighting a forest fire with a garden hose. . . ." *Id.*

11. *See* J. IZENBERG, HOW MANY MILES TO CAMELOT? 126-52 (1972); J. MICHENER, note 2 *supra;* T. TUTKO & W. BRUNS, WINNING IS EVERYTHING AND OTHER AMERICAN MYTHS (1976); P. WEISS, SPORT: A PHILOSOPHIC INQUIRY 175-91 (1969). Moreover, some university officials feel that state legislatures are more disposed to dispense financial aid to those schools with successful athletic programs. N.Y. Times, Mar. 15, 1974, at 24, col. 3.

12. *See* notes 2, 3 and 5 *supra.*

13. *See* N.Y. Times, Mar. 11, 1974, at 1, col. 2, wherein it is stated that: "in the big-business atmosphere of college sports, solvency and survival are linked to victory." *Id.*

14. The money generated is essentially the result of gate receipts, television, and contributions from alumni and other outside sources. *See* Note, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions,* 10 CONN. L. REV. 318, 321 (1978). This concept is apt-

readily be seen that between the need of a school to secure student-athletes through scholarship programs and other benefits, and the rigid rules adopted by the NCAA to maintain amateurism, student-athletes may find themselves in a legal tinderbox concerning their eligibility. It is this tension that is inevitably at the core of litigation stemming out of an NCAA ineligibility declaration.

This note will examine the constitutional problems presented by an NCAA determination of a student-athlete's ineligibility. Section I addresses the question of whether NCAA operations constitute state action so as to subject the ruling to constitutional scrutiny. Section II explores the potential equal protection safeguard available to the student-athlete. Section III examines potential procedural due process guarantees for the student-athlete. The note concludes with a suggestion that the NCAA's view of amateurism is unworkable both in theory and practice, and must be revised in the interest of clarifying the legal status of student-athletes today.

I. THE STATE ACTION PREREQUISITE[15]

Upon being declared ineligible by the NCAA, student-athletes have sought fourteenth amendment protection of their interest in intercollegiate athletic participation. The fourteenth amendment explicitly provides that its equal protection and due process guarantees will apply only to actions made by the state.[16] Thus, the threshold premise which the

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ly illustrated by the Notre Dame situation where "Notre Dame ordinarily takes in nearly $3 million in regular season football revenues. With an additional $670,000 from other sports (mainly basketball), it easily covers the cost of its total athletic program, $3.3 million, with about $270,000 to spare. Its $1.2 million share of cotton bowl receipts came on top of that." *Take the Money and Run,* FORBES, Jan. 22, 1979, at 44.

15. The determination of state action will also satisfy the "under color of state law" requirement for 42 U.S.C. § 1983 (1976). This section provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

The state action and under color of state law prerequisites are equivalents and will be treated as such in this Note. *See* United States v. Price, 383 U.S. 787 (1966); Regents of the Univ. of Minnesota v. NCAA, 560 F.2d 352 (8th Cir. 1977); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973).

16. The fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Thus, by its express terms, the Constitution makes it clear that its equal protection and due process guarantees will apply only to governmental actions. However, as will be discussed more fully in this section, the term state has been interpreted by courts to include organizations which are affected with state action and are therefore subject to constitutional constraints.

student-athlete must establish to trigger constitutional protection is that NCAA operations constitute "state action."[17] In arguing that NCAA actions are state actions, student athletes have relied upon two major theories. The first is based on a public function analysis, that is, by performing a traditional governmental function the NCAA subjects itself to constitutional scrutiny. The second approach is founded upon an entanglement theory, whereby NCAA actions are viewed as state actions by virtue of the organization's public membership. If the student-athlete fails to demonstrate the requisite state action, then NCAA activities will be considered private conduct outside the scope of constitutional purview.[18]

A. Public Function Analysis

Virtually every court which has been faced with the issue of state action on the part of the NCAA has found sufficient state action to invoke constitutional protection.[19] In *Parish v. NCAA,*[20] the court utilized a public function analysis in finding that NCAA activities constituted state action.[21] The court asserted that the state and federal government have a traditional interest in all aspects of education, and that organized athletics is an important part of the educational

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17. A student-athlete may not be able to seek constitutional remedies in federal court where it is apparent that his case is frivolous. In Oklahoma High School Athletic Ass'n. v. Bray, 321 F.2d 269 (10th Cir. 1963), the court dismissed the case of a student-athlete for not being within the federal court's cognizance. The court stated that the plaintiff's

> grievance with the Athletic Association lay only with the application of its residence rule, the Board's refusal to grant an exception for hardship, and a general attack upon the amount of power delegated by the high schools to the Association. Such complaints are not within federal cognizance, [and] are not subject to review in federal court....

Id. at 273.

18. Since its earliest decisions, the Supreme Court has recognized that the fourteenth amendment imposes no restraints on the conduct of private parties. "It is State action of a particular character that is prohibited [by the fourteenth amendment]. Individual invasion of individual rights is not the subject-matter of the amendment." Civil Rights Cases, 109 U.S. 3, 11 (1883). *See also* Virginia v. Rives, 100 U.S. 313 (1879). This premise has been continually reaffirmed by the Court over the years. *See, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelly v. Kraemer, 334 U.S. 1 (1948).

19. Regents of the Univ. of Minnesota v. NCAA, 560 F.2d 352 (8th Cir. 1977); Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974); Hunt v. NCAA, No. 76-370 (W.D. Mich. Sept. 10, 1976); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973). *But see* McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974), discussed at notes 54-59 and accompanying text *infra.*

20. 506 F.2d 1028 (5th Cir. 1975).

21. *See* Howard Univ. v. NCAA, 510 F.2d 213, 220 (D.C. Cir. 1975); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973). "The N.C.A.A. in supervising and policing the majority of intercollegiate athletics and athletes nationwide performs a public function, sovereign in nature, that subjects it to constitutional scrutiny." *Id.* at 1156.

system.[22] When intercollegiate athletics became national in scope and therefore beyond the control of any one state, the need arose for some type of regulating body to coordinate the athletic system.[23] The NCAA undertook this coordination of collegiate athletics, and hence for the court, was performing a traditional public function.[24] The *Parish* court stressed that states should not be allowed to sidestep constitutional restrictions by forming or supporting "private" organizations in which they have placed a part of their governmental power.[25] The decision indicates that management of intercollegiate athletics is a public function, which and when performed by the NCAA or any other formally private organization, affects that organization with state action.

However, it is questionable whether this type of state function analysis would survive scrutiny by the Supreme Court today. The public function theory as originally formulated in *Marsh v. Alabama*[26] has been given a narrow reading in recent Supreme Court cases.[27] In *Marsh,* the Supreme Court held that because a company-owned town functioned in the same manner as other towns, company appointed town managers were bound by the same constitutional restraints as would bind managers of a public municipality.[28] The theory evolving from this decision is that private parties are subject to constitutional restrictions if they perform functions traditionally reserved to the state. In *Hudgens v. NLRB,*[29] the Court interpreted *Marsh* as applying only in situations where the private party assumed *all* of the functions of a city or state government.[30] Further, in *Flagg Brothers v. Brooks,*[31] the Court placed great weight on the fact that in *Marsh* the company-owned town was *exclusively* exercising what was traditionally a governmental function.[32] Therefore, it would appear that private activity which does not com-

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22. Parish v. NCAA, 506 F.2d 1028, 1032 (5th Cir. 1975).

23. *Id.*

24. *Id.* The court further stated, "in light of the national . . . scope of collegiate athletics and the traditional governmental concern with the educational system, that were the NCAA to disappear tomorrow, government would soon step in to fill the void." *Id.* at 1033.

25. *Id.*

26. 326 U.S. 501 (1946).

27. *See, e.g.,* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Hudgens v. NLRB, 424 U.S. 507 (1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

28. Marsh v. Alabama, 326 U.S. 501, 508 (1946).

29. 424 U.S. 507 (1976).

30. *Id.* The *Hudgens* Court pointed out that, "[i]n effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State." *Id.* at 519.

31. 436 U.S. 149 (1978).

32. *Id.* at 159. The issue in *Flagg Brothers* involved whether private creditors were performing the traditional state function of resolving disputes by virtue of a statute authorizing them to use self-help techniques. Since the proposed action by the plaintiff in *Flagg Brothers* was not the only means of resolving the dispute, the function the creditors were performing lacked the feature of exclusivity which would have rendered the action state action. *Id.* at 159-60.

pletely displace government activity would not fall within the public function doctrine.

Assuming that the NCAA is performing a governmental function by virtue of its regulation of intercollegiate athletics, it is difficult to see how it can meet the *Hudgens* standard of performing the full range of governmental functions in the area concerned. According to *Parish,* the essence of the public function being performed by the NCAA related to the state's traditional interest in education. Thus, in order for the NCAA to be affected with state action under a public function analysis, it would appear that the NCAA would have to be involved in the full spectrum of activities the state would normally be performing in regard to education. However, the regulation of athletics is but a fragment of the overall process of education.

Moreover, the NCAA's activities do not have the feature of exclusivity that is required under the *Flagg Brothers* standard. The Court argued in *Flagg Brothers* that only when the state delegates its exclusive perogative in an area to a private party can state action exist.[33] However, regulation of intercollegiate athletics is not a function exclusively reserved to either the state or the NCAA. Indeed, membership in the NCAA is not necessarily a prerequisite for operating an intercollegiate sports program.[34]

Compounding the difficulties raised by *Hudgens* and *Flagg Brothers* in applying a public function analysis to NCAA activities is the hesitancy of some courts to hold that education itself is a traditional public function. In *Issacs v. Board of Trustees of Temple University,*[35] the court noted that the public function theory was "a slender analytical reed upon which to lean, for it admits to practically no limitation,"[36] and accordingly held that education was not a traditional public function for purposes of applying the doctrine.[37] Ultimately these cases lead to the conclusion that the public function analysis employed by the *Parish* court should not be sufficient to saddle the NCAA with constitutional restrictions via state action.

B. Entanglement Theory

A better approach to the state action problem was enunciated by the court in *Howard University v. NCAA,*[38] where the court relied on an

33. *Id.* at 160.

34. However, it should be kept in mind that in order to operate a large scale intercollegiate athletic program on an economically sound basis, membership in the NCAA may be a practical necessity. *See* note 46 *infra.*

35. 385 F. Supp. 473 (E.D. Pa. 1974). *See also* Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968).

36. Issacs v. Bd. of Trustees of Temple Univ., 385 F. Supp. 473, 486 (E.D. Pa. 1974).

37. *Id.*

38. 510 F.2d 213 (D.C. Cir. 1975).

entanglement theory in reaching its conclusion that NCAA activities constituted state action. The court in *Howard* began its analysis by "sifting facts and weighing circumstances"[39] to see if government involvement in NCAA activities was so substantial as to render the activities state action. First, the court noted that approximately half of the NCAA's members are state or federally supported[40] and that public schools provide the vast majority of the NCAA's capital.[41] Second, the court asserted that public schools are a dominant force in determining NCAA policy and in dictating NCAA actions.[42] Third, the court found that the NCAA's regulation and supervision over intercollegiate athletics is extensive and represents a very valuable service to member schools.[43] Finally, the court placed great weight on the fact that the NCAA negotiates television contracts, the proceeds of which flow directly to the involved schools, most of which are public.[44] Based on these factors, the *Howard* court concluded that "the NCAA and its member public instrumentalities are joined in a mutually beneficial relationship, and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny."[45] Ultimately, the thrust of the analysis is that state action exists because of the dominant membership and participation of public organizations in a private parent organization.[46]

The *Howard* court went on to state that because the question is one of entanglement through dominant membership and participation, the

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39. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court stated: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. This seems to be the universal approach used in resolving state action issues, as each case is thoroughly examined to see if its particulars give rise to the government involvement necessary to warrant state action. *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974); Evans v. Newton, 382 U.S. 296, 299 (1966).

40. Howard Univ. v. NCAA, 510 F.2d 213, 219 (D.C. Cir. 1975).

41. *Id.* Contributions to the NCAA are based upon the school's size, and the public schools generally have the largest student body populations.

42. *Id.* The members of the governing council and various committees of the NCAA are provided traditionally by public institutions. Moreover, the Convention holds the principal power in the NCAA as evidenced by its ability to elect officers, adopt and amend the NCAA Constitution and bylaws, and oversee all committees and councils. The Convention is composed of representatives of the member schools, half of which are public.

43. *Id.* at 220. The NCAA conducts championship events for the benefit of member schools and regulates the amateur status of student-athletes, financial aid policies, playing and practice seasons, and minimum academic standards.

44. *Id.* The proceeds amounted to approximately $13,000,000 annually.

45. *Id.*

46. The *Howard* court does not attempt to demark precisely how much governmental entanglement would be necessary for a finding of state action. As the court points out:

> If the NCAA was composed of solely public institutions, clearly state action would be present. In contrast, if the NCAA had no public members, its actions would be private for constitutional purposes. Drawing the line as to the requisite quantum of public participation to invoke fourteenth amendment protections is a difficult task in-

recent Supreme Court decisions in *Moose Lodge No. 107 v. Irvis*[47] and *Jackson v. Metropolitan Edison Co.*,[48] limiting the scope of state action in different contexts, do not affect the *Howard* analysis.[49] Yet, not all courts are convinced that the ramifications of *Moose Lodge* and *Jackson* do not spill over into the NCAA context.[50] These cases may cast doubt on whether the action of the NCAA declaring a student-athlete ineligible is state action by virtue of the relationship between the NCAA and its member public schools. The *Jackson* decision made it clear that in order to find state action, there must be a nexus between the complained of activity, and the contact between the state and the private entity which is claimed to lead to state action.[51] Therefore, in order to find state action in the NCAA context, there would appear to be a need for a direct nexus between the state-supported schools' involvement in the NCAA and the NCAA's act of declaring a student-athlete ineligible. Upon first impression, the nexus may seem insufficient in that an NCAA ineligibility ruling will run counter to the interests of a particular school. The scenario that evolves from such a ruling depicts the NCAA attempting to enforce its directive against a recalcitrant school trying to maintain eligibility for its athletes.[52] On balance,

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deed. However, that is unnecessary in this case where the degree of public participation and entanglement between the entities is substantial and pervasive.

Id. at 220. This analysis suggests that if a group of private schools formed their own athletic association, and if that association found a student-athlete to be ineligible, the student-athlete would not be afforded constitutional protection because the association's acts would not be state action. Yet, as a practical matter, a private school has no choice but to join the NCAA, and its predominantly public school members. *See* Bd. of Regents of the Univ. of Oklahoma v. NCAA, 561 P.2d 499, 504 (Okla. 1977) ("[The NCAA] is so dominant in its field that membership in a practical sense is not voluntary, but economically necessary"). *See also* Univ. of Nevada v. Tarkanian, ____ Nev. ____, 594 P.2d 1159 (1979).

47. 407 U.S. 163, 177 (1972) (Court held there was no state action on the part of a private club's discriminatory membership policy despite the state's grant of a liquor license to the club).

48. 419 U.S. 345, 352 (1974) (Court held there was not state action when a heavily regulated utility with something of a governmentally protected monopoly terminated electric service).

49. Howard Univ. v. NCAA, 510 F.2d 213, 219 n.10 (D.C. Cir. 1975).

50. *See, e.g.*, Regents of the Univ. of Minnesota v. NCAA, 560 F.2d 352 (8th Cir. 1977), where Judge Bright stated, "cases such as [*Jackson* and *Moose Lodge*] could support a strong argument that no state action exists." *Id.* at 373 n.34 (Bright, J., concurring). *See also* Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976).

51. As the *Jackson* Court stated: "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be treated fairly as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

52. *See, e.g.*, Regents of the Univ. of Minnesota v. NCAA, 422 F. Supp. 1158 (D. Minn. 1976), *discussed in* note 130 *infra*. Arguably, there is insufficient nexus because the NCAA declaration is damaging to the school and is therefore disassociated from the symbiotic relationship between the NCAA and the school. The symbiosis concept has its origins in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In *Burton*, the Court held that a restaurant's refusal to serve blacks was state action where the restaurant leased space in a public parking facility. Underlying this conclusion was the finding of an economic interdependence between the restaurant and the state. The parking facility relied on funds generated by the lease to remain self-sustaining, and the restaurant leased new premises from the state, garnered tax advantages and ob-

however, a school's interest in maintaining one athlete's eligibility would appear to be outweighed by its interest in the NCAA's upholding the integrity and reputation of collegiate athletics.[53] Moreover, this conclusion is buttressed by the fact that the regulations themselves were promulgated by committees composed of predominantly state school members.

Up until this time there has only been one case, *McDonald v. NCAA*,[54] which has held that NCAA activities do not constitute state action.[55] In so holding, the court noted that the NCAA is not under the control of any one state, nor, conversely, does the NCAA oversee the athletic program of a particular state.[56] Accordingly, the court held that the NCAA is "not a sovereign equivalent,"[57] and the fact that public schools voluntarily concur in the decisions of the NCAA does not make the actions of the NCAA state action.[58] The court went on to say that

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tained a convenient place for customers to park their cars. Significantly, the discriminatory practice held to be state action was seen by the Court as benefiting both parties. *Id.* at 723-24. An NCAA ineligibility ruling, on the other hand, is not a mutually beneficial act to the extent that the school loses the services of a valuable athlete.

53. Despite losing the services of a valuable athlete, a school may nonetheless benefit from NCAA rulings by virtue of the latter's weeding out the undesirable elements in collegiate athletics. Additionally, by policing intercollegiate sports, the NCAA may relieve the school of a function it might ordinarily feel compelled to perform.

54. 370 F. Supp. 625 (C.D. Cal. 1974).

55. The conclusion in *McDonald* was expressly rejected in Howard Univ. v. NCAA, 510 F.2d 213, 218-19 (D.C. Cir. 1975) and Parish v. NCAA, 506 F.2d 1028, 1032 (5th Cir. 1975). Additionally, the Ninth Circuit has apparently overruled *McDonald* by implication in their holding in Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1254 (9th Cir. 1974) (NCAA activities do not constitute state action). Yet, the *McDonald* decision does deserve attention because of its novel approach to the state action issue. *See* Howard Univ. v. NCAA, 510 F.2d 213, 218 (D.C. Cir. 1975).

56. McDonald v. NCAA, 370 F. Supp. 625, 631 (C.D. Cal. 1974). In making this point, the court distinguished a line of cases holding actions of high school athletic associations to be state action. Chief among these cases is Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968), which the *McDonald* court found to be inapposite to the NCAA situation in that the high school athletic association functioned in relation to one particular state.

57. McDonald v. NCAA, 370 F.2d 625, 631 (C.D. Cal. 1974).

58. *Id.* at 632. The *McDonald* court further distinguished *St. Augustine* on another basis. *St. Augustine* involved a claim of racial discrimination and, according to the *McDonald* court, was resolved on those grounds. The idea is that courts expand the range of private activity that would be considered state action because of a judicial aversion to racial discrimination. This rationale seems justifiable when seen in light of the historic purpose of the fourteenth amendment to vitiate racial discrimination. *See* Judge Friendly's concurring opinion in Coleman v. Wagner College, 429 F.2d 1120 (2nd Cir. 1970), where he argued: "that racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts. . . ." *Id.* at 1127 (Friendly, J., concurring). However, the *McDonald* court's reliance on the racial aspect of *St. Augustine* is flawed because the high school line of cases now clearly extend constitutional scrutiny to situations where racial discrimination is not involved. *See* Howard Univ. v. NCAA, 510 F.2d 213, 218 (D.C. Cir. 1975). For example, state action has been found on the part of high school activity associations in cases challenging sex discrimination, Brenden v. Independent School District, 477 F.2d 1292 (8th Cir. 1972); eligibility rules, Florida High School Activities Ass'n v. Bradshaw, 369 So.2d 398 (Fla. App. 1979); and regulation of high school debate

state action exists only in the concurrence of a state school or other sovereign equivalent in an NCAA decision, and that the NCAA ruling itself is not state action.[59] However, the *McDonald* rationale does not seem to hold up when the entanglement theory is utilized to determine if state action exists. According to the *Howard* court, the issue is not whether the NCAA is the sovereign equivalent of a particular state, but rather whether there is sufficient entwinement between the interests and affairs of the NCAA and its predominantly public school membership to make a finding of state action.[60]

In conclusion, the entanglement approach appears to be more appropriate than the public function approach for student-athletes to argue in their efforts to subject NCAA ineligibility rulings to constitutional scrutiny. Whereas the public function analysis seems vulnerable to charges that NCAA operations do not fulfill all of the criteria necessary for a finding of state action, the entanglement approach seems comparatively sound. In general, the state action question is close, especially in light of the Burger Court's tendency to restrict the applicability of state action. Nevertheless, courts faced with the issue are decidedly finding state action on the part of the NCAA, and the weight of precedent will assuredly continue this trend.[61]

II. EQUAL PROTECTION

If NCAA declarations of ineligibility are held to constitute "state action" for constitutional purposes, one source of protection the student-

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tournaments, Baltic Independent School District No. 115 v. South Dakota High School Activities Ass'n, 362 F. Supp. 780 (D. S.D. 1973).

The reliance on the historical purpose of the fourteenth amendment against racial discrimination in regard to when a private actor assumes the position of the state seems questionable as a logical matter. An aversion to racial discrimination does not appear to be a fundamentally sound factor in making the determination of when a private party is affected with state action. Moreover, there are inherent problems in administering constitutional rights in this manner. *See* Issacs v. Bd. of Trustees of Temple Univ., 385 F. Supp. 473, 485 (E.D. Pa. 1974), where the court stated:

> It is difficult, and perhaps impossible, to arrange federal constitutional rights in an ascending hierarchy of value. What is clear is that any deprivation of such a right . . . is a matter of extreme importance to the person who suffers the deprivation. It is equally clear that the courts should be especially sensitive to any such deprivation, whether it involves a black man who is refused service in a segregated restaurant . . . or two faculty members who were fired without a hearing for speaking their minds about a university's publication policies. . . .

59. McDonald v. NCAA, 370 F.2d 625, 632 (C.D. Cal. 1974) where the court stated:

> It is the act of the state or its sovereign equivalent that must be measured by constitutional standards; for in the measure of compelling interest, how can a private educational institution under the same compulsion of membership in the NCAA be made to choose between membership in the NCAA or the attainment of sovereign equivalence? If the NCAA action is state action, then the concurring action of its members — both public and private — is also state action. The statement of this result makes patent its absurdity.

60. Howard Univ. v. NCAA, 510 F.2d 213, 219 (D.C. Cir. 1975).

61. *See* note 19 *supra*.

athlete can rely upon is the equal protection clause.[62] In essence, this fourteenth amendment guarantee demands the uniform treatment of similarly situated persons in relation to a governmental action.[63] The Supreme Court has developed a basically two-tier approach to equal protection problems.[64] On the one hand, a regulation creating a classification that involves either a "fundamental" right[65] or "suspect" class[66] will be subject to a strict scrutiny analysis to determine its constitutionality. In order to survive this rigorous standard of review the regulation must be found to serve a compelling state interest.[67] On the other hand, a regulation that involves neither a fundamental right nor a suspect class is subject to a much more lenient "rational relationship" test, which requires only that the regulation bear a rational relationship to a legitimate state objective.[68] The practical result is that classifications that do not infringe upon fundamental rights or discriminate against suspect classes will usually be upheld by the courts as constitutional.[69]

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62. The equal protection clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

63. Reynolds v. Sims, 377 U.S. 533, 565 (1965).

64. There also may be a third, or middle-tier, test for the application of the equal protection clause. This middle-tier test would utilize a standard of review that would be more demanding than the traditional rational relationship test, yet not as exacting as the strict scrutiny approach. By invoking this middle-tier test, courts can avoid creating new suspect classifications and fundamental rights, while at the same time getting the opportunity to grapple with important issues that might otherwise be perfunctorily disposed of through the rational relationship test. For example, cases dealing with sex discrimination fit this pattern. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). *See generally* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

65. Fundamental interests include the right to travel, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, *see e.g.*, Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); and the right of the criminal defendant to have access to the judicial process, *see, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

66. Suspect classifications include those based on race, *see, e.g.*, Palmer v. Thomson, 403 U.S. 217 (1971); Loving v. Virginia, 388 U.S. 1 (1967); those based upon national origin, *see, e.g.*, Oyama v. California, 332 U.S. 633 (1948); Korematsu v. U.S., 323 U.S. 214 (1944); and those based upon alienage, *see, e.g.*, Nyquist v. Mauclet, 432 U.S. 1 (1977); *In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

67. *See* Graham v. Richardson, 403 U.S. 365, 375 (1971). In *In re* Griffiths, 413 U.S. 717 (1973), the Supreme Court emphasized that in order to justify a classification based on alienage, "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment of its purpose' or the safeguarding of its interest." *Id.* at 721-22, *quoting* McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

68. In McGowan v. Maryland, 366 U.S. 420, 425 (1961), then Chief Justice Warren stated that such a classification would be unconstitutional only if it "rests on grounds wholly irrelevant to the achievement of the State's objective." *See also* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

69. *See* Gunther, *supra* note 64, where the author describes the traditional rational relationship test to have "minimal scrutiny in theory and virtually none in fact." *Id.* at 8.

In *Buckton v. NCAA,*[70] Canadian student-athletes successfully relied on the equal protection clause to enjoin the NCAA from having them declared ineligible from intercollegiate sports.[71] The ineligibility ruling was based on NCAA regulations prohibiting any athlete who had participated in Canadian junior A hockey from further participation on a NCAA member team.[72] The regulation was designed to maintain amateurism in collegiate hockey by excluding those players who had received compensation for their athletic efforts. Although the plaintiffs did play junior A hockey, they were attending school at the same time.[73] As compensation, each player had received only money for room and board at their respective schools and additional sums for school books and minor expenses.[74] Upon learning that the student-athletes had played in the junior A system, the NCAA directed Boston University to declare them ineligible to play for the school hockey team.[75]

The *Buckton* court first decided that the student-athletes were members of a suspect classification based on alienage.[76] Accordingly, the court applied the strict scrutiny test to the NCAA regulations rendering the Canadians ineligible, finding that the "regulations constitute and impose disparate eligibility standards, one for student-athletes who have played hockey in the United States, and another for those who have played hockey in Canada."[77] The NCAA regulations did not take into account the fact that a Canadian youth who wished to play competitive hockey at the secondary school level must play for a junior A team.[78] Conversely, an American youth of like age and ability could play competitively for a high school team, as the American athletic system has more organized interscholastic hockey programs.[79]

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70. 366 F. Supp. 1152 (D. Mass. 1973).

71. *See also* Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975), where two collegiate soccer players successfully struck down the NCAA's so-called "foreign-student rule" on equal protection grounds. The foreign-student rule eliminated one year of an alien student-athlete's potential eligibility for each year the athlete participated as a representative of a team in a foreign country after the age of 19 and before his matriculation at a NCAA member institution. *Id.* at 215. The rationale behind the rule was to prevent these student-athletes from "dominating championship competition because of age and experience." *Id.* at 222. Since the student-athletes were members of a suspect class, the rule was subjected to close judicial scrutiny. The court concluded that the arbitrary discrimination against the student-athletes could not be justified by the NCAA's objective since the alien student-athletes were "penalized for activities . . . in which American athletes may freely compete." *Id.*

72. NCAA CONST. art. 3, § 1, read as follows at the time of the infraction: "Any student-athlete who has participated as a member of the Canadian Amateur Hockey Association's major junior A hockey classification shall not be eligible for intercollegiate athletics." Buckton v. NCAA, 366 F. Supp. 1152, 1155 (D. Mass. 1973).

73. *Id.* at 1154.

74. *Id.*

75. *Id.* at 1155.

76. *Id.* at 1157.

77. *Id.*

78. *Id.* at 1158.

79. *Id.*

Thus, because of the difference between secondary school hockey programs in Canada and the United States, Canadians did not have the same opportunity as Americans to play intercollegiate hockey by virtue of the NCAA regulation.

The NCAA maintained that it had a compelling interest in preserving amateurism in collegiate sports, and therefore its classification was justified.[80] However, after noting that the NCAA permits schools to give limited aid to student-athletes, the court held it would be discriminatory to bar athletes from intercollegiate play who had received the same type of aid from a source other than a school.[81] In other words, the NCAA regulation merely focused on the source of the aid rather than its character, and in so doing failed to achieve its goal of maintaining amateurism in the collegiate ranks.[82]

Although the student-athletes in *Buckton* received constitutional protection via the equal protection clause, this appears to be the exception rather than the rule.[83] In *Buckton,* because a suspect classification was involved, the court utilized a strict scrutiny analysis of the regulation in question. However, when neither a suspect class nor a fundamental interest is involved, courts will resort to the rational relationship test which is significantly easier for the NCAA to satisfy.[84] Since the majority of NCAA ineligibility cases do not involve suspect classes or fundamental rights, most student-athletes do not get the benefit of strict judicial scrutiny of the regulation rendering them ineligible. Illustrative of this point is *Jones v. NCAA,*[85] decided by the same court that issued the *Buckton* opinion.

In *Jones,* as in *Buckton,* a student-athlete was declared ineligible by the NCAA because he had participated in Canadian junior A hockey. However, the *Jones* court declined to follow the *Buckton* holding because of factual differences between the two cases. The plaintiff in *Jones* was an American, not a Canadian, who had played two years of

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80. *Id.* at 1157. The NCAA was concerned with the disassociation between Canadian junior A hockey and education; a situation which does not exist in the American context. From the NCAA's point of view, the motivation behind aid to an athlete is suspect unless the source of that aid is a school. *Id.* at 1158.

81. *Id.* at 1159.

82. *Id.*

83. However, considering the increasing influx of foreign amateur athletes to this country, the equal protection clause affords important constitutional protection to a large segment of persons who may be classified as "aliens." Canada, for example, has lost at least thirteen of its best swimmers to this country, as well as more than 100 track and field athletes, and the "list runs on to hockey players (so numerous lately that quotas are being slapped on Canadian recruits), football and basketball players, . . . and scores of others." Griffiths, *Muscles for Money: The Brawn Drain to the U.S.,* MCLEAN'S, July 2, 1979, at 13. A major attraction is the generous scholarship offers made by American schools. *Id.*

84. *See* notes 68-69 *supra.*

85. 392 F. Supp. 295 (D. Mass. 1975).

junior A hockey while not attending school.[86] Because the plaintiff was neither an alien nor a member of another suspect class, the court found no basis upon which to examine the NCAA regulation under a standard of strict scrutiny.[87] Accordingly, the court applied the rational basis test and held there was at least a rational relationship between the NCAA's goals of preserving amateurism and the various eligibility standards the NCAA had promulgated to meet that goal.[88] Moreover, the court noted that the plaintiff's two year hiatus from school while participating in junior A hockey was in itself grounds for not following the *Buckton* decision.[89] To restore the student-athlete's eligibility in this situation would give him an advantage over other student-athletes, American or Canadian, since he received compensation while not simultaneously attending school.[90]

The student-athlete in *Jones* forged a second equal protection argument founded on the premise that classifications based upon wealth are suspect. The plaintiff maintained that he was discriminated against on the basis of wealth because he was forced out of necessity to accept compensation from junior A teams because of his family's inability to pay for his room and board and other related expenses.[91] This compensation would have been unnecessary, the plaintiff argued, if his family were better off financially.[92] Therefore, his being deemed a "professional" was a direct result of his family's financial status.[93] The student-athlete relied upon a series of Supreme Court decisions which had carefully scrutinized classifications involving wealth to support his argument that the court should apply a strict scrutiny analysis to his ineligibility ruling.[94] Nevertheless, the *Jones* court declined to invoke a strict scrutiny analysis of the NCAA regulations.[95]

The *Jones* court relied on *San Antonio Independent School District v. Rodriguez*[96] to distinguish the student-athlete's predicament from

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86. *Id.* at 297.

87. *Id.* at 298.

88. *Id.* at 298-99.

89. *Id.* at 301.

90. *Id. See also* Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), where the court, facing a situation similar to that in *Jones,* found that the plaintiff collegiate hockey players could not elicit strict scrutiny analysis of NCAA regulations because the classifications were not based on alienage, nor were the plaintiffs aliens themselves. The rules were then found to have a rational relationship to NCAA objectives, and therefore upheld. *Id.* at 897-98.

91. Jones v. NCAA, 392 F. Supp. 295, 301 (D. Mass. 1975).

92. *Id.*

93. *Id.*

94. *See, e.g.,* Goosby v. Osser, 409 U.S. 512 (1973); Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); *but see* Ross v. Moffit, 417 U.S. 600 (1974).

95. Jones v. NCAA, 392 F. Supp. 295, 298 (D. Mass. 1975).

96. 411 U.S. 1 (1973). This was a class action brought on behalf of students from poor families challenging a school financing system that was based on local property taxation. The

that of cases where wealth based classifications were invalidated after exacting analysis. In the latter situations, the laws overturned were found to totally deny individuals important constitutionally protected interests on the basis of wealth.[97] The regulations questioned in *Jones* merely made it more burdensome for poor student-athletes to pursue their hockey activities, as opposed to working a complete deprivation of the opportunity to play hockey.[98] Moreover, the student-athlete's right to participate in a hockey program can not be viewed as a fundamental right for equal protection purposes.[99] In *San Antonio,* the Supreme Court stated that it would recognize only established constitutional rights as being fundamental.[100] In so holding, the Supreme Court determined that education was not a fundamental interest, despite taking into account the vital role that education plays in our society.[101] In rejecting the premise that strict scrutiny analysis is required in cases where wealth classifications affect the individual's right to education, the *San Antonio* decision makes it doubtful whether student-athletes could suceed on a similar argument involving their right to play hockey.

In summary, the equal protection argument has not been a particularly effective vehicle for student-athletes attempting to protect their interest in participation since only the unusual case will trigger a strict scrutiny analysis of the regulation rendering them ineligible.[102] Reality suggests that NCAA ineligibility issues rarely involve actual discrimination against suspect classes or infringement against fundamental rights, therefore making the equal protection guarantee an unsuitable remedy for the student-athlete.

III. Procedural Due Process

The due process clause,[103] when compared to the equal protection clause, offers the student-athlete a more appropriate source of consti-

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plaintiffs maintained that the quality of education the students received was directly proportional to the wealth of the area in that the quality of education was a direct reflection of property tax revenues. The Supreme Court rejected this argument, holding that "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24.

97. For instance, in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), a poll tax worked as an absolute deprivation of the fundamental right to vote.

98. Jones v. NCAA, 392 F. Supp. 295, 302 (D. Mass. 1975).

99. As, for example, the right to vote is so viewed. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

100. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 29-39 (1973).

101. *Id.*

102. An interesting approach that would subject NCAA regulations to strict scrutiny analysis would be the treatment of students as a suspect classification. *See* Letwin, *After Goss v. Lopez: Student Status as Suspect Classification?,* 29 STAN. L. REV. 627 (1977). Moreover, it is not inconceivable that some ineligibility issues may be susceptible to the middle-tier equal protection analysis. *See* note 64 *supra.*

103. The due process clause of the fifth and fourteenth amendments states that no person shall be deprived of "life, liberty, or property without due process of law." U.S. CONST. amends. V; XIV, § 1.

tutional protection. Upon being declared ineligible, student-athletes have claimed procedural due process violations in an attempt to have NCAA sanctions declared unconstitutional. In these actions student-athletes typically maintain that they were not afforded the rudimentary due process safeguards in the NCAA or school's determination that they were ineligible.[104] In making this argument, student-athletes must show that their interest in athletic eligibility rises to the level of a liberty[105] or property interest. According to the landmark case of *Board of Regents v. Roth,*[106] a property interest will exist in a benefit if it can be demonstrated that there is a legitimate claim of entitlement to the benefit and not merely an abstract or unilateral desire for it.[107] Section A examines the premise that an athletic scholarship establishes a property interest in athletic participation for student-athletes. Section B discusses the theory that athletic participation is a property interest due to its educational and economic aspects. Absent a showing that the

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104. *See, e.g.,* Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), where student-athletes charged the following violations: (1) lack of impartiality of the Committee on Infractions; (2) lack of standards on which to base the finding that an official inquiry was necessary; (3) and on which to base the imposition of serious penalties; (4) failure to provide the student-athletes the right to council at an eligibility appeals hearing; (5) failure to properly promulgate NCAA legislation so as to give notice of what constituted violations of that legislation. *Id.* at 894.

105. In Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), the Supreme Court stated: "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Thus, student-athletes could conceivably argue that due process involvement is warranted because NCAA ineligibility rulings deprive them of "liberty" by impairing their character and future employment opportunities. In this regard, the court in Buckton v. NCAA, 366 F. Supp. 1152, 1159 (D. Mass. 1973), asserted:

> Even the most blase and hardened campus observer would recognize the obvious stigma that attaches to a declaration of athletic ineligibility, particularly when such ineligibility is based on alleged professionalism, as opposed to more routine academic insufficiency. A reasonable if not necessary implication would be that plaintiffs lacked moral fiber. . . .

However, the Supreme Court narrowly interpreted *Constantineau* in Paul v. Davis, 424 U.S. 693, 709 (1976), by holding that damage to reputation alone does not impinge liberty interests. Additionally, it appears that NCAA ineligibility rulings would not deprive student-athletes of liberty if there was no public disclosure of the reasons for the rulings. *See* Bishop v. Wood, 426 U.S. 341, 348 (1976). While the liberty issue has not been dealt with extensively in the NCAA ineligibility decisions, it seems apparent that student-athletes have a stronger basis for invoking due process by arguing that they have a property interest in eligibility.

106. 408 U.S. 564 (1972).

107. *Id.* at 577. The Court defined property interest as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives; reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id.

student-athlete's interest in athletic participation is a property interest, these procedural due process guarantees will not be applicable.[108]

A. The Student Athlete's Scholarship As A Property Right

Board of Regents v. Roth[109] involved the dismissal of a university professor without a hearing. The professor was hired for a fixed term of one year and was untenured. The Court held that his interest in continuing to teach at the university did not rise to a property-like status since the professor had no more than unilateral expectation of continuing to teach at the university.[110] However, in *Perry v. Sindermann,*[111] a companion case to *Roth,* the Court held that a non-tenured teacher may have a property interest in re-employment if the college had a de facto tenure program.[112] Thus, despite the fact that there was no explicit contractual tenure provision, there might be an implied contractual agreement stemming from the college's words and conduct in light of the circumstances.[113] Therefore, where the college, in effect, gave tenure to teachers who had been employed for seven years and the plaintiff had been employed for ten years, there existed the necessary mutual understanding between the parties to give the plaintiff a property interest in re-employment.

The understanding between the school and the scholarship student-athlete seems analogous to the agreement between the school and the professor in *Perry.* In *Colorado Seminary v. NCAA,*[114] the court examined the premise that a student-athlete has a property interest arising out of the contractual agreement created by the scholarship. The argument posed by the student-athletes was that the athletic scholarship establishes a contracted for property interest in participating for the

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108. An inquiry of exactly what process would be due student-athletes is beyond the scope of this Note. However, in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), the Supreme Court indicated that due process requirements were flexible and summarized the relevant considerations as follows:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

109. 408 U.S. 564 (1972).

110. *Id.* at 578.

111. 408 U.S. 593 (1972).

112. *Id.* at 600. *See also* Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Soni v. Bd. of Trustees, 513 F.2d 347 (6th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976).

113. Perry v. Sindermann, 408 U.S. 593, 602 (1972).

114. 417 F. Supp. 885 (D. Colo. 1976).

school's athletic team.[115] If it is accepted that such a property interest exists, it would seemingly follow that the student-athletes would be entitled to due process procedures before that interest could be terminated.

Nevertheless, the *Colorado Seminary* court held that the interest in participation still would not rise to the level necessary to afford constitutional protection. The court stated that it:

> [was] not persuaded that the interest is the equivalent of a legal entitlement necessary to establish a constitutionally protected interest. The athlete on scholarship has no more "right" to play than the athlete who "walks on." The interest is therefore too speculative to establish a constitutionally protected right.[116]

In contrast to *Colorado Seminary,* the court in *Hunt v. NCAA,*[117] held that the student-athlete does have a constitutionally protected property interest in participation arising out of the contractual relationship formed by the scholarship.[118] In *Hunt,* the scholarship was seen to create a contractual relationship that caused both the school and the student-athletes to understand that the student-athletes would play for the school football team. Where the *Colorado Seminary* and the *Hunt* courts differ is in the former's conclusion that, in *Roth* terms,[119] the student-athlete had only a unilateral interest in participation and not a legitimate claim of entitlement.

Although the *Colorado Seminary* decision indicates that the student-athlete's interest in participation is merely unilateral or abstract, this premise does not seem entirely accurate. As in *Perry*, an implied contractual agreement may be found where the school and the student-athlete anticipate the student-athlete's participation in the school's athletic program. When a student-athlete accepts a scholarship offer, he does so for a variety of reasons, often placing greatest emphasis on such factors as the person and ability of his future coach, his future teammates, and the reputation, style and locale of his future team.[120] Many athletes have a large number of scholarship offers from which to

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115. The court presented the argument as follows:

> [T]he contracted for property interest is not just the scholarship funds received in exchange for the athlete's services. The contractual interest includes the expectation that the student will be allowed to participate in intercollegiate competition, the only contingency being that he be good enough to make the team and that he avoid injury. Thus, the services offered is what also is sought — the playing of collegiate sports.

Id. at 895.

116. *Id.*

117. No.76-370 (W.D. Mich. Sept. 10, 1976).

118. *Id.* The court stated, "it seems clear that [the student-athletes] have a property interest arising from their contract with the University granting them certain benefits constituting a football scholarship." *Id.*, slip op. at 4.

119. Bd. of Regents v. Roth, 408 U.S. 564 (1972). *See* note 107 *supra.*

120. *See* K. DENLINGER & L. SHAPIRO, *supra* note 2, at 220-22.

choose. Frequently, the student-athlete accepts the scholarship and attends the school for the sole purpose of participating in a particular school's athletic program. Moreover, in light of the zealous recruiting procedures used by schools to entice student-athletes to their programs,[121] it is evident that the school anticipates the student-athlete's participation.[122] Realistically, the scholarship student-athlete is virtually assured of a position on the school team, barring injury. The walk-on student-athlete, on the other hand, has no such assurance and rarely qualifies for major collegiate athletic teams.[123] Thus, it appears that the agreement between the school and the student-athlete is the kind of "mutually explicit understanding" required in *Perry* which supports a claim of entitlement to the right to participate in the athletic program. Therefore, the *Hunt* approach seems to be correct in recognizing a property interest in the student-athlete's eligibility, and the concomitant right to due process safeguards.[124]

Additionally, the *Colorado Seminary* court addressed the question of whether the deprivation of a previously granted scholarship because of an ineligibility ruling would merit the protections of procedural due process.[125] That is, if the student-athlete's scholarship is dependent on his participation in the school's sports program, then that interest in participation should invoke due process safeguards. The *Colorado Seminary* court rejected this argument because the University was not going to revoke the scholarships of the student-athletes involved.[126] In dicta, however, the court suggested that if the scholarships were revoked, then due process protections would be warranted.[127] Presumably, this results because the student-athlete would already have a vested interest in the scholarship funds. In this regard, it is significant that the NCAA regulations permit schools to revoke scholarship benefits if the student-athlete discontinues participation.[128] Moreover,

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121. *See* note 3 *supra.*

122. *See* Buckton v. NCAA, 366 F. Supp. 1152, 1158 (D. Mass. 1973), where the court noted that "it would be naive to maintain . . . that because the source of aid happens to be a school, the motivation behind the aid is not . . . an effort to induce a good athlete to attend a particular school in order to be assistance to its athletic program."

123. *See* Note, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions,* 10 CONN. L. REV. 318, 346 (1978).

124. The Supreme Court decision in Bishop v. Wood, 426 U.S. 341, 344 (1976), reiterated the holding in *Perry,* stating that "a property interest in employment can, of course, be created . . . by an implied contract." However, the *Bishop* decision seems to signal a more restrictive view of "property" as the Court considered state law as instrumental to the existence of a property interest.

125. *See also* Regents of the Univ. of Minnesota v. NCAA, 560 F.2d 352, 367 (8th Cir. 1977); Parish v. NCAA, 506 F.2d 1028, 1034 (5th Cir. 1975).

126. Colorado Seminary v. NCAA, 417 F. Supp. 885, 895 (D. Colo. 1976).

127. *Id.*

128. NCAA CONST. art. 3, § 4(c)(2), *reprinted in* NCAA MANUAL, *supra* note 7, at 18, which states: "Aid may be gradated or cancelled if the recipient (i) renders himself ineligible for inter-

if financial aid is given on a yearly basis, it is possible that the school, while not cancelling the student-athlete's current scholarship, may simply elect not to renew it the following year.[129] Under these circumstances, it would appear that student-athletes have the requisite property interest in participation should their scholarships be revoked outright or in the following year.

B. Athletic Participation and the College Experience

1. Educational Aspects

Courts have viewed the student-athlete's interest in participation in intercollegiate athletics as an integral aspect of the student-athlete's overall education. In *Regents of the University of Minnesota v. NCAA*,[130] the court held that the interest to participate in intercollegiate basketball is a property right entitled to due process guarantees.[131] In the court's words:

> [T]he opportunity to participate in an athletic program is a very important part of each student-athlete's education. The concepts of winning, losing and doing your best, while made somewhat trite by modern media, are nonetheless important to everyone's development. In the athletic experience, all these concepts are intensely focused into brief periods of competition either with oneself or another.[132]

Therefore, the court concluded that because athletics is a substantial element of the educational process, it should fall within the ambit of the due process clause.[133]

Once participation in collegiate athletics is established to be an important facet of the overall educational process then student-athletes may rely on *Goss v. Lopez*,[134] to support their position that participa-

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collegiate competition; . . . or (iv) voluntarily withdraws from a sport for his own personal reasons." *See also* Taylor v. Wake Forest Univ., 16 N.C. App. 117, 191 S.E.2d 379 (1972).

129. The NCAA rules also permit this, *see* NCAA CONST. art. 3, § 4(d), *reprinted in* NCAA MANUAL, *supra* note 7, at 18.

130. 422 F. Supp. 1158 (D. Minn. 1976). In this case, three basketball players were found by the NCAA to have committed various infractions of NCAA regulations, and consequently the NCAA directed the University to declare the players ineligible. The University refused, after determining on their own that the players did not violate the rules in question. As a result of their refusal, the NCAA put the University's athletic teams on probation. Subsequently, the University brought this action for injunctive relief from the NCAA sanction.

131. *Id.* at 1161-62. *See also* Brenden v. Independent School District, 477 F.2d 1292 (8th Cir. 1973); Moran v. School District No. 7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972); Cabrillo Community College, Dist. of Santa Cruz County v. California Junior College Ass'n, 44 Cal. App. 3d 367, 118 Cal. Rptr. 708 (1975).

132. Regents of Univ. of Minnesota v. NCAA, 422 F. Supp. 1158, 1161 (D. Minn. 1976).

133. *Id.*

134. 419 U.S. 565 (1975).

tion is a property interest that qualifies for due process protection. In *Goss,* the Supreme Court found that students facing a temporary suspension from school should be accorded due process safeguards because of their property interest in receiving a public education.[135] Using the *Roth*[136] guidelines, the Court held that "the state is constrained to recognize the student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[137] Indeed, courts have frequently stressed the need to afford constitutional protection to a student's interest in education.[138]

Nevertheless, other courts have found that participation in intercollegiate athletics does not attain a property-like status. In *Colorado Seminary,* the court was explicit in rejecting the argument that athletic participation is a property interest because of its educational aspects.[139] In relying on *Albach v. Odle,*[140] the *Colorado Seminary* court found the *Goss* decision to be inapplicable to an interest in athletic participation.[141] The *Albach* decision refuted the proposition that a high school student athlete had a property interest in participation in interscholastic athletics.[142] Explaining its divergence from the *Goss* rationale, the court stated that athletic participation is only one of many components of the educational process.[143] Since the court interpreted *Goss* as treating only the whole educational package rather than its separate components, it held that the interest in athletic participation would not require due process guarantees.[144]

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135. *Id.* at 574.

136. Bd. of Regents v. Roth, 408 U.S. 564 (1972). The independent source from which this claim of entitlement grew were the state statutes providing free public education and mandatory attendance. Goss v. Lopez, 419 U.S. 565 (1975).

137. *Pd.* at 574. The *Goss* Court further stated that beyond a *de minimus* deprivation of that interest the gravity of the deprivation is irrelevant to whether due process must be considered. *Id.* at 576.

138. *See, e.g.,* Brown v. Bd. of Ed. of Topeka, 347 U.S. 343 (1954). In Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969), the Court stated: "It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506.

139. 417 F. Supp. 885, 895 (D. Colo. 1976).

140. 531 F.2d 983 (10th Cir. 1976).

141. Colorado Seminary v. NCAA, 417 F. Supp. 885, 895 (D. Colo. 1976).

142. *See also* Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963).

143. Albach v. Odle, 531 F.2d 983, 985 (10th Cir. 1976).

144. *Id.* In the court's words:

> The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement. We do not read *Goss* to establish a property interest subject to constitutional protection in each of these separate components. *Id.*

Many high school ineligibility decisions have followed the *Albach* rationale,[145] and arguably this rationale can be applied to the collegiate context. This argument is buttressed by the contention that collegiate athletics is not an aspect of the educational process in light of what amounts to the student-athlete's virtual alienation from the rest of the academic community. Since student-athletes must devote so much time to sharpening their athletic skills, their more traditional academic pursuits are often neglected.[146] Moreover, it is not unusual for student-athletes to be exposed to immoral and unethical practices which at times fester in the collegiate athletic milieu.[147]

Yet the broader view, espoused in *Regents of the University of Minnesota,* is compelling in its assertion that athletics play an important role in the collegiate educational experience. As that court pointed out, athletics not only perform a socializing function, but are also instrumental in building character.[148] Even beyond that, however, the student-athlete's participation in collegiate athletics can be seen as serving to prepare the athlete for future employment in professional sports.[149] Training young people for their future vocations, whether it

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145. *See, e.g.,* Pegram v. Nelson, 469 F. Supp. 1134 (D. N.C. 1979). In Dallam v. Cumberland Valley School Dist., 391 F. Supp. 358, 361 (D. Pa. 1975), the court stated: "[T]he property interest in education created by the state is participation in the entire process. The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution." In *Dallam,* the court emphasized that a student barred from interscholastic sporting activities still had instruction and some athletic competition available to him. *Id.* at 360. Thus, the only avenue closed to the student was the opportunity to play for his school team against other school teams. *Id.*

146. *See* K. DENLINGER & L. SHAPIRO, *supra* note 2. This study portrays the emphasis put on the student-athletes' particular sport, so much so that their other academic pursuits are sacrificed.

147. *See* notes 2-5 and accompanying text *supra.*

148. Regents of the Univ. of Minnesota v. NCAA, 422 F. Supp. 1158, 1161 (D. Minn. 1976).

149. *See* J. MICHENER, *supra* note 2, at 188-89, where the author states:

> I see nothing wrong in having a college or a university provide training for the young man or woman who wants to devote his adult life to sports. My reasoning is twofold: (1) American society has ordained that sports shall be a major aspect of our national life, with major attention, major financial support and major coverage in the media. How possibly can a major aspect of life be ignored by our schools? (2) If it is permissible to train young musicians and actors in our universities, and endow munificent departments to do so, why is it not equally legitimate to train young athletes, and endow them with a stadium?

In K. DENLINGER & L. SHAPIRO, *supra* note 2, at 31, the authors queried, "if MIT chooses to produce engineers — and recruits teachers and scholars to that end — why shouldn't Ohio State be a proper training ground for the NFL or Maryland for the NBA?"

In Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972), the court stated that:

> [P]art of the function of educating children is to provide them with the basic knowledge and training necessary to become productive adult citizens. However much one may share Thomas Jefferson's scorn for games that are played with a ball, professional baseball is nowadays so important a commercial activity that questions are even raised as to whether or not in some of its manifestations it may come within the scope of the anti-trust laws. Hence, it is difficult to refute the argument that a secondary school system that deprives a student of the opportunity to develop his full potential for entering the field of professional baseball is not functioning as it should. When this deprivation is not because the system is impoverished or limited in its educational offerings, but is because it desires to use the deprivation as a disciplinary

be auto mechanics, law or sports, is not merely one component in the educational process, but the essence of the educational process. Therefore, collegiate student-athletes should be able to apply the *Goss* rationale to their benefit. Moreover, athletics can be viewed as playing a more important role in the collegiate educational context than they do in the high school setting. The very fact that student-athletes must devote a great deal of time and energy to their athletic endeavors evinces the heightened significance that attaches to collegiate sports. Thus, exclusion from intercollegiate athletics may work such a severe deprivation on the student-athlete in relation to his overall education that it calls for due process involvement even under the *Albach* rationale.[150]

2. Economic Aspects

The economic element or the student-athlete's interest in participation in intercollegiate athletics was addressed in *Behagen v. Intercollegiate Conference of Faculty Representatives.*[151] In *Behagen,* the court held that college basketball players could not be suspended from intercollegiate athletics without the minimum standards of due process.[152] In making its decision, the court noted that student-athletes have a substantial economic interest in participating in their particular sport since future professional careers are potentially very lucrative.[153] In the court's words, "to many (student-athletes) the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education."[154] Not only may student-athletes display themselves for scouting

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measure in an attempt to attain objectives, however commendable, of doubtful legal validity, the problem becomes somewhat more sharply in focus.

Id. at 301.

150. In Pegram v. Nelson, 469 F. Supp. 1134 (D. N.C. 1979), the court explored the area in which a student's interest in extracurricular activities might be accorded constitutional protection. While holding that exclusion from one extracurricular activity was beyond the pale of due process, the court nonetheless indicated that total exclusion from extracurricular activities for a long period of time might be the kind of deprivation invoking due process. *Id.* at 1140. This is significant in that the court recognizes as a property interest what had heretofore been considered a mere "component" not worthy of due process protection under the *Albach* rationale. The *Pegram* court appears to measure the deprivation of the particular interest involved against the backdrop of the student's total educational interest. When the deprivation is substantial in relation to the whole educational picture, then due process should be implicated. The *Albach* line of cases, then, may only stand for the idea that interscholastic sports are not so instrumental to the high school educational process as to vest a property interest in those who play them. However, it does not necessarily follow that the same is true at the college level where athletics often take on added significance.

151. 346 F. Supp. 602 (D. Minn. 1972).

152. *Id.* at 604.

153. *See also* Buckton v. NCAA, 366 F. Supp. 1152, 1154 (D. Mass. 1973), where the court stated: "[The student-athletes] are skilled hockey players with sufficient athletic and academic potential for teaching, coaching, and professional hockey. A college hockey career would be of valuable assistance to them in achieving any of these goals."

154. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972).

purposes, but they also have an opportunity to hone their skills because they receive excellent coaching and play against competitive teams. Additionally, participation may be important inasmuch as the athletes may become public personalities through media attention thus aiding them in obtaining future employment in general.[155]

In contrast to the *Behagen* court's view of the economic factor, other courts have viewed the student-athlete's interest in future professional careers as "too speculative and not of constitutional dimensions."[156] In *Parish v. NCAA,*[157] student-athletes were unsuccessful in arguing that because they could garner experience and exposure leading to future professional careers by playing collegiate basketball, they had a property interest in eligibility.[158] In *Parish,* the court specifically stated that the interest did not meet the guidelines set in *Roth.*[159] This view seems plausible, as a strict reading of *Roth* would probably render the student-athletes' expectation of a possible career as a unilateral expectation of a benefit without a legitimate claim of entitlement.[160] Thus, standing alone, the pure economic interest in a possible future athletic career would not be a constitutionally protected property interest. This does not mean, however, that *Behagen* is no longer valid, because the court's analysis addressed the future economic interest in conjunction with the present educational interest. The *Behagen* court asserted that one of the reasons why the right to receive an education is so vital is because education is an essential ingredient to economic success later in life.[161] The *Behagen* intertwinement of the educational and economic aspects of the student-athlete's interest in participation is a realistic approach to the problem.[162]

Essentially, student-athletes have two grounds on which to base their claims to procedural due process rights in the event that their athletic eligibility is threatened with revocation. In that most student-athletes participating in major intercollegiate athletic programs are scholarship

155. J. WEISTART & C. LOWELL, THE LAW OF SPORTS 22 (1979).

156. 417 F. Supp. 885, 895 (D. Colo. 1976). *See also* Louisiana State Bd. of Ed. v. NCAA, 273 So.2d 912 (La. Ct. of App. 1973); Sanders v. Louisiana High School Athletic Ass'n, 242 So.2d 19 (La. Ct. of App. 1970).

157. 506 F.2d 1028 (5th Cir. 1975).

158. *Id.* at 1034.

159. *Id.* The court asserted "[b]oth the injury [to the hoped for career] and the career are far too speculative to establish a property interest as defined in *Roth.*" *Id.*

160. *See* McDonald v. NCAA, 370 F. Supp. 625, 632 (9th Cir. 1974), where the court stated: "The players share of intangible assets is — at best — a fleeting instant in the history of athletics. How many can remember the players in seven out of the last nine NCAA national championship basketball tournaments?"

161. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972).

162. Moreover, participation in collegiate athletics may offer the student-athlete an opportunity to attend college by scholarship. For some less affluent student-athletes, this may be the only means by which they can attend college. *See* Regents of the Univ. of Minnesota v. NCAA, 560 F.2d 352 (8th Cir. 1977); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976).

recipients, they may argue that their scholarships establish a property interest either in the right to participate or in the scholarship funds themselves. Alternatively, student-athletes may claim that their interest in athletic participation is akin to their interest in education, thereby warranting due process before that interest is terminated. To date, not all courts have been willing to find the requisite property interest in eligibility necessary to extend due process to student-athletes. However, in fairness it appears that this constitutional safeguard should be afforded to student-athletes because their interest in eligibility is so vital. Due process can at least offer student-athletes modest protection for this interest because it would require that their interest in eligibility not be terminated arbitrarily. However, as a caveat, it should be remembered that the due process clause is not an absolute panacea for all harms which befall student-athletes.

IV. THE AMATEUR-PROFESSIONAL DICHOTOMY IN COLLEGIATE ATHLETICS

Many of the problems currently besetting collegiate athletics descend from conceptions of amateurism and professionalism. The dividing line between amateurism and professionalism is laden with ambiguities.[163] To simply contend that professionals only play their sports for the money involved while amateurs play solely for their love of the game is to make a wooden and unfair distinction. Many professionals love to play their sports, and undoubtedly, many amateurs have financial motives. It is equally wrong to maintain that professionalism somehow taints the student-athlete's educational experience. There is nothing inherently wrong or educationally disruptive in working at a craft for pay. Moreover, the manner in which large scale collegiate athletic programs are run often leaves little time or incentive for student-athletes to pursue their more traditional academic interests. The distinction between amateurism and professionalism is further blurred by the NCAA regulations themselves. The NCAA Constitution provides that student-athletes may be professional in one sport and amateur in another.[164] And in some sports, namely golf and tennis, student-athletes may participate along side with or against professionals.[165]

One solution to the problem may be to allow student-athletes to receive compensation for their services. In actuality, student-athletes may already be functioning in a professional capacity inasmuch as their

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163. *See* P. WEISS, *supra* note 11, at 192-211.

164. NCAA CONST. art. 3, § 1, *reprinted in* NCAA MANUAL, *supra* note 7, at 9. *See* N.Y. Times, Jan. 9, 1974, at 27, col. 6.

165. NCAA CONST. art. 3, § 1(d) O.I.5, *reprinted in* NCAA MANUAL, *supra* note 7, at 11.

scholarships and other benefits can be viewed as compensatory.[166] However, the myriad violations of NCAA rules governing permitable assistance suggests that this compensation is not sufficient. Student-athletes provide a very valuable service to their school, not merely in providing income for the school as a direct result of gate receipts and television revenues, but also in providing the school with a readily visible focal point. A football or basketball team is often the most significant contact the school has with its alumni and the general public. Thus, through its athletic program the school gains and maintains contacts that frequently result in valuable contributions, increased student admissions and an enhancement of good will.[167] Adequately compensating student-athletes for their services would both lessen the number of NCAA infractions and end the hypocrisy of labeling major collegiate athletic programs as amateur.

In his work, *Sports in America,*[168] James Michener offers a possible resolution to the problems in collegiate athletics. Michener proposes that schools who desire to run major intercollegiate sports operations be allowed to form their own league. The member schools would pay their players salaries based on ability and participation. Academic requirements would not be placed on these athletes, but the opportunity to study would be available to them on an optional basis.[169] A draft system could be developed for the member schools to select athletes as they graduate secondary school, thus eliminating the ruthless recruiting practices that now exist.[170] In addition, professional football and basketball could be called upon to subsidize the collegiate program.

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166. *See* notes 2-5 and accompanying text *supra.* Moreover, in Van Horn v. Industrial Accident Commission, 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1973), it was held that a scholarship student-athlete was entitled to workman's compensation benefits. The court found that the scholarship payments were received because of athletic ability and participation, and therefore a contract for hire existed so as to allow for workman's compensation recovery. *Id.* at 172. *See also* Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

167. *See* K. DENLINGER & L. SHAPIRO, *supra* note 2, at 30, where the authors state: "some athletes generate 10 and 20 times as much income as their scholarship is worth to the school, a very few . . . generate perhaps 100 times what they receive."

168. J. MICHENER, *supra* note 2, at 197-207.

169. Bill Bradley, former N.Y. Knick and now United States Senator from New Jersey, suggested that: "[C]ollege basketball and football should exist on a semi-pro level. Athletes should be paid to play for a university in exchange for either money or education. The choice should belong to the athlete." N.Y. Times, Mar. 13, 1974, at 46, col. 6. This idea was espoused as early as 1905, when the former president of Leland Stanford Junior University proposed:

> Let the football team become frankly professional. Cast off all deception. Get the best professional coach. Pay him well and let him have the best men the town and the alumni will pay for. . . . Let the teams struggle . . . in perfectly honest warfare, known for what it is, and with no masquerade of amateurism or academic ideals. . . . The evil in current football rests not in the hired men, but in academic lying and in the falsification of our own standards . . . of scholars and men of honor.

Jordan, *The Future of Football,* COLLIER'S, Dec. 9, 1905, at 20.

170. *See* notes 2-5 and accompanying text *supra.*

This would only seem fair, as those professional teams benefit enormously from the free training and experience the athletes gather in playing collegiate ball. Baseball, after all, pays for the same training and experience for its players by maintaining its own farm system. The schools that do not wish to embark on a major intercollegiate athletic program would operate their sports programs as they do today, but with the instance of NCAA violations mitigated because of a de-emphasis on building a winning sports entity. Athletics, in these schools, may even assume a more reasonable place in relation to the student-athlete's overall education.

A system, such as the one Michener suggests, may not be the ideal remedy for the problems that currently afflict collegiate sports. Amateur athletics do have an important role to play in the educational process. The prospect of participating in a sporting event solely for the benefits one can derive from the game itself is desirable. However, the fact remains that major collegiate athletic programs have moved forcefully into the sports entertainment business. The student-athletes who figure so fundamentally in this industry should be afforded their fair share. For the many student-athletes who never receive degrees, it may be the only thing of substance with which they leave.[171]

CONCLUSION

Student-athletes clearly have much at stake in protecting their interest in intercollegiate athletic participation. Even though it is apparent that NCAA ineligibility rulings will constitute state action, the equal protection clause does not appear to be an appropriate source of protection. However, the due process clause can provide important constitutional safeguards to the student-athlete. While the due process guarantee can not by itself prevent the deprivation of the student-athlete's interest in participation, it can ensure that such a deprivation does not occur arbitrarily or unfairly. In light of the importance of the student-athlete's interest in eligibility, this minimal constitutional protection should be the least that is afforded.

While it is regrettable that athletics should become embroiled in the judicial process, the recent rise in litigation regarding to

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171. *See, e.g.*, J. DURSO, *supra* note 2, at 81-86. The author reports that of the approximately 200,000 high school seniors playing basketball each year, only about 5,700 are playing as college seniors, and only about 211 of the college players are drafted by the professionals. Of the 211 drafted, an average of about 55 are actually signed, or about 1% of those who played collegiate basketball. *Id.* at 76.

Interestingly, those student-athletes fortunate enough to reach the professional leagues often do so without having obtained an undergraduate degree. In 1974, over 35% of those athletes playing in the National Basketball Association never graduated from college. In the American Basketball Association, more than 40% of the players never received diplomas. *Id.* at 81.

student-athletes' eligibility may be long overdue. The fact that increasing numbers of student-athletes feel compelled to resort to the courts may indicate that the collegiate athletic system is in need of overhauling. At the heart of the problem is the NCAA's deeply rooted desire to segregate amateurism from professionalism. This desire is clearly not responsive to the realities that confront student-athletes today in that professionalism already appears to be throughly imbued in collegiate athletics. Indeed, various courts have found athletic scholarships to constitute employment contracts between the school and the student-athlete.[172] This type of employer-employee relationship is entirely consistent with the realities of amateurism that exist in collegiate sports today.

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172. *See* note 166 *supra*. In Taylor v. Wake Forest Univ., 191 S.E.2d 379 (N. C. App. 1972), the court held that a student-athlete was contractually obligated to play for his school football team because of an award of an athletic scholarship, or else forfeit the scholarship proceeds. *See also* Begley v. Corp. of Mercer Univ., 376 F. Supp. 908 (E.D. Tenn. 1973).

Children's Television Programming and the FCC: Background for Affirmative Regulation

In 1977, the Federal Communications Commission (FCC) announced that it would not adopt quantitative programming guidelines as license renewal criteria when a commercial television broadcast licensee is challenged by a new applicant.[1] Having had the establishment of such percentage standards in certain program categories under consideration since 1971, the FCC formally rejected the notion as "a simplistic, superficial approach to a complex problem. . . . [W]e are not convinced that the government should impose on broadcasters a national standard of performance in place of independent programming decisions attuned to the particular needs of the communities served."[2] Barely two years later, a task force of FCC staff recommended that broadcasters be mandated to schedule 7½ hours of educational children's programs weekly, or alternatively, to face possible full review at the time of license renewal.[3] If the FCC were to adopt this alternative review procedure, it

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1. *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, Report and Order,* 66 F.C.C. 2d 419 (1977) [hereinafter cited as *1977 Report and Order].*

2. *Id.* at 428-29. The FCC derives its authority to review broadcast licenses from §§ 301, 303, 307 and 309 of the Communications Act of 1934. 47 U.S.C. §§ 301, 303, 307, 309 (1976). *See* note 9 and accompanying text *infra.* Licenses are granted for a three-year term. As a "competitive spur" to current licensees, new parties have an opportunity at renewal time to compete for licensed facilities in a comparative hearing proceeding. The FCC had proposed license renewal guidelines for commercial network-affiliated and VHF nonaffiliated stations in connection with its 1970 *Policy Statement,* 22 F.C.C. 2d 424 (1970), preferring renewal applicants over challengers where "substantial" service was being provided by renewal applicants. The Commission proposed the guidelines "in an effort to explore the feasibility and appropriateness of quantifying a concept of substantial service by which the past performance of a licensee could be properly evaluated in the context of a comparative hearing." *1977 Report and Order, supra* note 1, at 421. The guidelines included local programming (10-15% of the broadcast effort), news (8-10% for affiliates, 5% for nonaffiliates), and public affairs (3-5%). While the guidelines themselves were not rejected, the 1970 *Policy Statement, supra,* unduly favoring the renewal applicant, was invalidated by the Court of Appeals for the District of Columbia as giving the renewal applicant more than the lawful renewal expectancy, and depriving a new applicant of the right to a full hearing on its application. *See* Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971); Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978). For a discussion of the license renewal process and of program regulation by the FCC, *see generally* Goldberg and Couzens, *"Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation,* 31 FED. COM. L.J. 1 (1978).

3. CHILDREN'S TELEVISION TASK FORCE, FCC, TELEVISION PROGRAMMING FOR CHILDREN: A REPORT OF THE CHILDREN'S TELEVISION TASK FORCE, Vol. 1 at 76-77 (1979) [hereinafter cited as TASK FORCE REPORT]. For the complete task force recommendations, *see* note 57 *infra.*

would establish 7½ weekly hours of children's programming as a minimum programming processing guideline.[4] If, on the other hand, the FCC were to require 7½ weekly hours as an absolute condition to acquire, maintain, or renew a commercial broadcasting license, it would be setting an even stricter standard and a higher level of government intrusion than contemplated before.[5] Currently, the FCC has initiated a notice of proposed rulemaking with respect to children's programming.[6] This Note briefly surveys previous examples of program regulation by the FCC in Section I. Section II traces the history of efforts to attain regulation of children's programming. Section III discusses the FCC task force's rationale for quantitative children's programming standards. Section IV sets forth the statutory authority of the Commission to adopt such standards. Section V explores the constitutionality of affirmative children's programming regulations. Section VI anticipates some problems that could arise from implementation of the regulations as presently proposed.[7]

I. SURVEY OF PROGRAMMING REGULATION BY THE FCC

Although the FCC's proposed rulemaking seems paradoxical at first blush, it is neither a sudden response to the issue of children's television specifically, nor an unprecedented entry into regulation of television

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4. *Notice of Proposed Rulemaking: Children's Television Programming and Advertising Practices,* 75 F.C.C. 2d 138, 149 (1980) [hereinafter cited as *1980 Notice of Proposed Rulemaking*]. The FCC has delegated authority to its staff to routinely grant uncontested license renewal applications only where commercial licensees (except independent UHF stations) meet the minimum guidelines of 5% local programming, 5% news and public affairs programming, and 10% nonentertainment programming. 47 C.F.R. § 0.281 (a)(8)(i). The Commission invited comment on adding a similar processing guideline for children's programming:

> If a television licensee proposed programming for the next three-year license term that fell below the Commission's guidelines, the staff would send the renewal application to the Commission for full review to determine if the renewal should be granted. If the television licensee aired, during the last license period, programming that fell below the Commission's guidelines, the staff could grant the renewal if the licensee submitted a satisfactory explanation. If the staff determined that the explanation was unsatisfactory, the staff would send the application to the Commission for full review.

1980 Notice of Proposed Rulemaking, supra at 150. Presumably, under this alternative proposed by the task force, the current licensee would receive no impermissible advantage in a contested renewal proceeding, during which a full comparative hearing would be conducted consistent with the holding in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

5. Adoption of an industry-wide, a priori rule could be imposed upon commercial licensees and applicants invariably and universally. Adoption of a guideline to be used in connection with license renewal could be more flexibly interpreted by the individual licensees and less uniformly enforced by the FCC. The Commission itself has suggested the inherently more elastic approach of quantitative processing guidelines by stating that "[a children's programming] processing guideline would allow the Commission more flexibility in special cases than a mandatory rule." *1980 Notice of Proposed Rulemaking, supra* note 4, at 150. *See* notes 145-51 and accompanying text *infra.*

6. *See 1980 Notice of Proposed Rulemaking, supra* note 4.

7. Children's television advertising practices, also under consideration by the FCC, are beyond the scope of this Note.

programming generally. As early as 1927, the federal government imposed on radio broadcasters the requirement to serve the "public convenience, interest or necessity" in exchange for the license privilege.[8] This language was carried over into the current Communications Act,[9] as was the Radio Act's concept of the licensee as a public trustee for the needs and desires of all diverse groups served by the station.[10] As a public trustee, a licensee may "make use of rights belonging to the public . . . [but has] no proprietary interest . . ." in the frequency.[11] As there is a finite number of frequencies available for all who wish to participate, broadcasters hold licenses for the use and benefit of all, and must temper their individual use of a license accordingly.[12] The "public

8. Radio Act of 1927, Ch. 169, 44 Stat. 1162, § 81 (repealed 1934).

9. 47 U.S.C. §§ 151 *et seq.* Section 303 bases the powers and duties of the Commission on the "public convenience, interest, or necessity." *Id.* at § 303. Section 307 authorizes the Commission to grant and renew licenses "if public convenience, interest, or necessity will be served thereby." *Id.* at § 307. The Commission was challenged several years after passage of the Communications Act of 1934 as having exceeded its statutory authority to regulate. In National Broadcasting Co. v. United States, 319 U.S. 190 (1943), Justice Frankfurter spoke for the Court:

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. . . . [T]he Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. . . .
>
> The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity". . . .

Id. at 215-16.

10. In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), the Court observed:

> The regulatory scheme evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the listening and viewing public. In this structure the Commission acts in essence as an "overseer," but the initial and primary responsibility . . . rests with the licensee.

Id. at 117.

11. MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257, 1264 (D.C. Cir. 1968) (citation omitted). In pertinent part, 47 U.S.C. § 301 (1976) reads: "[N]o such license shall be construed to create any right, beyond the terms, conditions, and period of the license."

In FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), the Court said of the Communications Act:

> The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.
>
> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.

Id. at 475.

In Brandywine-Maine Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 922, the United States Court of Appeals for the District of Columbia Circuit, to which there is a statutory right of appeal of FCC orders, declared: "The question of whether the licensee is operating in the public interest, the established standard for license renewal, is determined at the time of renewal. . . . [T]he prime consideration must come back to the effectiveness of the licensee in his role as trustee for the public." *Id.* at 475 (footnotes omitted).

12. *See* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) wherein Judge Burger spoke for the court:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable

interest," "public trustee" and "scarcity of frequencies" rationales have been the basis for much of the FCC's regulation.[13] While its regulatory discretion is broad, the Commission is constrained by section 326 of the Communications Act, which prohibits governmental censorship over station communications or signals, and forbids any regulation which would impair the right of free speech.[14] Significantly, however, the exercise of governmental authority on the basis of serving "the public convenience, interest or necessity," has been held not to work censorship on a licensee.[15] In fact, the public interest standard has been asserted to impose regulation in several fundamental programming areas.

A. Definition of Certain Program Category Priorities

When the Communications Act was written, Congress' concern that the licensee represent the public interest was not limited to satisfying a

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part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.

Id. at 1003. *See also* note 104 *infra.*

13. *See, e.g.,* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) wherein Justice Frankfurter stated:

> The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio". . . . The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. . . .
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> . . . .
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> Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.

Id. at 216, 226 (citation omitted). *See also* notes 9, 10 *supra.* Often, the "public interest," "public trustee" and "scarcity of frequencies" rationales have been used as strains of a single theory of regulation.

14. 47 U.S.C. § 326 (1976) provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

In Columbia Broadcasting Co. v. Democratic National Committee, 412 U.S. 94 (1973) the Court explained:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half-century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned. . . .
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> . . . .
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> This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

Id. at 102, 117.

15. *See, e.g.,* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 951 (1963). Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969). *See also* notes 102-25 and accompanying text *infra.*

general audience's desires for entertainment or information, but extended to securing a place for special cultural and economic voices.[16] Historically, the FCC has considered a balance of program fare in granting licenses.[17] In 1960, the Commission enunciated fourteen categories, including children's programs and educational programs, which typically should be considered by broadcasters to develop adequate public service.[18] These categories are considered in the review of bids for license renewal, for which applicants are required to make an assessment of community needs known as "ascertainment."[19] This ascertainment requirement is an assurance that licensees will, through dialogue with community leaders and citizens, familiarize themselves with the problems and issues (including those with respect to children) of their communities. Ideally, the category guidelines and the ascertainment process should result in a balanced schedule attuned to community needs. If challenged at renewal time, a licensee responsive to the community may defend a programming schedule on that basis, diminishing or eliminating the need for government involvement in a debate on specific programming choices.[20]

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16. Part of the legislative history of the 1934 Communications Act is the unadopted Wagner-Hatfield Amendment to dedicate 25% of broadcast facilities for educational, agricultural, labor and other non-profit interests. E. BARNOUW, THE GOLDEN WEB, A HISTORY OF BROADCASTING IN THE UNITED STATES, VOL. II-1933-53 at 23-27 (1968), *cited in* Goldberg and Couzens, *supra* note 2, at 6.

17. In its *Report and Statement of Policy Res: Commission en banc Programming Inquiry,* 44 F.C.C. 2303 (1960), the Commission recalled that:

> [I]n its review of station performance the Federal Radio Commission sought to extract the general principles of broadcast service which should (1) guide the licensee in his determination of the public interest and (2) be employed by the Commission as an 'index' or general frame of reference in evaluating the licensee's discharge of his public duty. . . . It required existing stations to report the types of service which had been provided and called on the public to express its views and preferences as to programs and other broadcast services. . . .
>
> The standards . . . were adopted by the Federal Communications Commission, and have remained as the basis for evaluation of broadcast service.

Id. at 2313.

18. *Id.* at 2314. The list includes: "(1) Opportunity for Local Self-Expression, (2) the Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming." *Id.*

19. The Commission's *Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants,* an appendix of *Ascertainment of Community Problems by Broadcast Applicants,* 57 F.C.C. 2d 418 (1975) reiterated that "[t]he principal ingredient of a licensee's obligation to operate in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the problems, needs and interests of the public within the station's service area." *Id.* at 441 (citation omitted). The ascertainment process requires that licensees continuously engage in exchanges with community leaders and the general public to elicit service area problems, needs and interests on an ongoing basis.

20. In its *1977 Report and Order,* the Commission commented: "We rely chiefly on program percentages and avoid judging program quality per se, but there are certain qualitative aspects we must consider. . . . We therefore look to the adequacy of an applicant's ascertainment of community problems, needs, and interests, and to his programming in response to them." *1977 Report*

B. *Reservation of Certain Times for Non-Network Programming*

An indirect attempt to achieve diversification of programming is the FCC's Prime Time Access Rule, which became effective in its present form in 1975.[21] The Commission's objective in promulgating the rule was to reduce network dominance and foster increased local and syndicated programming. The rule prohibits network-owned or affiliated stations in the fifty largest audience markets from broadcasting more than three hours of network programming during the four evening prime time hours, with exceptions for network programming for children, public affairs, and documentaries.[22] According such "special treatment" to children's, public affairs, and documentary programming was upheld by the Court of Appeals for the Second Circuit as a proper exercise of governmental authority in the public interest.[23]

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and Order, supra note 1, at 428. *See also* Note, *Regulation of Program Content by the FCC,* 77 HARV. L. REV. 701 (1963), wherein the author speaks of the FCC's attempts to balance programming by categories as a way for the Commission to "maintain at least a minimal degree of program control while avoiding the difficult value judgments involved in closer qualitative content regulation." *Id.* at 705.

21. *Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, Second Report and Order,* 50 F.C.C. 2d 829 (1975) [hereinafter cited as *PTAR, Second Report and Order*].

22. In 1970, the Commission first introduced the rule (PTAR I), which did not include an exemption for children's programming. 47 C.F.R. § 73.658 (k) (1979). PTAR I was upheld in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), wherein the public interest and the scarcity of frequencies were held to justify this restraint on the programming discretion of licensees. In 1974 the Commission modified the rule (PTAR II), in part by designating specific time slots for local access time. 44 F.C.C. 2d 1081 (1974). PTAR II was not reviewed on the merits; however, finding that the Commission had granted insufficient lead time for implementation, the Court of Appeals, Second Circuit, enjoined the FCC from making the rule effective before September 1975. National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249 (2d Cir. 1974).

After further inquiry, the Commission adopted PTAR III, which retained the essential characteristics of PTAR I while exempting children's programming, public affairs and documentary programming (and other categories on a limited basis) from the rule. *PTAR, Second Report and Order, supra* note 21. Explaining why it would permit networks to recapture prime time for the broadcast of programs for children aged 2-12, the Commission stated:

> We find that the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time. We believe that the importance of these kinds of programming outweights [sic] any concern as to its source, whether locally produced, first-run syndicated, network or off-network [programming originally broadcast by networks and now purchasable in local markets], and that the public interest is better served by allowing children's programming . . . to appear to some extent in cleared time regardless of [its] source. . . . The viewing public has a right to [this kind] of programming. . . .
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> . . . .
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> [T]he Commission wishes to encourage licensees to meet the needs of children with a variety of programming, especially at a time other than Saturday and Sunday morning. In order to foster such material, and to avoid the problem mentioned with network broadcasts [8PM starting time is too late in relation to children's bedtimes], we conclude that an exemption to permit access-period presentation of such material (in addition to the usual three hours of network material) should be granted, with respect to both network and off-network programs. As mentioned, we are extending this to regular as well as special programs, since they may be equally beneficial to the public.

Id. at 840-41.

23. National Ass'n. of Indpt. Television Producers and Distrib. v. FCC, 516 F.2d 526 (2d Cir. 1975). *See* notes 109-12 and accompanying text *infra.*

C. Requirement of Access under Certain Conditions

The Communications Act requires broadcasters to allow candidates for federal office "reasonable access" to licensed frequencies,[24] and specifies conditions under which licensees must "afford equal opportunities" to "legally qualified candidates" for other offices.[25] Moreover, under section 315 (a), broadcasters have an affirmative duty to provide well-balanced treatment of controversial issues and matters of public importance.[26] In 1967, the FCC added the rule that one who has been attacked on the air must be given notice of the attack and opportunity to respond over the broadcast facility.[27] Declaring that the public's collective right to receive certain types of programming outweighs the broadcaster's individual right to determine programming, the Supreme Court upheld the Commission's affirmative regulation in *Red Lion Broadcasting Co. v. FCC.*[28]

D. Exclusion of Certain Programming at Certain Times

In 1976 the FCC declared that a radio broadcast containing "patently offensive" language should be channeled "to times of day when children most likely would not be exposed to it."[29] Although it was not contended that the complained-of language was obscene, the Supreme

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24. 47 U.S.C. § 312 (a) (7). This section provides for revocation of license for failure to provide or sell "reasonable amounts of time . . . [to] a legally qualified candidate for Federal elective office on behalf of his candidacy." *Id.*

25. 47 U.S.C. § 315 (a). While the licensee is not obligated to allow any candidate for a non-federal office to use the facility in the first instance, time may not be provided one candidate without affording equal opportunity to other candidates. Exceptions are made for candidate appearances in bona fide newscasts or interviews, documentaries, and on-the-spot news coverage.

26. 47 U.S.C. § 315 (a) (4). In 1959, the following language was added:

> Nothing in the foregoing sentence [imposing no obligation on licensees to allow use of facilities by any non-federal office candidate, and declaring bona fide newscasts, interviews, documentaries and on-the-spot news coverage not to be within the meaning of "use"] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Id.

27. 47 C.F.R. § 73, 1920 (1979).

28. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Court upheld both the personal attack and the political editorializing rules, which require broadcasters to give timely notification, transcript, and opportunity to respond to an editorial opposing a legally qualified candidate, or to an attack on honesty, character, integrity, or like personal qualities made in the presentation of a controversial public issue. In reaching this conclusion, the Court emphasized the paramount right of the public to have access to ideas of importance to society. *Id.* at 390. *See also* notes 104, 113-15 and accompanying text *infra.*

29. *Memorandum Opinion and Order,* 59 F.C.C. 2d 892 (1976). Pacifica Foundation's radio station WBAI, a noncommercial FM station in New York, N.Y., had broadcast at 2 PM a 12-minute monologue by comedian George Carlin containing seven words relating to sex and excretory functions, which Carlin described as words one would not say over the airwaves. WBAI had warned the audience in advance of the nature of the broadcast, which was part of a larger discussion about societal attitudes toward language.

Court held that the FCC ruling was not censorship under the definition of section 326 of the Communications Act.[30] A major rationale for the holding was the need to protect children from potentially harmful material.[31]

The proposed FCC requirement that commercial licensees broadcast 7½ hours of educational children's programming per week would be a case of first impression in the courts. Were this quantitative rule adopted, the Commission would impose an unprecedented affirmative duty on broadcasters. However, the government's long-standing interest in the welfare of children has been demonstrated in license-granting and renewal determinations for two decades. This interest also has led to preferred treatment for children under the Prime Time Access Rule, and to special regulation of adult programming deemed to be potentially harmful to children. Moreover, the Supreme Court in *Red Lion* has affirmed the public's paramount right to access to cultural ideas and experiences broadcast over the airwaves. Thus, prior actions by the FCC are precedents on which the Commission may rely if a convincing record is developed for affirmative regulation of children's programming in the public interest.

II. History of Efforts to Secure Regulation

For over a decade the FCC has been aware that children's television is a significant public issue. By the mid-1960's, television's effect on children had become a concern to parents, educators and social scientists.[32] As television acquired the status of a major advertising market, networks and their affiliate stations sought the largest share of consumer viewers and hence the greatest commercial sponsorship. Children's programs, once a part of the general audience schedule, were increasingly relegated to graveyard spots in the weekly schedule, and to animated cartoons either borrowed from the motion picture industry or produced for television.[33] Moreover, children began to join the mass

30. FCC v. Pacifica Foundation, 438 U.S. 726 (1978), *reh. denied*, 439 U.S. 883 (1979). *See also* notes 119-24 and accompanying text *infra*. For a discussion of the implications of this decision, *see* Wing, *Morality and Broadcasting: FCC Control of "Indecent" Material Following Pacifica*, 31 Fed. Com. L. J. 145 (1978).

31. FCC v. Pacifica Foundation, 438 U.S. 726, 749-50 (1978), *reh. denied*, 439 U.S. 883 (1979).

32. *See, e.g.*, M. Winn, The Plug-in Drug (1977). Most statisticians agree that many school-age children spend more time watching television than they do in formal educational activities.

33. Task Force Report, *supra* note 3. The report stated:

> The percentage of programs in specified time designations gives an indication of how the range of scheduling choice declined after the early years of commercial television. In 1950-51, non-Saturday programming accounted for 78% of the 52 childrens' (sic) network series aired. By 1960-61, non-Saturday network programming made up 42% of the

adult audience of prime time entertainment.[34] Concerned about possibly deleterious effects of steady viewing on children's behavior, intellectual development and physical well-being, individuals formed themselves into groups to change children's television.[35]

A leading advocacy group is Action for Children's Television (ACT), begun in 1968 in a suburb of Boston, Massachusetts.[36] Attempting to arouse public support for reform in children's television, ACT soon assembled a roster of complaints to the FCC.[37] The ACT proposals, accepted as a petition for rulemaking, called for the total elimination of commercial sponsorship of children's programs, and for the devotion of at least fourteen hours per week by commercial broadcasters to programs for children between the ages of 2 and 12.[38] During its three-year inquiry into ACT's proposals, the FCC received more than 100,000 responses, including documentation from the networks, licensees, and

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31 children's series aired. In 1970-71, 11% of the 58 network children's series were non-Saturday programs. Beginning with 1972-73, the percentage figure rose to 18% of the 62 network series and during 1978 the percentage of non-Saturday programming rose to 19% of the 42 programs.

Most children's programming broadcast since the early sixties appeared on Saturday mornings, with Saturday afternoon and Sunday morning taking second and third places as periods for children's shows. Saturday morning shows comprised 10% of the total programs in 1950-51, 48% in 1960-61, and 69% in 1970-71. The number of Saturday morning children's programs dropped to 60% of the total in 1976-77. The decrease was due in part to the introduction of two "afterschool" series for children on weekday afternoons and of three "informational spot" series with 3-5 minute sequences dispersed throughout weekend time periods.

Id. at Vol. II, ch. 2, 32-33.

With respect to non-entertainment programming, the Report noted:

The amount of non-entertainment programming for children peaked at 23% of the 29 network series for youngsters in 1962-63. The lows occurred in 1948-49 . . . and in 1968-69, when 4% of the 49 shows were classified as non-entertainment programs. In the first two years of the 1970's, the percentage of non-entertainment programs rose to 10 percent and fluctuated between 12 and 15 percent over the next six years.

Id. at Vol. II, ch. 2, 21.

With respect to original children's material, the Report found:

Independent stations have increased the amount of children's programming by showing more syndicated material; network-affiliated stations have substituted syndicated for network-originated programs. The syndicated shows consist largely of reruns of network programs — in 1978, 41 percent were former network programs — and many of them were originally produced for adults but are considered to appeal to children. A consequence has been a decline in the amount of original material on the air for children.

Id. at Vol. I, ch. 3, 38 (footnote omitted).

34. *Id.* at Vol. I, ch. 3, 30.

35. Some groups active in this area are the Committee on Children's Television (CCT), the Council on Children, Media and Merchandising (CCMM), and the Washington Association for Television and Children (WATCH).

36. ACT describes itself in the masthead of its news magazine RE-ACT as "a national non-profit consumer organization working to encourage diversity and eliminate commercial abuses from children's television."

37. *Children's Television Report and Policy Statement* [hereinafter cited as *Children's Report*], 50 F.C.C. 2d 1, 1-2 (1974).

38. *Id.*

public interest groups, as well as replies from many individual citizens.[39] Although the preponderance of individual responses favored the measures in the ACT proposals, commercial television networks and licensees were generally opposed.[40] The FCC issued a formal report in October of 1974, declining to impose formal regulation in either the age-specific programming or the advertising area.[41] Instead, the FCC's *Children's Report* called upon licensees to uphold their duty as public trustees by providing age-specific, diversified programming.[42] Such programming should include a "reasonable amount" of a nature "to educate and to inform — and not simply to entertain."[43] Broadcasters were also to achieve a balanced schedule of weekday and weekend children's programming.[44] The Commission held out the possibility that formal rules would be reconsidered if licensees did not voluntarily undertake these measures.[45] In a related action, the Commission modified its license renewal application form to include information on the existing number, nature, and broadcast time of programs for children to age twelve.[46]

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39. *Id.* at 2. The Commission described this response as "overwhelming." Citizens were asked to comment, not only on the ACT proposals, but on "what constitutes 'children's programming,' the appropriate hours for broadcasting children's programs, [and] . . . the desirability of providing programs designed for different age groups. . ." *Id.* The Commission augmented the record by conducting a series of panel discussions and oral argument. *Id.*

40. *Action for Children's Television v. FCC,* 564 F.2d 458, 462 (D.C. Cir. 1977). Industry opposition to the ACT programming proposals was summarized as involving First Amendment and licensee discretion concerns, vagueness, efficacy of self-regulation, and governmental interference with parental judgment.

41. *Children's Report, supra* note 37, at 6, 7. The Commission stated that "the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the 'public interest.' " *Id.* at 5. However, the Commission did not "believe that it is necessary for [us] . . . to prescribe by rule the number of hours per week to be carried in each category. . . . [W]e are involved in a sensitive First Amendment area, and we feel that it is wise to avoid detailed governmental supervision of programming whenever possible." *Id.* at 6.

42. *Id.* at 6,7. The three proposed ACT age categories (2-5,6-9,10-12) were compressed into two categories: pre-school and school age. The Commission noted that "[a]ge specificity is particularly important in the area of informational programming because pre-school children generally cannot read and otherwise differ markedly from older children in their level of intellectual development." *Id.* at 7.

43. *Id.* at 6.

44. *Id.* at 8. The Commission noted its concern "with the relative absence of children's programming on weekdays. It appears that this lack of weekday children's programs is a fairly recent development. . . . Although we are not prepared to adopt a specific scheduling rule, we do expect to see considerable improvement in scheduling practices in the future." *Id.*

45. Broadcasters were given 14 months from the release of the *Children's Report* to fully comply by self-regulation, after which the Commission planned "to evaluate the improvements in children's programming . . . which are now expected. . . ." *Id.* at 19. Licensees were also asked to improve children's television advertising practices by self-regulation.

46. *Memorandum Opinion and Order,* 53 F.C.C. 2d 161, 162-63 (1975). Two modifications were: "— define children's programs as programs designed 'primarily' for children twelve years and under. — require licensees to describe programs designed for children, indicating source, time, day of broadcast, frequency and program type." *Second Notice of Inquiry: Children's Programming and Advertising Practices,* 68 F.C.C. 2d 1344, 1347 (1978).

When the FCC denied reconsideration of ACT's proposals in 1975, the organization sought judicial review of the chairman's ex parte communication with members of the industry.[47] ACT contended that this ex parte communication and subsequently adopted industry proposals for self-regulation, to which ACT did not have opportunity to respond, constituted a procedural defect in the Commission's report.[48] ACT also challenged the Commission's failure to adopt formal rules and regulations, basing this claim on the doctrine of "public convenience, interest, or necessity."[49] The court dismissed both contentions, finding no abuse of agency discretion.[50] In 1978, following the National Association of Broadcasters' (NAB) documentation of industry compliance with the *Children's Report,*[51] ACT filed a petition for rulemaking with the Commission, urging that self-regulation fell below the standards set forth in the report.[52] Several months later, after reviewing public comments to the NAB study and the ACT petition, the Commission reactivated its inquiry into children's television programming and advertising practices.[53] In its invitation to further public responses, the

47. Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

48. *Id.* at 468-71. ACT's petition for reconsideration had recommended quantitative children's programming rules to avoid a vagueness problem in the *Children's Report,* a ban on advertising during programs for pre-school children, and Commission encouragement of network children's television production on a rotating basis. *Id.* at 468. When reconsideration was denied, ACT claimed an abuse of agency discretion in the Commission's ex parte discussions with officials of the National Association of Broadcasters (NAB), a professional organization comprising networks and licensees, shortly before self-regulation was announced and informal rulemaking proceedings were concluded. The Court found ACT's complaint reviewable, but concluded that self-regulation was not an unpredictable result of the proceedings and that the Commission had complied with the Administrative Procedure Act requirement of meaningful public participation in the proceedings. *See* note 93 *infra.*

49. *See* notes 8-15 and accompanying text *supra.*

50. Action for Children's Television v. FCC, 564 F.2d, 458, 481 (D.C. Cir. 1977). The Court declared:

> The Commission's emphasis on the self-regulatory actions taken by the NAB and the INTV [Association of Independent Television Stations] during these rulemaking proceedings was hardly a recognition on its part that they sufficed to resolve all the concerns raised during the public comment stage and later addressed in the *Report.* That emphasis was placed to demonstrate that industry self-regulation was not a mere will-o-the-wisp, but rather an encouraging sign that it would be sufficiently responsive to obviate the need for substantial governmental intrusion into areas in which, for good reasons, licensees traditionally have exercised considerable discretion.
>
> The Commission did not act arbitrarily or otherwise abuse its broad discretion in declining to adopt ACT's proposed rules as its own, or, for that matter, in declining to adopt any rules whatsoever for the time being.

Id. For a discussion of the standard of review of informal rulemaking proceedings, *see* notes 79 and 93 *infra.*

51. *Children's Programming and Advertising Practices: Second Notice of Inquiry,* 68 F.C.C. 2d 1344, 1349 (1978). The NAB found "adequate diversity, educational and cultural content and scheduling on other than weekends to satisfy those FCC programming policies." *Id.*

52. *Id.* at 1350. ACT again asked for a more specific definition of children's programming and for "codification of the Commission's policies on amount, nature, age-specificity, and scheduling of children's programming." *Id.*

53. *Id.* The Commission had also received a petition for inquiry and rulemaking from the Council on Children, Media and Merchandising and "[n]umerous filings . . . from industry and consumer groups in support or opposition to the filings by ACT and CCMM." *Id.* at 1350-51.

Commission stated: "We have had a long-standing obligation to reactivate this docket. . . . [Responses] will assist us in determining whether self-regulation has been effective, whether our present children's programming . . . policies are sufficient, and whether additional actions by the Commission are necessary to ensure licensee compliance with our guidelines."[54] To assist in the development of a full record and the examination of potential solutions, the Commission assigned a task force of staff and field experts to prepare background data, assess industry compliance with the *Children's Report,* identify other potential programming outlets, and outline desirable courses of action.[55] After receiving the task force report, the Commission issued its second notice of proposed rulemaking in the area of children's television programming, asking for public comments on the full range of task force recommendations.[56]

III. THE TASK FORCE FINDINGS AND RECOMMENDATIONS

While the task force report called for developing program outlets other than commercial television, increasing children's programming on public television stations, and removing obstacles to commercial airing of federally funded children's programming, its primary recommendation was the adoption of minimum children's educational programming requirements for commercial television until the public has access to sufficient children's fare through other programming outlets.[57]

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54. *Id.* at 1352. The Commission asked for comments on licensee compliance with the *Children's Report,* amount and nature of existing children's programming, scheduling, monitoring of compliance, economic implications of the *Children's Report,* alternative program outlets, network cooperation, and ascertainment of children's needs and interests.

55. The Commission stated:

> [G]iven the important issues surrounding children's television, and our commitment to evaluating self-regulation as thoroughly as possible, we will not rely solely on evidence submitted by interested parties. We will be conducting our own research on several key issues. This research may be conducted by Commission staff, particularly where the Commission has useful and appropriate data in its own files, or we may contract for research on particular issues.

Id. at 1352.

56. *1980 Notice of Proposed Rulemaking, supra* note 2. *See* note 57 and accompanying text *infra* for the complete task force recommendations.

57. *1980 Notice of Proposed Rulemaking, supra* note 2, at 146-52. Based on the TASK FORCE REPORT, the FCC developed five policy options for public comment:

> Option 1. Rescind the Policy Statement and rely on other program sources for children's programming.
> Option 2. Maintain or Modify the Policy Statement.
> Option 3. Mandatory Programming Rules.
> Option 4. Children's Programming License Renewal Processing Guidelines.
> Option 5. Increasing the Number of Video Outlets.

Id.

The task force recommended with respect to Options 3 and 4:

> [A] rule requiring 5 hours per week of educational or instructional programming for preschoolers and 2½ hours per week of educational or instructional programming for

To set the stage for affirmative regulation, the FCC task force took pains to isolate the nature and characteristics of children's television from other aspects of television programming. Its five-volume report reflected a quantitative analysis of children's programs, both entertainment and educational, by demographic region, sample year, day of week, and time of day.[58] One volume consisted entirely of research papers on topics ranging from learning theory to alternative technologies.[59] Young children have a greater need for educational television, readers were told, as they have fewer sources of information than do older persons.[60] Educational television benefits not only children in terms of improved skills and positive attitudes,[61] but contributes with education itself to "the democratic process, to lower crime rates, and to improved social cohesion . . ., [benefits for which] [e]ven families without children would be willing to pay. . . ."[62] Although the task force found evidence of a demand for educational programming for which some parents would pay,[63] a supply of programs meeting only this demand would necessarily deprive society as a whole of the benefits

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school age children. This programming must be scheduled between the hours of 8 a.m. and 8 p.m. on weekdays. . . . An alternative to the mandatory programming rule is for the Commission to amend its delegations of authority to adopt these programming standards as a processing guideline which the Broadcast Bureau [of the FCC] could use when reviewing broadcast license renewals. Licensees that propose less children's programming than the processing guideline would automatically be presented to the Commission for full review.

TASK FORCE REPORT, *supra* note 3, at Vol. 1, ch. 5, 76-77. Further, the task force noted:

> We see these rules as the only short-term solution available to us at this time. Mandatory programming rules, however, are at best an imperfect and temporary measure to provide some interim relief for the lack of educational programming for children. We are also recommending that the Commission terminate this programming requirement when the television market provides sufficient amounts of children's educational programming.

Id. at Vol. 1, ch. 5, 70-71. Other task force recommendations were: Undertake regulatory actions that might encourage increases in the number of alternatives such as pay cable or over-the-air subscription TV, and encourage Congress to improve existing governmental subsidy programs for children's television by altering the funding structure for the Public Broadcasting Service to provide more programming for children, and by amending the Emergency School Aid Act restrictions that preclude advertising from being inserted by commercial television stations into children's programming funded by the Department of Health, Education and Welfare, Office of Education. *Id.* at Vol. 1, ch. 5, 70-72.

58. TASK FORCE REPORT, *supra* note 3, Vol. III. The task force report comprises five volumes: I. Overview; II. Industry Compliance with the 1974 Policy Statement; III. Staff Research Papers (including Demographic Analyses of Children's Weekday Television Viewing, Amount of Children's Instructional Programming Aired During the 1973-74 and 1977-78 Television Seasons, Non-Program Material Time Aired on Saturday Morning Children's Television, Study of Separation Devices Used in Saturday Morning Children's Television, and An Economic Analysis of Advertiser-Supported Television Broadcasting Markets); IV. Amount and Scheduling of Children's Television Programs: 1973-74 and 1977-78; and V. Supplemental Research Papers.

59. *Id.*, Volume V.

60. *Id.* at Vol. I, ch. 3, 20.

61. *Id.*

62. *Id.* at Vol. I, ch. 3, 21.

63. *Id.* at Vol. I, ch. 3, 41.

of educational television being available to all children.[64] Thus, while development of other television delivery modes might be a long-term solution to providing an adequate supply of educational children's programs, there exists an immediate need for these programs via commercial television stations, which presently dominate the field.[65]

The FCC task force found essentially no difference between the amounts of instructional children's programming commercially aired in 1973-74 and 1977-78, despite quantitative deficiencies deplored in the 1974 *Children's Report.*[66] In its examination of the utter failure of the *Children's Report* to foster increased children's programming, the task force pointed to the nature of advertiser-supported broadcasting as a prime and inherent obstacle.[67] While adult television viewers pay for programs indirectly by purchasing advertised goods, children are twice removed from program financing as they have little money of their own or influence on family expenditures.[68] Further, children constitute a

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64. *Id.* at Vol. I, ch. 3, 21. The task force noted that:

> [T]he whole society benefits when children acquire the attitudes and skills that educational television programs appear to teach and are exposed to the richness of our common heritage. Thus even if parents could buy directly the educational programming they might desire for their children, a less-than-optimal amount would be provided because the advantages to the rest of society would not be reflected in the purchase.

Id.

65. Statement of Charles D. Ferris, Chairman, Federal Communications Commission, regarding The FCC Children's Task Force Report (October 30, 1979). Chairman Ferris stated:

> [T]he staff report points out that public broadcasting today reaches only 60 percent of American citizens and that cable, STV [subscription television] and other alternate technologies cannot be expected to be fully available until at best the late 1980's, and perhaps later. In the interim, can we afford to let the commercial television medium fail our children?

Id.

66. TASK FORCE REPORT, *supra* note 3, at Vol. III, ch. 2. The task force selected five experts in children's television to identify instructional programs, using all network-originated and syndicated children's programs which had been broadcast during composite weeks in 1973-74 and 1977-78. The findings revealed no differences in number of instructional programs or number of minutes broadcast in the two time periods. *Id.*

67. *Id.* at Vol. I, ch. 3, 26-33. The task force stated:

> Since advertising revenues depend on the size of the audience, the broadcaster will have an incentive to try to attract the largest possible number of viewers to a program. The choice of what programs to offer and how much to spend on programming will depend on the size of the audience. Thus, for instance, during periods of the day when the television audience is relatively small, fewer resources will be devoted to programming than during prime time because less advertising revenue is at stake.

Id. at 28-29.

68. *Id.* at Vol. I, ch. 3, 30-31. The report continued:

> Advertisers of children's products must appeal indirectly to the parents by directing their commercial message to the child, who in turn must convince the parents to purchase advertised products. Even if this indirect strategy is successful the payoff is small, since only a small portion of a household's income is spent on goods that interest children. Preschoolers in particular have no money of their own and are less likely than older children to influence their parents' purchases. Broadcasters can expect greater advertising revenues, and profits, from programming for adults than from programming for school age children, and can expect even less from programming for preschool children.

Id. (footnotes omitted). This task force conclusion has the effect of removing a major rationale of the Commission when it declined to adopt regulations in its 1974 *Children's Report:* "[I]t may be expected that the commercial marketplace will continue to provide an incentive to carry these programs." *Children's Report, supra* note 37, at 6.

demographically shrinking segment of the audience, and, while they frequently cross over to join an adult audience, the converse is rarely true.[69] If left alone, the task force predicted, children's programming would be sparse, cheap, not age-specific, poorly scheduled, non-educational, and largely relegated to independent stations which program for audiences missed by network affiliates.[70] These consequences would (and do) flow naturally out of the economic context of commercial programming decisions which, as the task force noted, have left the "children's market . . . dramatically underserved."[71] Plainly the economic structure of commercial television conflicts with and overwhelms the policies enunciated in the *Children's Report.* The FCC could and should respond, said the task force, by encouraging more numbers and kinds of sources for programming, such as subscription television, whereby parents could pay directly for educational programs.[72] However, as the commercial licensee bears the responsibility to program for all segments of the population, because the financing of commercial television undermines this responsibility with respect to children, and since the educational use of television is desirable and

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69. TASK FORCE REPORT, *supra* note 3, at Vol. I, ch. 3, 29-30. The report revealed:

> In 1972 children aged two through twelve made up 20 percent of the population; by 1978 they had fallen to 17 percent of the population. The total number of children in this age group had fallen by nearly five million over the six-year period. Both industry and Census Bureau forecasts predict a continued decline in the numbers of both preschool and school age children over the next few years.
>
> While children will watch many adult programs, adults are unlikely to watch any but exceptionally well produced children's programs. Programming for children thus may drive away the adult viewers most advertisers prefer.

Id. (footnotes omitted).

70. *Id.* at Vol. I, ch. 3, 33-35. The task force emphasized that better service to children exists in larger television markets, which support a greater number of stations, especially independent UHF stations:

> In practice, in the smaller markets all advertiser-supported stations are network affiliated. They present, for the most part, programming designed by the networks to draw the largest national audience. Larger markets contain large enough groups with specialized tastes to support independent stations who compete through counter-programming, leaving the majority audiences to the networks and directing their programming to the audiences the networks miss. Thus the tastes of relatively small groups, including children and ethnic minorities, tend to be served better in larger markets.

Id. at 32.

71. *Id.* at Vol. I, ch. 3, 43. The task force concluded, "In short, we believe that what economists call a market failure exists in children's television programming." *Id.*

72. *Id.* at Vol. I, ch. 5, 80-81. The task force predicted:

> The existence of few viable outlets in most markets could be altered by UHF comparability efforts, broadcast satellites, subscription television, and cable television. . . . As the number, profitability, and power of independent stations increases throughout the nation we can expect more programming directed to the interests of specialized audiences such as children.
>
> The spread of cable television and subscription television will make it possible for viewers to purchase programming that is not available from advertiser-supported broadcasters. . . . Over time, the regulatory efforts should be directed to making it possible to rely on the incentives of the private market to stimulate quality children's programming, as only then will the efforts of the broadcasters be harnessed toward achieving the public good.

Id.

beneficial to the whole of society, the task force argued that the government is warranted in adopting regulations to secure this benefit.[73]

IV. Statutory Authority of the FCC to Regulate Programming

It has been judicially determined that the FCC is within the scope of authority granted by the Communications Act both in granting broadcast licenses and in regulating television programming.[74] The Commission acts "as public convenience, interest, or necessity requires . . .,"[75] a standard which is "not susceptible of precise or comprehensive definition,"[76] while conferring "wide discretion in determining questions both of public policy and of procedural policy."[77] The public interest standard has withstood constitutional challenge,[78] and rulings based upon it are shown the customary judicial deference accorded to federal administrative determinations.[79] On behalf of the public interest, the Commission may properly have a concern for licensee programming decisions even where a majority of the community feels adequately served.[80]

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73. *Id.* at Vol. I, ch. 3, 44. The task force concluded: "[W]e believe that the responsibility of licensees to program for all segments of the audience remains undiminished; it is our view that this specific market failure provides an instance in which government intervention may yield significant returns to society." *Id.*

74. *See* notes 9-15 and 22-31, and accompanying text *supra.*

75. 47 U.S.C. § 303 (1976).

76. McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956).

77. Ward v. FCC, 108 F.2d 486, 491 (D.C. Cir. 1939).

78. In National Broadcasting Co. v. United States, 319 U.S. 190 (1943), the Court concluded:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. . . . Because it cannot be used by all, some who wish to use it must be denied. . . . [T]he licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Id. at 226-27. The Court here was dealing with the FCC's power to grant and deny licenses and to restrain licensees with substantive standards relating to license renewal. *See* note 13 *supra.* The public interest standard, which the *National Broadcasting* Court termed the "touchstone" of the FCC's authority to regulate, has been successfully asserted by the Commission in its requirements of balanced programming, access to the airwaves, and content regulation with respect to children. *See* notes 18-30 and accompanying text *supra.*

79. *See, e.g.,* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), note 50 *supra,* and notes 86 and 93 *infra.*

The scope of judicial review in informal rulemaking proceedings such as that challenged by ACT, is limited to detemining whether the agency acted within its discretionary bounds. Agency actions are not usually accorded de novo review. *See* note 93 *infra.*

80. Citizens Committee v. FCC, 436 F.2d 263 (D.C. Cir. 1970). In *Citizens Committee* the license transferee of two radio stations had attempted to change their formats from classical to popular music fare. Although the format change was supported by a community program preference survey, the court ruled that an adjudicatory hearing was also required, declaring that the Commission's responsibility in the area of programming does not "[stop] whenever 51% of the people in the area are shown to favor a particular format." *Id.* at 272. *See* note, The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes, 40 GEO. WASH. L. REV. 933 (1972).

While it enjoys broad discretion under the Communications Act, the FCC has been cautious in the exercise of regulatory power in instances which might raise potential conflict between government authority and traditional licensee discretion. Recent FCC decisions not to require fixed quantitative programming standards reiterated this concern.[81] In affirming the decisions, however, the Court of Appeals for the District of Columbia Circuit emphasized the discretionary latitude conferred by the Communications Act. In *National Black Media Coalition v. FCC,*[82] the court labeled a decision not to mandate quantitative standards "a *poliyc judgment* traditionally left to agency discretion."[83] In *Action for Children's Television v. FCC,*[84] the plaintiffs had asked that a specific number of hours of children's programming be required of commercial television licensees.[85] While it upheld the FCC's decision to allow broadcasters themselves the time to remedy the situation, the court declared, "we believe that the Commission may well have adequate authority to regulate in this area, and even perhaps to the extent proposed by ACT."[86] The FCC's reluctance to adopt affirmative regulations suggests the statutory tension between the public interest standard of section 303 and the prohibition against censorship of section 326.[87] Thus for the past twenty years the Commission has urged

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81. *See* notes 1, 2 and 41 and accompanying text *supra.*

82. 589 F.2d 578 (D.C. Cir. 1978).

83. *Id.* at 581 (emphasis added). Petitioners had protested the Commission's failure to adopt quantitative guidelines for news and public affairs programming as part of license renewal comparative hearing proceedings. *See* notes 1-2 and accompanying text *supra.* The court said:

> Nothing in the Communications Act imposes any requirement that the FCC promulgate quantitative programming standards. In granting broadcast licenses the FCC must find that the "public convenience, interest or necessity will be served thereby." Within these broad confines, the Commission is left with the task of particularizing standards to be used in implementing the Act.

National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1978) (citation omitted).

84. 564 F.2d 458 (D.C. Cir. 1977).

85. *See* note 48 and accompanying text *supra.*

86. Action for Children's Television v. FCC, 564 F.2d 458, 480 (D.C. Cir. 1977). The court concluded on an almost wistful note:

> We might occasionally wish that judges were imbued with legislative powers as well, but we know that under our constitutional system of government we are not. . . . If our relationship with the Commission and other federal agencies is to remain a partnership, we may not succumb to the temptation of casting ourselves in the unsuited role of *primus inter pares.* Rather, our function in passing upon these particular proceedings must come to an end once we have concluded that the Commission's action was a reasoned exercise of its discretion.

Id. at 481-82. *See also* note 93 *infra.*

87. *See, e.g.,* National Ass'n of Indep. Television Producers and Distrib. v. FCC, 516 F.2d 526 (2d Cir. 1975), wherein the court stated:

> We must start with the assumption that no matter how dedicated they may be to the "public interest" and no matter how sincere in their abhorrence of censorship, the parties advocate what they think is essentially in their own economic interest. It is the task of the Commission to find, as best it can, what is in the "public interest" amid the conflicting advocacy of that "public interest" by its several protagonists.
>
> The extraordinary development of the television industry around a relatively few

licensees to provide for children through their own initiatives. In 1974, more specific guidelines for adequate service to children were added, and the commercial industry was put on notice that formal regulation might follow.[88] The Commission's conclusion after six more years was not merely that licensees had failed to improve service, but that the fundamental economic basis of commercial television militates against improvement.[89] Moreover, procedures adopted by the Commission itself to promote adequate broadcast services generally have proved insufficient for children specifically. In the words of Chairman Charles D. Ferris:

> A unique approach to children may be justified partly because the structural remedies we use to insure input by other community elements in television programming decisions, such as affirmative action employment, or required consultations between television broadcasters and all segments of the audience — called "ascertainment" — are not available to use for children.[90]

Notwithstanding a governmental disinclination to dictate specific levels of programming, the FCC's statutory authority may emerge as the most cogent argument for mandating children's programs. If licensees are unwilling or unable to fulfill their obligation as trustees to one segment of the population, and if existing safeguards are inadequate to protect the interests of that segment, only the government is empowered to remedy the situation.[91] Arguably, the unserved interests of children alone are sufficient to trigger action under the public interest standard of the Communications Act. The FCC task force strengthens this argument by suggesting that the whole of society is unserved if children are unserved.[92]

In addition to acting within the authority of its governing statute, the FCC must also comply with provisions of the Administrative Procedure Act in its decision-making process.[93] Procedural compliance was at

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> frequencies on the spectrum makes for vigorous competition alongside governmentally licensed monopoly. . . . Free speech in television is a balance between encouragement of access to the medium and the prevention of non-access to the medium.

Id. at 532-33.

88. *See* note 45 and accompanying text *supra.*

89. *See* notes 67-71 and accompanying text *supra.*

90. Statement of Charles D. Ferris, Chairman, Federal Communications Commission, regarding the FCC Children's Task Force Report (October 30, 1979).

91. The combination of the negative marketplace motive, and the powerlessness of children themselves to influence that motive, suggests that assertion of the public interest standard is not only appropriate but an inescapable Commission responsibility, particularly as the long-term solutions foreseen by the Commission are futuristic and hence ungovernable. *See* note 65 *supra.*

92. *See* notes 62-64 and accompanying text *supra.*

93. 5 U.S.C. § 500 *et seq.* (1976). This Act governs federal administrative agencies in procedural matters. Section 553 requires notice and opportunity to be heard in rulemaking proceedings, although a resulting rule need not reflect the wishes and desires of interested parties. Under section 706 (1976), a Commission rule is not judicially set aside unless it is "arbitrary,

issue in *Action for Children's Television,* wherein the FCC's ex parte communication with representatives of the television industry was held not to be fatal to a decision not to adopt quantitative children's programming standards.[94] A different result was reached in *Writers Guild of America, West, Inc. v. FCC,*[95] a 1976 federal district court case involving the FCC's attempt to create a "family hour" without engaging in a rulemaking proceeding. Television artists successfully argued that impermissible pressures had been exerted by the FCC, the NAB, and commercial networks to protect children and other viewers by reducing portrayals of sex and violence during certain hours of evening programming.[96] The FCC was found to have violated administrative due process by threatening regulatory action, including license renewal proceedings, when it did not have or believe it could assemble a record supportive of such regulation.[97] The record of inadequacy of children's program-

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capricious, an abuse of discretion, . . . otherwise not in accordance with law," contrary to the Constitution, exceeds statutory authority, fails to observe required procedure, or is so unwarranted by the facts as to call for de novo review.

94. *See* notes 48-50 *supra.*

95. 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded sub. nom.* Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979). *Writers Guild* was vacated on the ground that the FCC, not the district court, had primary jurisdiction in this matter.

96. The Family Viewing Policy was added to the NAB Television Code after the Commission chairman conducted meetings with staff and industry representatives, delivered major public speeches urging that formal regulation might be considered if self-regulation was not undertaken, and engaged in similar private conversations with network and NAB representatives. The policy provides that entertainment programming in the first hour of and the hour immediately prior to prime time network programming should be appropriate for general family viewing. When occasionally programming is not appropriate at this or other prime periods, viewer advisory announcements should be employed. Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355, 357, 359-60 (9th Cir. 1979). The District Court did not find fault with the Policy itself, if it had been adopted voluntarily. However, the court construed the chairman's actions as a violation of procedure required by 5 U.S.C. § 553 (1976). The court also found per se violations of the first amendment right of viewers as well as petitioners (actors, directors, writers and producers) through a "concerted plan to cause industry-wide delegation of programming authority." Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064,1143 (C.D. Cal. 1976), *vacated and remanded sub nom.* Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979).

97. On appeal, the Court of Appeals for the Ninth Circuit said of the chairman's actions:

> [T]he Chairman . . . embarked on a course of what is described by the press as "jawboning," to have the networks adopt a system of self-regulation that would reduce the amount of sex and violence in television programming without the need for any "formal" Commission action. The FCC staff had recommended a variety of Commission responses to the problem, including issuing notices of inquiry, notices of proposed rulemaking and policy statements. Chairman Wiley, however, opted for jawboning instead, in the belief that many of the staff proposals for formal action would pose serious First Amendment and section 326 problems. . . . A similar use of jawboning earlier had proven successful in inducing industry self-regulation in the area of children's television programming.

Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355, 359 (9th Cir. 1979). The court concluded: "The [district] court's conclusions strike at the very core of the pervasive issue concerning the scope of the FCC's power in regulating broadcasting and put at issue a technique of governing, *viz.,* jawboning, that under one name or another has long been in use in government generally." *Id.* at 362.

ming, by contrast, has been developed over six years, and against the benchmark of the 1974 *Children's Report,* which was itself both an analysis of deficient service and notice that government regulation could result from a failure to adequately self-regulate.[98] The validity of the 1974 report, including the possibility of future imposition of quantitative programming standards, has already been judicially established.[99] Further, the FCC has instituted a proper inquiry, with procedural safeguards, prior to determining whether or not regulations will be promulgated.[100] Therefore it would appear that there is no procedural impediment to imposing children's programming regulations.

V. CONSTITUTIONAL VALIDITY OF AFFIRMATIVE CHILDREN'S PROGRAMMING REGULATIONS

Implicit in sections 307 and 326 of the Communications Act is the broadcaster's right to select the programming to be aired by the licensed facility.[101] While this freedom is frequently recited in connection with the first amendment, section 326 itself does not so much affirm a right of the licensee as it flatly prohibits the government from imposing its own views over the public airwaves.[102] The broadcaster has two duties

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98. The FCC has recognized this distinction. In its second notice of inquiry into children's television, the Commission quoted from the *Writers Guild* district court opinion that "[i]t may be that the rights of children to diversity of programming have been so severly ignored by broadcasters that affirmative requirements that meet their needs in the times when children most frequently watch television could be constitutionally supported in a properly prepared administrative record." *Children's Programming and Advertising Practices: Second Notice of Inquiry,* 68 F.C.C. 2d, 1344, 1348 (1978) *quoting* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1149 (C.D. Cal. 1976) *vacated and remanded sub nom.* Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979). The Commission saw in the *Writers Guild* opinion a contrast between "the Commission's power to prescribe by rule *additional* programming for children, based on a finding of inadequate diversity, . . . with what the court found to be an impermissible infringement of diverse speech by negative restraint. . . ." *Id.*

The Court of Appeals, in remanding *Writers Guild,* commented:

> Enough has already been said to indicate that there presently exist constraints on the right of individual licensees to present on the air such matters as they wish. Well known are the ramifications of the Fairness Doctrine . . . and the Commission's position with respect to indecent language. . . . It simply is not true that the First Amendment bars *all* limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public.

Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355, 364 (9th Cir. 1979).

99. Action For Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

100. *See* notes 37-56 and accompanying text *supra.*

101. *See* notes 10 and 14 *supra.* This principle is fundamental to administrative and judicial interpretation of the Communications Act. *See, e.g.,* McIntire v. Wm. Penn Broadcasting Company of Philadelphia, 151 F.2d 597 (1945), *cert. denied* 327 U.S. 779 (1945), which noted: "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC." *Id.* at 599. (citation omitted).

102. The *Pacifica* Court ruled that § 326 forbids prior restraint, not subsequent review of programming, implying that the evil which the section seeks to avoid is government dictation of programming. FCC v. Pacifica Foundation, 438 U.S. 726, 735 (1978), *reh. denied,* 439 U.S. 883 (1979). In *Writers Guild,* the district court struck down, not the policy favored by the FCC, but the

as a public trustee: to make programming decisions on behalf of the community to be served, and to guard against interference, including governmental interference, with those programming decisions.[103] Under the public trustee theory, the broadcaster's individual right to freedom of speech is merged with, if not subsumed by, the same rights of community members held in trust.[104] What the Constitution guarantees is no abridgement of those rights. What the government conveys is a privilege to hold a medium of expression for the exercise of those rights.[105] What the Act protects is the licensee's individual freedom to make judgments about how to exercise those rights, burdened though it is by the duty to ascertain and document the problems, needs and interests of the community as a whole.[106] And although broadcasters enjoy individual journalistic first amendment rights, under the standard of "the public convenience, interest, or necessity," the rights of the community may be asserted even at the expense of those individual rights.[107] It has been suggested that one federal court has construed broadcasters' first amendment rights to be subordinate to "public interest" considerations enunciated by the FCC.[108]

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method by which the Commission sought to impose the policy. Although this method was repugnant to the district court, both the district court and the court of appeals held out the possibility that, under properly developed proceedings, affirmative regulations on behalf of children would not constitute censorship, though they would perforce curtail the first amendment rights of broadcasters. *See* note 98 *supra.*

103. In its *Report on Chain Broadcasting,* May 2, 1941, quoted in National Broadcasting Co. v. United States, 319 U.S. 190, 206 (1943), the FCC stated: "A licensee is not fulfilling his obligation to operate 'in the public interest,' and is not operating in accordance with express requirements of the Communications Act if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory." *Id.*

104. The *Red Lion* Court said of licensees as public trustees:

> [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prohibits the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. . . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of the broadcasters, which is paramount.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

105. Thus the FCC is not precluded by the first amendment from allocating scarce frequencies with the goal of promoting diversity in mass media. National Citizens Committee v. FCC, 555 F.2d 938 (D.C. Cir. 1977).

106. Nor is the FCC precluded by the first amendment from the regulation of programming format to achieve balance. Citizens Committee v. FCC, 438 F.2d 263 (D.C. Cir. 1970). *See* note 80 *supra.*

107. The *Red Lion* Court declared: "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

108. *See* Goldberg and Couzens, *supra* note 2, at 22; *See* also Note, *supra* note 80, at 942-43.

The "public interest" standard and the scarcity of frequencies/public trustee theory have already been judicially applied to uphold two major instances of affirmative regulation by the FCC. In *National Association of Independent Television Producers and Distributors v. FCC,*[109] the Second Circuit Court of Appeals validated the FCC's rule permitting licensees to air network children's programming during time previously reserved for local broadcasts.[110] In *National Association* the public interest was said to "require some sacrifice of an entertainment category for a public affairs category. . . ."[111] However, the court commented that mandating rather than permitting such favored-category programming might "raise serious First Amendment questions."[112] In this regard it should be noted that the *National Association* court was dealing with a specific time slot, whereas the proposed children's regulations would allow broadcasters discretion to air a weekly total of 7½ hours of educational programs within a sixty hour period. Moreover, *National Association* establishes that children's programming is of sufficient import to the public interest to be singled out for preferential treatment by governmental regulation.

In *Red Lion Broadcasting Co. v. FCC,*[113] the Supreme Court sustained a regulation requiring reply time for those who have been attacked on the air, even if the station must assume the cost of such time.[114] Justice White, stressing the necessity of "enforced sharing of a scarce resource . . .," opined, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . . *It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.*"[115] In *Red Lion,* the Court

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109. 516 F.2d 526 (2d Cir. 1975).

110. The court was ruling on a challenge to that portion of the Prime Time Access Rule which made possible network recapture of early evening time for children's, public affairs, and news programs. *See* notes 22-23 and accompanying text *supra.*

111. National Ass'n of Indep. Television Producers and Distrib. v. FCC, 516 F.2d 526, 538 (2d Cir. 1975).

112. *Id.* at 536. The court qualified this prediction by continuing: "On the other hand, the general power of the F.C.C. to interest itself in the kinds of programs broadcast by licensees has consistently been sustained by the courts against arguments that the supervisory power violates the First Amendment." *Id.* at 536 (footnotes omitted).

113. 395 U.S. 367 (1969).

114. *Id.* This landmark decision broadened the concept of the "fairness doctrine" to embrace the right of access to scarce public frequencies which the public shares. Such right belongs not only to one who wishes to speak or to reply, but to the public who wishes to view and hear as well.

115. *Id.* at 390. The FCC has cited *Red Lion* as supportive of the constitutionality of affirmative children's programming regulation:

> The Supreme Court, in its landmark decision in *Red Lion* . . . gave considerable support to the principle that the FCC could properly interest itself in program categories. . . . While the holding of the *Red Lion* case was limited to the fairness doctrine, the Court's

was affirming not just the right of an "individual to speak, write, or publish," but also the "crucial" right of the public to see, hear, and to have access to "ideas and experiences." *Red Lion* establishes the public's right to be offered programming in the broad cultural realm, from which programming for the benefit of children is easily inferred.[116]

FCC v. Pacifica Foundation[117] adds the weight of another constitutional theory. The FCC in *Pacifica* exercised a negative rather than affirmative order — banning the broadcast of "patently offensive" language at certain times.[118] The Supreme Court's condoning the regulation of protected speech has been much criticized.[119] To be sure, the FCC had not attempted to ban the program in controversy from being broadcast at any time, "but rather sought to channel it to times of day when children most likely would not be exposed to it."[120] Justice Stevens' plurality opinion justified this limiting of first amendment protection of speech in part by stating:

> [B]roadcasting is uniquely accessible to children, even those too young to read. . . . Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theatres, for example, may be prohibited from making indecent material available to children.[121]

The *Pacifica* Court found the protection of children, an established rationale for limiting first amendment rights in the print and motion picture media,[122] a value so important as to permit an even more drastic restriction of broadcasters' rights.[123] While bookstores and theatres

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opinion has a significance which reaches far beyond the category of programming dealing with public issues.

Children's Programming and Advertising Practices: Second Notice of Inquiry, 68 FCC 2d 1344, 1345 (1978).

116. For a discussion of the *Red Lion* access doctrine as an affirmative rationale for program regulation, *see* Barron, *Access — The Only Choice for Media?,* 48 TEXAS L. REV. 766 (1970).

117. 438 U.S. 726 (1978), *reh. denied,* 439 U.S. 883 (1979).

118. *See* notes 29-31 and accompanying text *supra.*

119. *See, e.g.,* Krattenmaker and Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory,* 64 Va. L. Rev. 1123 (1978).

120. FCC v. Pacifica Foundation, 438 U.S. 726, 733 (1978), *reh. denied,* 439 U.S. 883 (1979).

121. *Id.* at 749.

122. The Court cited *Ginsberg v. New York,* 390 U.S. 629 (1968), which had held that material may be non-obscene as to adults but obscene as to children.

123. The Court declared that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978), *reh. denied,* 439 U.S. 883 (1979). In addition to the unique accessibility of broadcasting to children as a reason for limited protection, Justice Stevens noted that:

> [T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts

might be required to exclude children, their material would continue to be available to adults. The plurality in *Pacifica,* however, made it clear that permitting broadcast of "patently offensive" words dealing with sex and excretion in any time slot would be contingent on the relative presence of children in the audience.[124]

Pacifica appears to elevate societal concern for children to a position superior to the broadcaster's right to program for adults. If such concern is potent enough to keep programming off the air completely, a requirement to add children's programs should not encounter insuperable constitutional barriers. In the former instance, a broadcaster's already exercised judgment would be subject to FCC veto. In the latter instance, a broadcaster would only be supplied an affirmative context in which to exercise judgment.[125] The government's authority to establish categories of programming which licensees should consider is well established. Among those categories, children's programming has attained an especially favored status.[126] That children are also the object of special governmental protection suggests that quantitative programming standards would not come within the ban on government-dictated programming.

This unique position of children in questions of the constitutionality of limiting free speech distinguishes them from other classes seeking preferred access to the airwaves. Undeveloped intellectually and emotionally, children stand in need of representation in nearly every aspect of society. The duty of the parent to provide care is transferable under appropriate circumstances to the teacher, the guardian ad litem, and the state.[127] The federal government, having preempted the area of broadcasting, now proposes a representative role for licensees consistent both with the fostering and protection of children's interests and the licensee's duty as trustee for children as a segment of the community.

> the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder.

Id. (citations omitted).

124. In a footnote, Justice Stevens added:

> The Commission's action does not by any means reduce adults to hearing only what is fit for children. [Citations omitted.] Adults who feel the need may purchase tapes and records or go to theatres and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; *whether broadcast audiences in the late evening contain so few children that playing the monologue would be permissible* is an issue neither the Commission nor this Court has decided.

Id. at 750 (emphasis added).

125. The Commission has emphasized that, beyond establishing quantitative categorial standards, it would not attempt to interfere with the selection of specific children's programs by licensees. In this way would the FCC preserve licensee discretion to choose programs.

126. Of all its forays into program regulation, the Commission has shown, through a long-standing docket, a special *Children's Report,* and an exemption to the Prime Time Access Rule, a singular concern for the welfare of children in relation to the broadcast media.

127. *See, e.g.,* Howard v. United States, 2 F.2d 170, 174-75 (6th Cir. 1924).

Children are innately and immutably incapable of creating their own programming, of articulating their needs and interests with respect to broadcast service, and of evaluating the adequacy of existing service.[128] As Chairman Ferris has suggested, "ascertainment" methods suitable for other classes are not usable for children.[129] If children's programming is to be adequate, the licensee must assume an affirmative responsibility which children cannot assume. If the FCC acknowledges this through regulation, it is unlikely that other community groups seeking similar treatment could present themselves as comparable classes.

Unlike the FCC rule in *Pacifica,* and unlike the Prime Time Access Rule exemption in *National Association,* the Commission has no intent to enforce mandatory children's programming on a permanent basis. Rather, the Commission is explicit in its characterization of minimum standards as a short-term measure.[130] So as to minimize the chilling effect on broadcasters' rights, and to encourage the development of program outlets which would specialize in children's programming, the task force has recommended that regulations be lifted when an adequate supply of programs becomes widely available.[131] Further, the task force points out that minimum programming standards, while operative, will not prove unduly burdensome. One network has complied with the proposed pre-school regulation voluntarily for twenty-five years.[132] The transitory nature of the proposed quantitative standards and existing compliance by one network suggest that arguments raising the chilling effect on broadcasters' first amendment rights and burdensomeness would be insufficient to overturn the regulations. The reasonableness of regulating in this area is strengthened by the Commission's concern, not merely with the rights of children as a single element of the community, but with the rights of all citizens, who stand to benefit from the improved skills, attitudes and behavior of children.[133] When measured against the interests of society as a whole, including

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128. This characteristic distinguishes children as users of broadcast frequencies from competing classes such as the elderly, which FCC Commissioner Washburn has suggested would be likely contenders for special status if a mandatory children's programming rule were imposed. *1980 Notice of Proposed Rulemaking, supra* note 4, at 157.

129. *See* note 90 and accompanying text *supra.*

130. In its *1980 Notice of Proposed Rulemaking, supra* note 4, the FCC said: "[W]e intend that, if adopted, the mandatory programming rule would be an interim measure and that the rule would contain a 'sunset' clause setting forth conditions under which it would be rescinded." *Id.* at 149.

131. In the same notice the Commission stated: "The staff task force report asserts that with a large number of video outlets in each market sufficient diversity in programming would occur to make it likely that educational programming for children be provided without FCC intervention." *Id.* at 149.

132. TASK FORCE REPORT, *supra* note 3, at Vol. I, ch. 5, 77. The task force refers to CAPTAIN KANGAROO, a one-hour pre-school program provided on weekday mornings by CBS.

133. *See* notes 62-64 and accompanying text *supra.*

those of broadcasters themselves as citizens and businesspersons, the expedient of adding children's educational programs to the commercial television schedule seems both a permissible and appropriate exercise of governmental authority.

VI. Some Problems of Regulation as Presently Proposed

Although the task force's recommendation to impose minimum levels of children's educational programming is supported by prior exercises of the Commission's statutory authority, and is buttressed by judicial affirmances of the constitutionality of programming regulation, the FCC task force report and 1980 Notice of Proposed Rulemaking raise questions about the definition, impact and rationale of minimum standards. In its 1974 *Children's Report,* the FCC asked commercial licensees to "1) make a 'meaningful effort' in the area of overall amount of programming for children . . . and 2) air a 'reasonable amount' of programming for children designed to educate and inform, and not simply to entertain."[134] Not until 1975 did the Commission supply a definition of a children's television program.[135] Consequently, in 1979 the task force relied to a significant extent on network definition of children's programs to analyze industry performance in the overall amount of children's programming aired.[136] In the area of educational programming, the FCC supplied a definition in the *Children's Report,*[137] but added:

> We simply expect the licensee to select the particular areas where he believes that he can make the best contribution to the educational

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134. *1980 Notice of Proposed Rulemaking, supra* note 4, at 142.

135. *Id.* The FCC's definition of a children's television program is "[a] program originally produced and broadcast primarily for a child audience twelve years and under. This does not include programs originally produced for a general or adult audience which may nevertheless be significantly viewed by children." *Id.* This definition should effectively exclude much of the material currently broadcast for child audiences by network-affiliated and independent stations. *See* note 33 *supra.*

136. Task Force Report, *supra* note 3, at Vol. II, ch. 1, 8. The task force commissioned two studies to analyze the overall amount of children's programming aired. In one study, examining programming between 1948-1978, network definition was used, "as the FCC did not establish its current definition of 'programs designed for children twelve years and under' until 1975." *Id.* (footnote omitted).

137. *Children's Report, supra* note 37, at 7. The Commission stated:

> There are many imaginative and exciting ways in which the medium can be used to further a child's understanding of a wide range of areas: history, science, literature, the environment, drama, music, fine arts, human relations, other cultures and languages, and basic skills such as reading and mathematics which are crucial to a child's development. . . . As a general matter, programs of this type are logged as "Instructional" in accord with the provisions of Section 73.670 of the Commission's rules. The rule defines instructional programming so as to include "programs . . . involving the discussion of, or primarily designed to further an appreciation or understanding of, literature, music, fine arts, history, geography and the natural and social sciences. . . ."

Id.

> and cultural development of the children in his community — and then to present programming designed to serve these needs. The Commission will, of course, defer to the reasonable, good faith judgments which licensees make in this area.[138]

In its evaluation four years later of licensee compliance in the educational programming category, however, the task force said: "Licensees do not define educational/informational programs uniformly. . . . [L]icensees are likely to report instructional/educational in a greater proportion to other types of programming. . . . Given the lack of supportive data for the licensees' varying classifications, we rest upon the more rigorous data collected by the staff."[139] If these shifting definitional bases do not signify a change in FCC ground rules, they surely point to a misperception on the part of licensees as to which of their "reasonable, good faith judgments" are ultimately acceptable.[140] The Commission's 1980 Notice of Proposed Rulemaking appears to perpetuate the confusion by declaring that if mandatory programming rules are adopted, the FCC will "continue to define educational programming in a broad manner and to give deference to licensees' own classifications of their children's programs."[141] In its apparent desire to avoid usurping licensee discretion and dictating programming content, the Commission may be opening the door to a challenge for

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138. *Id.*

139. TASK FORCE REPORT, *supra* note 3, at Vol. II, ch. 2, 25. To analyze the amount of educational and informational programming broadcast by commercial licensees, the task force employed three methods: (1) the study described in note 137, *supra*, (2) a panel of five experts to classify programs by their titles, and (3) data collected from license renewal application forms. The task force relied on its own data in preference to that supplied by licensees in method (3). *Id.* Of method (2), FCC Commissioner Washburn observed:

> The demarcation line between "instructional" and "entertainment" programming, in my judgment, is virtually impossible to draw. . . . The five experts whom the staff employed in its study of network programming ran head-on into this definitional problem. When they couldn't agree on whether a show was "entertainment" or "instructional", they would either leave it out or take a vote. This led to such anomalies as CBS' "Captain Kangaroo" for preschoolers being categorized in the study as pure entertainment although the Commission itself has consistently held it to be instructional. . . .

1980 Notice of Proposed Rulemaking, supra note 4, at 157.

140. The Commission acknowledged that both industry- and task force-prepared definitions were used in the TASK FORCE REPORT, *supra* note 3, and concluded that "[t]he results of the staff analysis of broadcaster compliance with the *Children's Report* . . . are essentially the same whether the FCC definition or a broader industry-created designation of children's programs is used." *1980 Notice of Proposed Rulemaking, supra* note 4, at 142. This is debatable in at least one section of the TASK FORCE REPORT, wherein 201 commercial licensees' characterizations of instructional/educational programming averaged out to 21.5% of all children's programming aired, but the task force preferred its own figure of 13% non-entertainment (network) children's programming. TASK FORCE REPORT, *supra* note 3, at Vol. II, ch. 2, 20-25. Whether or not the discarding of licensees' evidence of compliance changed the result of the TASK FORCE REPORT, it cast doubts on the FCC promises to defer to licensee judgment in both the 1974 *Children's Report* and the *1980 Notice of Proposed Rulemaking*. *See* note 141 and accompanying text *infra*.

141. *1980 Notice of Proposed Rulemaking, supra* note 4, at 148.

vagueness.[142] This hesitation to set forth more specific criteria may stem from an apprehension of first impression judicial review of mandatory programming rules. However, prior judicial affirmances of programming regulation in the public interest, the FCC's carefully constructed record for regulation, and the public's high level of concern for this area suggest that mandatory rules would be upheld.[143] The Commission might well encounter difficulty, on the other hand, if it nominally defers to licensee program classification while indirectly using an arbitrary definition of educational programming by rejecting, as the task force did, licensees' representations of their own programs.[144] If the FCC believes its own characterizations to be more reliable, a safer course would be to set forth criteria specific enough to leave little or no doubt in licensees' minds as to where to classify individual programs. Such criteria might be developed with the aid of licensees themselves, so as to ensure agreement at the outset between the government and the industry about what the regulations mean, and to preserve licensee control over actual programming selection.

A second problem is raised by the Commission's deliberation over which licensees would be within the scope of a minimum children's programming rule. As the ultimate remedy is seen in the development of other video outlets, such a rule would be temporary in nature for any affected licensee.[145] However, since some markets already have access to alternative outlets, commercial broadcasters in those markets are arguably exempt under the FCC's premise for regulation.[146] The task force findings indicate that industry non-compliance with the *Children's Report* was due to "market incentives under the current structure of commercial broadcasting . . . run[ning] counter to the programming policies and guidelines created in the *Children's Report.*"[147] Thus a mandatory programming rule would perforce work an economic hardship on any affected licensee. If application or rescinding of the rule is determined on a market-by-market basis, an inevitable result will be that some licensees will bear an economic burden which others escape, not by virtue of their own efforts or performance, but by for-

142. If the Commission establishes minimum performance levels but declines to provide specific guidelines at the same time, a potentially vague area will be the acceptability of licensee descriptions of programming, at least in instances when licenses are challenged. *See 1980 Notice of Proposed Rulemaking, supra* note 4, at 150.

143. *See* notes 74-133 and accompanying text *supra.*

144. In addition to the problem of arbitrariness, Commissioner Washburn has even cautioned that mandatory programming rules would inevitably lead to an intrusion by FCC staff into licensee discretion in program selection. *1980 Notice of Proposed Rulemaking, supra* note 4, at 157-58.

145. *See* notes 130 and 131 *supra.*

146. The Commission has suggested that "the rule might even be held inapplicable from the outset in certain markets, if they met the 'sunset' criteria." *1980 Notice of Proposed Rulemaking, supra* note 4, at 149.

147. *Id.* at 146.

tunate geography or the efforts of other providers of children's programming.[148] For example, if the FCC used the applicability criterion of a minimum number of over-the-air channels in a market, inequity would result to licensees in small market areas, who could not hope that natural marketplace factors would bring about the creation of specialized facilities and hence relief from regulation.[149] Such a rule would not have the effect of motivating the licensees in unregulated markets to program at all for children, nor could it provide an economic incentive for licensees in regulated markets to meet more than the minimum quantitative requirements. As the Commission has promised to eschew qualitative considerations, an unevenly applied rule might even prove counterproductive to the desired objective of improving children's television.[150] The Commission might minimize this risk by adopting either a uniformly applied rule, or the more flexible processing guideline by which all commercial licensees would be evaluated at renewal time, and by reconsidering its promise to issue "sunset" criteria at the same time rules are promulgated.[151]

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148. The Commission has set forth several factors which might determine the inapplicability of a mandatory programming rule:

> Criteria for rescinding the rule might include the expiration of a given time period or some structural condition such as national cable penetration reaching some specified level. Alternatively, the criteria might be applied on a market-by-market basis and might include the number of over-the-air stations in the market, cable penetration in the market, percentage of homes in the market passed by cable, or some combination of these. Widespread and low-cost availability of videocassette and videodisc equipment and programming might also make mandatory advertiser-supported broadcasting of children's programs unnecessary.

Id. at 149 (footnote omitted).

149. The task force offered these conclusions:

> Evidence collected in the compliance study indicates that the very largest markets provide most children's programming. . . . While we have no direct evidence, we may note that the increase in children's programming since 1973 may be associated with an increase in the number of stations per market. The increase occurred entirely in the top 50 markets. . . .
>
> Programming for children appears to be most available in markets containing independent stations, most of which are large cities.

TASK FORCE REPORT, *supra* note 3, at Vol. I, ch. 3, 40.

150. In this regard, FCC Commissioner Brown has commented:

> The Commission will not, for example, have accomplished much if, as a result of the approach we take, commercial broadcasters sacrifice quality in children's programming in favor of the security of numbers. . . .
>
> It is conventional wisdom that the FCC may not concern itself with quality in programming. Yet, no one seriously doubts that as the quantity of commercial children's programming is in the spotlight of this proceeding, so the quality of such programming . . . is a large presence offstage.

1980 Notice of Proposed Rulemaking, supra note 4, at 169.

The Prime Time Access Rule is an example of an attempt to foster diversity in programming. *See* notes 22-23 and accompanying text *supra*. But as this rule permits rather than mandates a certain type of programming, one result has been that many licensees opt for cheaper syndicated entertainment programs during the local access period, while others schedule local programming consistent with the objectives of the rule.

151. Under either plan, commercial licensees would be affected equally, and the prospect of relief from regulation for some licensees through external circumstances would be eliminated. As Commissioner Brown observed: "I see only two advantages to a quantitative requirement: First, it

The Commission's contemplation of an unevenly applied rule is predicated on the development of other video outlets as a long-term solution to the currently inadequate supply of children's programming.[152] In anticipating such a solution, the Commission appears to be moving toward a "structural" rather than content regulatory approach to achieving its desired end of program diversity in the public interest.[153] The structural approach has been suggested as a more effective method to achieve diversity while avoiding the serious first amendment questions raised by the traditional scarcity of frequencies rationale found in *Red Lion,* and the more recent theory of the pervasiveness of television found in *Pacifica.*[154] Application of the structural approach to encouraging children's programming, however, presents fundamental problems. If access to an adequate supply of educational children's programs is the goal of the Commission, it can best be achieved through the outlet to which children *have* access. Even if the Commission were to determine, on a market-by-market basis, or at a given future time, that an adequate supply of these programs was available through subscription or cable television, or through home video equipment, children's access to it would still be dependent upon the ability and desire of parents to pay for it. The task force has suggested that, though individual parents did pay for such a service for their own children, society would lose the benefit of having educational programming available to all children.[155] It could be argued that part of this loss to society would be, not simply the lack of positive educational experiences for all children, but the misuse of a national resource as well. Commercial television is presently a major and nearly ubiquitous socializing force for children in American society, whether or not pro-

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would put all broadcast licensees on an equal footing, where the economics of programming do not assure marketplace competition; second, such a requirement would assure more, though not necessarily "better," programming for young children." *1980 Notice of Proposed Rulemaking, supra* note 4, at 169. *See also* note 2 *supra.*

152. *See* notes 57, 130, 131 and 148 *supra.*

153. Under the structural approach the government would concern itself with the vehicles for programming rather than the composition of programming. Thus the FCC could turn its attention to increasing the number of programming outlets (for example, by making UHF stations more comparable with VHF stations) rather than attempting to achieve diversity by mandating minimum levels of programming within a given outlet. *See 1980 Notice of Proposed Rulemaking, supra* note 4, at 150-52. For a discussion of the structural approach to regulation, *see* Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation,* 31 FED. COM. L.J. 215 (1979).

154. David L. Bazelon, Chief Judge of the Court of Appeals for the District of Columbia Circuit, is a proponent of this view. *See* Bazelon, *The First Amendment and the "New Media" — New Directions in Regulating Telecommunications,* 31 FED. COM. L.J. 201 (1979). Judge Bazelon believes "[t]here are a variety of approaches to fostering diversity which promise significant gains without imposing substantial government control over the content of program. The key, in my view, is to move away from 'behavioral' regulation toward what I call 'structural' regulation of the media." *Id.* at 209.

155. *See* notes 62-64 and accompanying text *supra.*

grams are designed for their use and benefit. Further, unless parents do pay or programming is otherwise underwritten, the normal marketplace factors articulated by the task force might be expected to continue to keep children's programming supplies low.[156] Though other outlets may appear, there is no reason to anticipate that children as a class will have more influence on new outlet programming decisions than they presently have.[157] The government cannot foresee with precision and may not be able to control by law, what configuration of outlets and programming will be available to children apart from broadcasting.[158] The Commission itself has said, "Even in the long term it is likely that only advertiser-supported over-the-air broadcasting will be available to all television households."[159]

Even if the Commission's prediction proved not to be true, the FCC

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156. For example, one major alternative outlet for children's educational programming is public television. Although it is not discussed in the TASK FORCE REPORT, the bulk of instructional television programming is now provided over most public television stations, and is directed primarily to classroom use. In Massachusetts, for instance, five hours per school day of instructional television are broadcast over two public television stations for most of the school year. As public television seeks a larger share of the general audience, however, the time devoted to instructional television programming is decreasing. *TV Guide* has recently reported: "While public stations have increased their average weekly broadcast of general programming since 1972 from 36.0 to 64.1 hours, the instructional programming of public stations has fallen from 34.9 to 29.8 hours per week." *TV Guide* (Eastern New England Edition), April 12, 1980, at A-108. *See generally* Carnegie Commission, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* (1979).

Furthermore, while independent stations have been shown to account for much of the programming for child audiences now being broadcast by commercial stations, most of this fare does not meet the FCC definitions of "children's" or "educational" programming. *See* note 33 *supra*. No evidence has been adduced that increasing the number of independent stations would result in program selection which would bring programming into line with FCC objectives.

157. Parents support commercial television indirectly by purchasing advertised goods. *See* notes 67-68 and accompanying text *supra*. For children's programming to appear on pay TV services, parents might have to pay directly. Of the direct payment method of increasing the supply of children's programming, Commissioner Washburn has said:

> There is little or no hard evidence supporting the finding that parents, in any significant numbers, are willing to pay extra for additional educational programs, yet this finding is advanced as proof of the existence of "unsatisfied demand" for such programming. The fact that some cable-TV subscribers pay extra to get a service like Home Box Office does not justify the [FCC] staff's conclusion that subscribers would be willing to pay extra solely for children's television. None of the pay-TV services today has a children's channel sold separately from the rest of its programming. Consumers subscribe to pay-TV primarily to receive movies and sports without the interruption of commercial announcements.

1980 Notice of Proposed Rulemaking, supra note 4, at 156.

158. For example, the Commission has suggested that the proliferation of home videodisc and videocassette equipment might be alternatives to commercial television children's programming. *1980 Notice of Proposed Rulemaking, supra* note 4, at 149. Such a solution is not only out of the FCC's control, but depends, as do other suggested alternatives, on the ability and desire of parents to buy the equipment and to utilize it consistently with the Commission's objectives. Nor does this solution address the problem of the supply of children's programming. The mere availability of home equipment does not necessarily alter the nature of programs available to play on it.

159. *1980 Notice of Proposed Rulemaking, supra* note 4, at 152.

has clear statutory authority and latitude under the Constitution to oversee the broadcast frequencies as part of the public domain. The rights of children to share in the frequencies should not decrease or disappear simply on the basis that educational programs for them exist elsewhere, any more than the rights of adults to broadcast services are diminished by the existence of newspapers, magazines, books, satellite and pay TV. Nor should children's rights be conditioned on the absence of other outlets, as the temporary nature of the proposed rules suggests. It is unlikely that the Commission could or would completely forsake its public interest responsibility for overseeing broadcast frequencies if the alternative programming outlets it foresees became widely used. Though broadcast frequencies become merely one of a number of outlets, they will remain a public outlet. If broadcasters continue to have any obligation to program for any segment of the public, that obligation extends to all segments. Such a duty does not have a "sunset" clause, but persists for as long as broadcast frequencies are shared at all. The scarcity of frequencies rationale not only supports the case for a children's programming rule, but appears to be the only certain regulatory basis for furthering the Commission's goal of expanding the educational program supply for all children.

CONCLUSION

The FCC's traditional approach to television programming regulation has been to assert the "public convenience, interest or necessity" to assure public access to cultural and public affairs. The Commission regards licensees as "public trustees" responsible for ascertaining community needs and desires for the use of scarce frequencies. A primary method by which the Commission assures itself that the licensee is adequately performing as trustee is the process of license renewal every three years. Historically, the FCC has deferred to the licensee on matters of specific programming. Such deference has been felt by the Commission to be consistent with first amendment rights of the licensee, and with the free marketplace competition that creates and satisfies the public's demand for diversified programming. Recently, however, the Commission has taken initiatives in program regulation in the areas of public affairs and children's programming. Most of these initiatives have been upheld by the courts under the Commission's statutory authority and the limited first amendment rights of broadcast licensees.

After ten years of study, two major inquiries, and a six-year experiment with guidelines for industry self-regulation, the FCC staff found that children as a class continue to be seriously underserved, that self-regulation is a failure, that existing FCC safeguards of children's interests are ineffective, and that a chief and immediate remedy is to re-

quire quantitative, age-specific children's programming of all commercial licensees. The carefulness of the FCC's deliberation, the unsuccessful trial of less drastic alternatives, the likelihood that this method of regulation would not be adopted for other than children's programming, and the unique position occupied by children in the law, all lead to a conclusion that such regulation is well within the statutory authority of the Communications Act, is in compliance with the Administrative Procedure Act, is constitutionally permissible, and is supported by prior judicial decisions. It is suggested, however, that the proposed regulations be drafted to establish clear criteria for licensees to follow within the broad definition of "children's educational programming," that the FCC adopt either a uniformly applied rule or a minimum programming processing guideline applicable to all licensees, and that deregulation not be automatically anticipated as a result of the rise of other programming outlets. Regulation should persist for as long as children are sharers of broadcast frequencies, or unless adequate programming for children is undertaken voluntarily by commercial broadcasters, thus obviating the need for governmental intervention in the public interest.

SUZANNE R. NOONAN

CASE COMMENTS

Universal City Studios, Inc. v. Sony Corporation of America: Application of the Fair Use Doctrine Under the United States Copyright Acts of 1909 and 1976

During the 1970's a new technology — the home videotape recorder (VTR) — appeared on the American scene for use by the private consumer.[1] During the same period, the copyright law of the United States was undergoing a major recodification which culminated in the Copyright Revision Act of 1976.[2] The 1976 Act is the most recent Congressional expression[3] of the American copyright law and, as such, supercedes the Copyright Act of 1909.[4] The copyright implications of this new VTR technology were not fully addressed by the new Act in that the interests of the public vis-a-vis the copyright owner were not defined.[5]

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1. Sony began to market its Betamax VTR to the public in November, 1975. Wall St. J., Mar. 28, 1977, at 6, col. 2. Sony VTR sales were reported on Mar. 28, 1977 as 50,000 units with 150,000 projected to be shipped in 1977. *Id.* Total sales figures for the VTR industry in the United States have been reported as 150,000-160,000 units in 1977 with industry sales estimated by RCA for 1978 of 500,000-750,000 units. Wall St. J., May 19, 1978, at 10, col. 3; *id.*, Mar. 29, 1978, at 1, col. 6. The New York times reported that there were 800,000 units in American homes in March, 1979. Lindsey, *Video Recorders Changing Daily Habits,* N.Y. Times, Mar. 29, 1979, § 3, at 1, col. 1. Another source estimates 750,000 units by the end of 1978, 1,200,000 by the end of 1980 and 8,000,000 by 1985. Variety, Oct. 25, 1978, at 3, col. 3.

At the time of this suit, Sony was marketing at least four Betamax VTRs (costing approximately $875-1000). The VTRs included various options such as built-in timers and remote pause controls. The timer would enable the VTR to record a television program at a preselected time, while the owner was otherwise engaged. The pause control allows the interruption of whatever function the machine is in. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 435 (C.D. Cal. 1979).

2. 17 U.S.C. §§ 101 *et seq.* (Supp. II 1978).

3. The copyright laws have a constitutional source: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

4. Act of March 4, 1909, ch. 320, 35 Stat. 1075, formerly codified at §§ 1 *et seq., as amended* [hereinafter cited as *1909 Act;* any specific sections cited refer to sections of the act as codified in 17 U.S.C. prior to the 1976 revision].

5. *See* 17 U.S.C. §§ 101 *et seq.* (Supp. II 1978). Videotapes would be embraced within the statutory definitions of "audiovisual works" and "copies" as set forth in § 101 but generally except for provisions such as § 108 (f)(3) concerning "archives of an audiovisual news program" and § 111 (e) concerning "Nonsimultaneous secondary transmissions by cable systems,"the new act

Universal City Studios, Inc. v. Sony Corporation of America[6] is a case of first impression with respect to the issue of whether the "home use" of videotape recorders by private individuals to record copyrighted audiovisual works from broadcast television is a copyright infringement.[7] This decision is significant in that no copyright infringement was found when this new technology was examined in light of both the 1909 Act and the Revision Act of 1976.[8]

This Comment will focus upon the fair use doctrine as applied by the court under the 1909 Act and as codified in the 1976 Act.[9] The fair use doctrine permits the reasonable use of copyrighted material under certain circumstances without the consent of the copyright owner.[10] The four primary factors relied upon by the court in reaching its decision will be examined. It will be suggested that these factors weigh strongly against a finding of infringement and that this decision will be upheld

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does not consider videotapes. The statute gives no direct answer to the issue of home use copying with VTR equipment. *Cf.* H.R. REP. No. 1476, 94th Cong., 2d Sess. 66, 71-72, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680, 5685 (deals respectively with the general intention behind the fair use provision and off-the-air videotaping for nonprofit classroom use).

6. 480 F. Supp. 429 (C.D. Cal. 1979). An earlier decision was handed down in this case which dismissed two of the twelve counts originally filed in the complaint. The two dismissed counts dealt with claims against the defendants under the Lanham Trade-Mark Act, § 43(a), 15 U.S.C. § 1125(a) (1976). Universal City Studios, Inc. v. Sony Corp. of America, 429 F. Supp. 407 (C.D. Cal. 1977).

7. The 1976 Act defines "audiovisual works" in the following language:

> "Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101 (Supp. II 1978).

"Home use" recording as defined by the court is "the operation of the Betamax in a private home to record a program for subsequent home viewing." Universal City Studios, Inc., v. Sony Corp. of America, 480 F. Supp. 429, 442 (C.D. Cal. 1979). In the words of the court: "This case tests the scope of copyright protection for audiovisual material broadcast on public airwaves, and its resolution requires balancing of strong competing claims." *Id.* at 432.

8. Alleged infringements which occurred prior to January 1, 1978 will be governed by the copyright statutes then in effect. Any infringements after January 1, 1978 will be governed by the 1976 Act. *Id.* at 442.

Consider also that the state causes of action based on the common law copyright are dealt with in 17 U.S.C. § 301 (b) (2) (Supp. II 1978):"(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to — . . . (2) any cause of action arising from undertakings commenced before January 1, 1978. . . ."

9. The Congress codified the fair use doctrine as developed by decisional law in § 107 of the 1976 Act. 17 U.S.C. § 107 (Supp. II 1978). *See* section II *infra.*

10. The fair use doctrine is a judicially created defense. *See, e.g.,* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court,* 420 U.S. 376 (1975). *See generally* 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1979); Cohen, *Fair Use in the Law of Copyright,* 6 ASCAP COPYRIGHT L. SYMP. 43 (1955); Fried, *Fair Use and the New Act,* 22 N.Y.L.S.L. REV. 497 (1976-77); Latman, *Fair Use of Copyrighted Works* in 2 STUDIES ON COPYRIGHT 781 (1963); Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act,* 24 BULL. COPYRIGHT SOC., 215, Item 281 (1977); Comment, *Copyright Fair Use — Case Law and Legislation,* 1969 DUKE L. J. 73; Note, *Constitutional Fair Use,* 20 W. & M. L. REV. 85 (1978).

on appeal. Finally, the implications of this decision upon other issues in the copyright law will be considered.

I. STATEMENT OF THE CASE

The plaintiffs, Universal City Studios, Inc. and Walt Disney Productions, are two major producers and owners of copyrighted audiovisual works. Universal produces movies for both television broadcast and theater exhibition. With respect to television broadcasts, Universal licenses many of its programs to commercial networks and local stations which remunerate it as copyright owner.[11] Disney also owns an extensive collection of copyrighted films from which it has granted licenses for network broadcast and pay television exhibition.[12] In addition, Universal syndicates many of its television series to independent television stations through syndication licenses.[13] Disney, while not as involved in syndication as Universal, also has a potentially large syndication market.[14]

The primary defendants are the Sony Corporation of America, the manufacturer and distributor of Betamax recorders and tapes, numerous representative retail outlets for the Betamax products, and a representative individual owner of a Betamax recorder.[15] The plantiffs contended that the home recording of their copyrighted programs by in-

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11. The primary market for television programs are the networks and the local television stations. The copyright owners license their creations to the networks which then make the programs available to their affiliated network stations. Additional licensing arrangements arise between the copyright owners and individual local stations, generally on programs which either are not offered to the networks or which have already been run and rerun on the network. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 433-35 (C.D. Cal. 1979).

12. *Id.* at 434. Disney signed a multimillion dollar licensing agreement, its first, with a subscription television concern, Home Box Office. Wall St. J., July 13, 1978, at 13, col. 4.

13. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 434 (C.D. Cal. 1979). Universal possesses "approximately 2000 theater films in syndication. . . . All together, it has over 3000 syndication licenses covering more than 300,000 different programs." *Id.* This large inventory is significant when considering potential harm to the copyright owner threatened by the home use of videotape recorders (VTRs).

A syndication is a contractual relationship through which a copyright owner licenses a broadcaster to transmit his copyrighted work over the broadcaster's station. Generally the license provides for a number of showings over a specific time period. Typically in a syndication license, which may be executed in the third year of the first run of the series, are rights to show each episode approximately six times over four to six years commencing after the show's fifth year. *Id. See* Grover, *Delayed Payoff TV Series Only Become Profitable for Producers Upon Syndication, Years After They Are Made,* Wall St. J., Dec. 27, 1977, at 26, col. 1. The reason the syndication requires so many episodes is that the normal practice is strip programming where a different episode is broadcast each day Monday through Friday. The potential rewards to a producer of a successfully syndicated series can result in profits of $10-50 million. *Id.* It is easy to understand the plaintiffs' interest in litigating this case considering such potential rewards.

14. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 434-35 (C.D. Cal. 1979).

15. *Id.* at 433. Although the major corporate defendants were Sony Corporation (a Japanese corporation), the manufacturer of the Betamax products and Sony Corporation of America, the

dividual Betamax owners constituted a copyright infringement and that the corporate defendants were liable for that infringement as either direct or contributory infringers.[16] The plaintiffs also maintained that the retail defendants violated the copyright law by recording portions of plaintiffs' programs when demonstrating the Betamax recorders to prospective customers.[17] The plaintiffs further alleged that if the infringements were allowed to continue they would suffer great monetary damage.[18]

Relying implicitly upon the fair use doctrine, the defendants asserted that home use copying with VTRs by individual Betamax owners did not amount to a copyright infringement.[19] Since the statutory provisions of both the 1909 and 1976 Acts expressly create exclusive rights in the copyright owner over his works, unauthorized use of the copyrights by the defendants would have violated both Acts absent the raising of a successful fair use affirmative defense.[20] Thus, the issue presented for the court was whether the fair use doctrine, as judicially defined under the 1909 Act and as codified under the 1976 Act, protected the individual defendant's use of the plaintiffs' copyrighted materials.[21]

Under both Acts,[22] the court held that copyright holders possess no monopoly power[23] over off-the-air copying in the home by an in-

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United States distributor of the Betamax; the text for simplicity refers only to Sony Corporation of America.

The retail defendants included: Carter Hawley Hale Stores, Inc.; Associated Dry Goods Corporation; Federated Department Stores, Inc.; and Henry's Camera Corporation. *Id.* at 432. The representative individual Betamax owner, Griffiths owned a model 7200 which was purchased by his sons. *Id.* at 436. Another interesting note is that "Griffiths is a client of plaintiffs' law firm and consented to being a defendant in the lawsuit. Plaintiffs have waived any claim for damages or costs against Griffiths for his activities alleged in the complaint. Plaintiffs never expected Griffiths to be represented by counsel and he has not been." *Id.* at 437. Evidence was introduced at the trial concerning not only Griffiths' home use but also that by five other named individuals. *Id.* at 436-38. Additionally, the results of surveys of Betamax owners conducted by both the plaintiffs and defendants were introduced. *Id.* at 438-39.

16. Another contention advanced by the plaintiffs was that the defendants "interfered with their business relations and unfairly competed with them." Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 432 (C.D. Cal. 1979).

17. *Id.*

18. *Id.*

19. *Id.* The defendants argued, in the alternative, that if the home use in question was an infringement then Sony and the other corporate defendants would not be liable as direct, contributory or vicarious infringers. *See* note 7 *supra* for the court's definition of "home use."

20. *See* 17 U.S.C. §§ 106, 107 (Supp. II 1978); *1909 Act, supra* note 4, at § 1.

21. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 442 (C.D. Cal. 1979).

22. 17 U.S.C. §§ 101 *et seq.* (Supp. II 1978); *1909 Act, supra* note 4, at §§ 1 *et seq.*

23. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 432 (C.D. Cal. 1979). The copyright scheme provides for exclusive rights which in ordinary language would be expressed in monopolistic terms. The use of the word "monopoly" by the court does not conjure up questions of antitrust. "Monopoly" as used proceeds from the Congressional enactment of the copyright law. Patterson, *Copyright and the Public Interest,* in COPYRIGHT CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 43 (A. Kent & H. Lancour eds. 1972).

dividual for his private and noncommercial use.[24] In reaching this holding, the court recognized that the purposes for which individuals generally utilized VTRs; time-shifting, librarying, and avoiding advertisements;[25] constituted a private and noncommercial use of the plaintiffs' copyrighted materials. With respect to the other defendants, the court found no direct or contributory infringement and refused to impose vicarious liability.[26]

Although it was recognized that home use recording appeared to violate the literal statutory language with respect to copyright infringement, the court observed that the fair use doctrine was created to shield some forms of copying from the literal impact of the statutory mandate.[27] It was felt that the protection of the public interest with respect to the rights and works in dispute, required the application of a balancing test to weigh the need for public access to the copyrighted works against the need to provide an economic incentive for authors[28] to continue to produce copyrighted material.[29] This balancing test was per-

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24. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 432, 442 (C.D. Cal. 1979). The court stressed that its decision was limited to home use recording. *Id.*

25. The court discussed six named individuals who owned one or more Betamax recorders and approximately 100 to 340 tapes. Of these individuals nothing in the decision indicated any recording for other than private noncommercial use. There was an implication in the decision that one of these individuals did acquire some tapes by swapping tapes with others but only for private use. *Id.* at 436-38.

Time-shifting is the procedure whereby a VTR is used to record a broadcast program at its time of transmission, for subsequent viewing at the convenience of the individual. At trial two time-shifting situations were discussed. In the first, a man's son recorded some Mickey Mouse cartoons in the afternoon and when his father returned from work, the two replayed the recording. The second was an example of the use of time-shifting to overcome the broadcasting technique of "counter-programming." Counter-programming is the term used to describe the scheduling, by the various networks, of their programs to compete with the opposition. Time-shifting utilizing the VTR's capability to record a signal other than that being viewed on the television by the VTR's owner allows the owner to watch two of the programs aired simultaneously. *Id.* at 466.

Librarying of videotapes is the recording and retention of broadcast programs. This can be accomplished with relative ease if the individual has a VTR and the requisite blank videotapes. The only limiting factors would seem to be the expense of the blank tapes and the programs to which access can be gained either by off-the-air recording or some other means. *Id.* at 467. The *Universal* court did not purport to decide the legality of tape swapping, but limited its holding to the off-the-air recording. *Id.* at 442.

Other uses which can be envisioned for the VTRs are: playing back prerecorded cassettes, recording people making wills, training employees, creating home movies, and marketing efforts. Lindsey, *supra* note 1, at 1, col. 1. Another use for VTRs could be in recording legal depositions which could be allowed under a rule such as FED. R. CIV. P. 30(b)(4).

26. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 433 (C.D. Cal. 1979).

27. *Id.* at 442. *See* section II *infra* for fair use doctrine analysis under the 1909 Act.

28. "Author" in the copyright sphere is a term of art; it does not necessarily identify the creator of the copyrighted work but could also be an employer when a work is made for hire, as in the instant case. *See* 17 U.S.C. § 201 (Supp. II 1978); *1909 Act, supra* note 4, at §26.

29. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 432 (C.D. Cal. 1979). This balancing involves the central purposes behind the copyright law. The tool used in this balancing process by this court was the doctrine of fair use which is examined in section II *infra*.

formed by applying the factor analysis of the fair use doctrine to the facts of the case, taking into consideration that a new technology was involved. In applying this test, the court gave particular consideration to the factor of harm, [30] finding that the probable harm demonstrated by the plaintiffs was too speculative to preclude fair use.[31] In holding for the defendants, the court limited its decision to copyrighted materials made available by free television broadcast to the public over public airwaves and home use copying.[32]

II. Fair Use With Respect to Copyrighted Television Programs Broadcast Over the Air

Generally, the affirmative defense of fair use is considered to be the reasonable, but unconsented use of copyrighted material despite the copyright owners' exclusive rights.[33] Such a definition is only suggestive of its meaning because as the *Universal* court correctly observed the doctrine has remained flexible and is to be applied in an *ad hoc* manner.[34]

A. Fair Use Analysis Under the Copyright Act of 1909[35]

Although the 1909 Act did not contain any express recognition of a fair use doctrine, it was judicially created to permit the buffering of the

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30. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 450-52 (C.D. Cal. 1979). *See* notes 67-76 and accompanying text *infra.*

31. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 451-52 (C.D. Cal. 1979). The court particularly observed that the profits of the plaintiffs were increasing significantly during this period. *Id.* at 439-40.

32. *Id.* at 442. The court declined, based upon the facts at bar, to decide the issues of tape swapping, tape duplication and off-the-air recording for utilization outside the private home. *Id.*

"A court reviewing the limited claims of specified parties in a particular factual setting cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder." *Id.*; Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court,* 420 U.S. 376 (1975).

33. *See* Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).

34. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 447 (C.D. Cal. 1979). *See, e.g.,* Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d. Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279, 283 (5th Cir.), *cert. denied,* 398 U.S. 928 (1970); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 960 (D. N.H. 1978). Congressional legislative history behind the 1976 Act supports the court's observation:

> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5679.

35. *1909 Act, supra* note 4.

seemingly absolute statutory grant of monopolistic rights made to the copyright owner.[36] As such the doctrine is consistent with the constitutional grant of power to the Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[37] Since the central interest of the United States in conferring this copyright monopoly lies in the general good which thereby inures to the public from the authors' labors,[38] courts were justified in recognizing this interest through the creation of "the fair use doctrine to immunize some forms of copying from the literal implications of the statute."[39] The determination of whether the doctrine of fair use under the 1909 Act applied to the facts of *Universal,* required an examination of the facts through a factor analysis which developed under the common law.[40]

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36. *1909 Act, supra* note 4, at § 1 provided in part: "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work. . . ." Upon its face, this statutory provision would apparently reserve the right to copy the broadcasted television programs to the copyright owner and would not allow unauthorized copying.

37. U.S. CONST. art. I, § 8, cl. 8.

38. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (a case involving the noninfringing use by a small restaurateur of broadcast radio music made available to his patrons by the use of a common radio with four speakers); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). As one court stated:

> To serve the constitutional purpose, " 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.' Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, *e.g.,* whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography."

Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352-53 (Ct. Cl. 1973) (citations omitted), *aff'd per curiam by an equally divided court,* 420 U.S. 376 (1975).

39. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 442 (C.D. Cal. 1979). It would be important to note that:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. *Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.*

H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Part S, at 7 (Brylawski & Goldman eds. 1976) (emphasis added). From the language of the above, it is apparent that the statute is of critical importance in determining the rights of a copyright owner and as the Supreme Court stated in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1974): "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of ['the general benefits derived by the public from the labors of authors.' Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)]."

40. *See* note 10 *supra.*

Three cases which utilized fair use analyses in a noncommercial context under the 1909 Act were cited to the *Universal* court as precedent on behalf of the parties' respective interests.[41] *Wihtol v. Crow,*[42] was a decision by the Eighth Circuit Court of Appeals, which rejected the fair use defense. *Wihtol* involved the use by a choral director of a song *My God and I* as the basis for a new arrangement, the multiple copies of which were used by both a church choir and by a school choir in performing the arrangement. The *Wihtol* court rejected the fair use defense because it felt that the statute was inflexible and the use of all or substantially all of a copyrighted song was an infringement.[43] *Wihtol* was distinguished by the *Universal* court because it involved a public performance of copyrighted material rather than private use in the home.[44]

The second case considered was *Williams & Wilkins Co. v. United States*[45] which placed at issue the large-scale photocopying practices of the National Institutes of Health and the National Library of Medicine.[46] The Court of Claims held no infringement as the fair use

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41. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 449 (C.D. Cal. 1979). The *Universal* court recognized that the case at bar was noncommercial use in a new context. *Id.* at 448. *See* notes 88-89 and accompanying text *infra.*

42. 309 F.2d 777 (8th Cir. 1962). The Eighth Circuit Court of Appeals reversed the district court and held that the use was an infringement despite the fact that the use made was without intent to infringe and the argument that the use was fair. *Id.* at 780-81.

43. *Id.*

44. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 450 (C.D. Cal. 1979).

45. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court,* 420 U.S. 376 (1975).

46. *Id. Williams* was a case in which a publisher of copyrighted medical journals brought an action for infringement against the National Institutes of Health (NIH) and the National Library of Medicine (NLM). The basis for the action was the large-scale photocopying practices of the defendants. In 1970 for example, the NIH library photocopy budget was $86,000 and about 930,000 pages were copied. *Id.* at 1348. These practices involved the photocopying of copyrighted materials for the use and at the request of library patrons, primarily medical researchers. The court set forth a series of four factors which it considered in determining that the photocopying was a fair use and not an infringement. The four factors were: "(a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for and value of his work." *Id.* at 1352. In holding that the photocopying was permissible under the doctrine of fair use the court summarized its position in three propositions:

> First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be an infringement; and, third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine.

Id. at 1354. The primary purpose and character of the use in *Williams* was to promote medical research which arguably would weigh the first factor towards fair use. The *Williams* court emphasized that the NIH and NLM were "nonprofit institutions, devoted solely to the advancement

defense was found complete.[47] Fair use was found after balancing the burden to the defendants against that to the plaintiffs and finding that medical science's outweighed the medical publisher's.[48] *Williams* was not used as a precedent by the *Universal* court but rather was accepted as illustrative of the "relevance of the fair use doctrine when copyright protection is tested by new technology and noncommercial use."[49]

The third case, *Encyclopaedia Britannica Educational Corp. v. Crooks,*[50] dealt with the granting of a preliminary injunction enjoining the alleged copyright infringements of broadcasted educational films owned by the plaintiffs.[51] The court found that the defendant, the Board of Cooperative Educational Services of Erie County, a nonprofit corporation, videotaped a number of plaintiffs' copyrighted films without permission and subsequently distributed the videotapes among the 100 plus schools in Erie County.[52] The *Encyclopaedia Britannica* court granted the preliminary injunction based upon a prima facie

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and dissemination of medical knowledge. . . ." *Id.* Additionally, emphasis was made that with respect to both the library and user, the hallmark of the whole enterprise was "scientific progress, untainted by any commercial gain from the reproduction. . . ." *Id.* Generally accepted is the proposition that copying with a scientific purpose is given wide leeway as fair use. *See, e.g.,* Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied,* 434 U.S. 1014 (1978); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306-07 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).

The *Williams* court balanced the potential harm to medical science against the hypothetical harm assumed by the plaintiff and, in the absence of congressional direction, held that the photocopying was fair use. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1359 (Ct. Cl. 1973). The *Williams* court has been criticized for placing seemingly paramount importance upon the showing of concrete harm by the copyright owner. *See* Nimmer, *Photocopying and Record Piracy: of Dred Scott and Alice in Wonderland,* 22 U.C.L.A. L. REV. 1052 (1975). Professor Nimmer expressed that the Court of Claims treatment of the harm element was erroneous in that harm need not be shown to establish liability. M. NIMMER, *supra* note 10, at § 13.05 [E][4][C]. The copyright law has provision for the granting of statutory damages. 17 U.S.C. § 504 (Supp. II 1978). Such provision would seem to be a nullity if actual damages were required to be shown. Perhaps the court was justified, in spite of criticism such as Nimmer's, in that the doctrine of fair use has always been flexible, and an individual factor is not considered dispositive, but the totality of circumstances must be evaluated. *See* note 34 and accompanying text *supra.*

47. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1362 (Ct. Cl. 1973).

48. *Id.* at 1359.

49. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 450 (C.D. Cal. 1979).

50. 447 F. Supp. 243 (W.D. N.Y. 1978).

51. *Id. Britannica* was a case in which the decision dealt only with the issue of whether a preliminary injunction should issue enjoining the defendant from videotaping the plaintiffs' educational films or programs off the public airwaves. The three plaintiffs were corporations which owned copyrights in educational motion picture films. The scope of the defendants activities in the 1976-77 school year involved approximately ten thousand videotape duplications. The defendant admitted the copying but asserted as an affirmative defense the fair use doctrine. *Id.* at 247. The preliminary injunction was granted on a showing of a prima facie case of infringement. In copyright law, the prima facie showing of infringement requires that there be copying and that the plaintiff owns the copyright for the copied, allegedly infringed work. This case did not go to the merits, and thus did not involve a fully developed fair use analysis.

52. *Id.* at 252.

showing of infringement because the court found it hard to reconcile the defendant's large-scale copying with fair use and the potentially great injury which threatened plaintiffs' market.[53] *Encyclopaedia Britannica* was distinguished by the *Universal* court on the basis of its large-scale and highly organized system of videotaping and distribution.[54]

These three leading cases were distinguished on the basis of two factors unique to the *Universal* case; the home use recording was a use made by families or individuals in their private homes and the material allegedly infringed had been made available voluntarily by the copyright owners for free broadcast over the public airwaves.[55] Having successfully distinguished these cases, the court was particularly free to apply the fair use doctrine to the facts at bar.[56] The court recognized that the doctrine was essentially unchanged by the 1976 recodification,[57] and thus applied the traditional fair use factor analysis in considering the alleged infringements under both Acts.[58]

B. Fair Use Analysis Under the Copyright Act of 1976

The judicially developed fair use doctrine was codified as section 107 of the Copyright Act of 1976.[59] In drafting section 107, Congress codified the fair use doctrine as expressed in *Williams & Wilkins Co. v. United States.*[60] The first sentence of section 107, "[n]otwithstanding

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53. *Id.*

54. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 450 (C.D. Cal. 1979).

55. *Id.*

56. *See* note 34 and accompanying text *supra.*

57. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 442 (C.D. Cal. 1979).

58. *See* notes 59-101 and accompanying text *infra.* The fair use analysis performed by the *Universal* court was traditional with respect to the factors but expanded the judicially recognized scope of the doctrine. *See* note 38 *supra*; note 86 *infra.*

59. 17 U.S.C. § 107 (Supp. II 1978) provides:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

60. 487 F.2d 1345, 1352 (Ct. Cl. 1973). The *Williams* court set forth the four factors of the fair use analysis after citing the House report; H.R. REP. NO. 83, 90th Cong., 1st Sess. 29 (1967), *reprinted in* 11 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (Hein 1976); which accompanied H.R. 2512, a bill for the general revision of the copyright laws. Section 107 of H.R. 2512

the provisions of section 106 the fair use of a copyrighted work . . . is not an infringement of copyright,"[61] makes it clear that the exclusive rights granted by section 106 are to be tempered by the fair use doctrine. Fair use may be claimed "for purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[62] Although not among the listed purposes, the home videotaping of broadcast programs is certainly not precluded by the statutory language of section 107.

In addition to recognizing the doctrine, section 107 delineates the four primary factors to be used in making a fair use determination. The statute provides that a court consider:

> (1) the *purpose and character of the use,* including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the *nature of the copyrighted work;*
> (3) the *amount and substantiality of the portion used* in relation to the copyrighted work as a whole; and
> (4) the *effect of the use upon the potential market* for or value of the copyrighted work.[63]

When applying these factors, courts will not strictly impose them as rules of law but rather will use them as elements to be considered on the merits of the affirmative defense.[64] Neither the statutory language of section 107 nor its legislative history indicates the relative importance of

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with respect to the four factors of fair use is nearly identic to section 107 of the 1976 Act; *see* note 59 *supra*; and the factors used in *Williams*. In the third factor the *Williams* court used the word "material" whereas the 1976 Act and H.R. 2512 both used the word "portion." Although there was no statutory expression of fair use applicable to *Williams*, this word substitution might weaken any reliance upon *Williams* with respect to a § 107 (3) analysis under the 1976 Act. *See* note 100 *infra*.

61. 17 U.S.C. § 107 (Supp. II 1978). *See* note 59 *supra*. 17 U.S.C. § 106 (Supp. II 1978) (emphasis added) provides:

> *Subject to sections 107 through 118,* the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

62. 17 U.S.C. § 107 (Supp. II 1978) (emphasis added). The use of the words *including* and *such as* in section 107 is significant as these terms have statutory definitions given in section 101 where it provides: "[t]he terms 'including' and 'such as' are illustrative and not limitative." 17 U.S.C. § 101 (Supp. II 1978).

63. 17 U.S.C. § 107 (Supp. II 1978) (emphasis added). For full text of section 107 *see* note 59 *supra*.

64. H.R. REP. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680.

the various factors involved in the fair use analysis.[65] Despite this lack of distinction, numerous commentators and cases imply that the most important factor would be the economic impact of the use upon the copyrighted work or, in short, the harm factor.[66] Consistent with the relative importance of the harm factor, the *Universal* court placed heavy emphasis on the economic aspects of home use videorecording.

1. The Harm Factor

Once a prima facie infringement action is established,[67] the harm factor becomes central to three determinations: whether fair use is demonstrated; whether injunctive relief is warranted and assuming infringement, what is the extent of the damages.[68] The court did not require a showing of actual harm for purposes of the fair use analysis but adopted a *probable effects* standard which requires that the expected harm be probable.[69] By adopting this standard, the court was diverging

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65. The House report which accompanied S. 22 which became the enacted 1976 Copyright Revision Act stated with respect to the general intention behind section 107:

> section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680. It is important to note that the House report uses the phrase "some of the criteria" which indicates that the expression in section 107 is not rigid but merely illustrative of criteria to be applied. *Id.*

66. The lack of distinction may only be of esoteric concern because it is apparent from the legislative history that the courts are to apply the fair use doctrine on a case-by-case basis. *See* note 65 *supra.*

Among the legal commentators, *see, e.g.*, M. NIMMER, *supra* note 10, at § 13.05 [A][4] ("If one looks to the fair use cases, if not always to their stated rationale, this [harm factor] emerges as the most important, and indeed, central fair use factor"); Fried, *supra* note 10; Latman, *supra* note 10, at 793; Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 24-25, in 2 STUDIES ON COPYRIGHT 1224-25 (1963).

For cases which would support this proposition, *see* Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973); Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269 (S.D.N.Y. 1970); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968); Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914).

67. *See* note 51 *supra.*

68. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 451 (C.D. Cal. 1979).

69. The "probable effects test" was proposed in Fried, *supra* note 10, at 505 n. 39 to explain the process used by courts in the following decisions: Marvin Worth Prods. v. Superior Film Corps., 319 F. Supp. 1269 (S.D.N.Y. 1970); Addison-Wesley Pub. Co. v. Brown, 223 F. Supp. 219 (E.D.N.Y. 1963); and Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938). The process would burden the plaintiff with the task of showing only that the "probable economic effect" would be negative in a relative sense to him.

Professor Nimmer has proposed in his treatise a functional test that could be employed in

from the apparent requirement in *Williams*[70] of a concrete showing of injury as a prerequisite to the holding of an infringement.[71] In *Universal,* the court found that the plaintiffs had failed to clearly demonstrate that the probable effect of the home use recording would be economic harm to their copyrights.[72]

With respect to the harm issue, the plaintiffs argued a chain of assumptions which the court found too speculative and tenuous.[73] They contended that a large percentage of the nation's 75 million television households would, in the imminent future, own the Betamax machine (costing approximately $875), that a large number of these households would have the financial wherewithal to buy many tapes (costing approximately $20 each), that a viewer would watch the playbacks rather than live broadcasts, that the copyrights would be injured by the deletion of commercials from the tapes, and finally that the rerun audience would be smaller because of the Betamax.[74] However, the plaintiffs admitted experiencing no past injury and could not predict when the Betamax would cause the anticipated harm.[75] This admission was relevant not only with respect to the time frame of probable future harm but also to the market penetration necessary for the Betamax to cause harm.[76] In light of these admissions, the court found the chain of assumptions too speculative to establish probable harm.

The court's treatment of the harm issue indicates that a showing of harm under the probable effects standard would still require a close scrutiny of the remaining factors.[77] Thus, while not dispositive of the issue of a copyright infringement itself, the harm factor carries substantial weight in balancing the interest of the public in access to that material. This is particularly true in the noncommercial context where

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determining this harm issue. M. NIMMER, *supra* note 10, at § 13.05 [B]. Under such an approach a determination would be made as to whether the original and the questioned use would serve the same function. If the function of two overlap, then for purposes of fair use analysis, the issue of harm would be resolved in favor of infringement.

70. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court,* 420 U.S. 376 (1975).

71. *See* note 46 *supra.* The *Universal* court was careful to discern the role of harm in an action for copyright infringement. The court recognized that harm was not a threshold requirement for infringement but rather that it was but a factor in the fair use analysis. It would be meaningless to have harm as a fair use factor if it were presumptively determined once a prima facie showing of infringement were made. By adopting the *probable effects* standard the court was able to treat the harm factor analysis of fair use in a well reasoned manner.

72. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 452 (C.D. Cal. 1979).

73. *Id.* at 451.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 452. The lack of probable harm had a significant impact upon the *Universal* court's analysis of the "amount and substantiality of the portion used" factor. *See* notes 99-101 and accompanying text *infra.*

the alleged infringer is not directly in economic competition with the copyright owner. Although fair use analysis envisions consideration of all four factors, copyright owners alleging infringement in this context should be prepared to establish probable economic harm by a method less speculative than that employed by Universal and Disney.

2. The Nature of the Copyrighted Material Factor

The nature of the copyrighted work has not been the subject of much commentary or judicial interpretation,[78] but refers primarily to the type of material and whether the dissemination of this material would serve the public interest.[79] Another facet to this inquiry has been the availability of the work. One commentator has cited the Senate Report which accompanied the 1976 Act and concluded that the availability of the work has an impact upon whether reproduction is justified. [80] The degree of availability of a particular type of work has allowed more weight for an argument of fair use where the material utilized was out of print or otherwise unavailable.

In *Universal,* the copyrighted material allegedly infringed presented a unique situation because it was not sold directly to the home viewer. The material was licensed for broadcast and came into the viewer's home without any direct effort or expense on his part, and as such, was commercially remunerative to the copyright owner without a direct sale to the individual. [81] The copyright owners voluntarily licensed their works for dissemination. They were in no way compelled to broadcast the material over the public medium. Furthermore, the material at issue was not readily available when compared to copyrighted print material unless the viewer had a VTR.[82]

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78. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 452 (C.D. Cal. 1979); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977); HENN, COPYRIGHT PRIMER 156 (1979); Cohen, *supra* note 10, at 67.

79. *See, e.g.,* Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967) (a case finding fair use which involved the unauthorized use of portions of copyrighted magazine articles, which concerned Howard Hughes, in a subsequent book); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (a case holding fair use where the defendants reproduced selected frames of the Zapruder film of the assassination of President Kennedy in their book about the assassination).

80. M. NIMMER, *supra* note 10, at § 13.05 [A][2], *citing* S. REP. No. 473, 94th Cong., 1st Sess. 64 (1975). While the Senate report considered the nature of the copyrighted work primarily with respect to classroom use, the report nonetheless provides some indication that availability of the work should be of significance in fair use analyses. S. REP. No. 473, 94th Cong., 1st Sess. 64 (1975), *reprinted in* 13 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (Hein 1977); Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 452 (C.D. Cal. 1979).

Another commentator offers that the type of work often invites fair use. JOHNSTON, COPYRIGHT HANDBOOK 87 (1978) ("reference works and public speeches").

81. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 453 (C.D. Cal. 1979).

82. The following construct lends weight to this proposition. A book which has been made

The court found it crucial that the copyrighted material was telecast free of charge and that the copyright owners' opportunity to use the public airwaves resulted both in a profit and a wider dissemination of the copyrighted material than that normally available to a copyright owner.[83] The court also recognized that the determination of the nature of the work is much more difficult than it initially appears.[84] The court did not characterize the works at issue as educational, scientific or mere entertainment but relied in large measure upon the means of dissemination in its "nature of the work" analysis.[85]

The court could be criticized for passing over this factor so easily, but the nature of the material does not yield to an easy characterization as entertainment, educational or scientific material. However, even assuming that the works at issue were characterized as entertainment, a category which has not traditionally been accorded fair use protection[86] and which would lend weight to a finding of infringement, the means of dissemination employed by the copyright owners in conjunction with the individual's noncommercial and private use justifies the court's finding that this factor weighs in favor of fair use. This is evident because the works at issue are not sold directly to the individual VTR owner, but rather the VTR owner is allowed access voluntarily by the copyright owner. Thus, it could be argued that this special circumstance estops the copyright owner from complaining about the individual's noncommercial and private home use recording.

3. The Purpose of the Use Factor

Traditionally, the purpose and character of the use factor has been applied to determine whether use of the copyrighted material would fur-

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available to the public often can be borrowed or examined on many different occasions. A contrast with respect to broadcast television is readily apparent in that the viewer without a VTR has fewer opportunities to watch the program than the reader has to use the book.

83. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 453 (C.D. Cal. 1979). The profit made by the copyright owner is indirectly dependent upon the viewer. The economics of commercial broadcast television involves a broadcaster who sells advertising time and then uses that revenue to purchase broadcast rights to copyrighted programs. The amount which a program will earn is dependent upon how many viewers are measured to have watched it and their demographical makeup. The ratings services attempt to provide this information to the industry. *Id.* at 440-41.

84. *Id.* at 452.

85. *Id.* at 452-53. The court deferred making a characterization relying on Stanley v. Georgia, 394 U.S. 557, 566 (1969).

86. The traditional scope of fair use embraces "works in the fields of science, law, medicine, history and biography." Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967). *See, e.g.,* Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352-53 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court,* 420 U.S. 376 (1975); Loew's Inc. v. CBS, Inc., 131 F. Supp. 165, 175 (S.D. Cal. 1955), *aff'd sub nom.,* Benny v.

ther the public interest in the dissemination of creative works.[87] The use of VTRs to record broadcasted programs was accepted by the *Universal* court to serve the same function as the original broadcast.[88] However, the character of the use of VTRs in this case was private, noncommercial and within the home, while the original use was public and commercial.[89] Thus, the alleged infringement did not result in direct commercial market competion with the original broadcast. The noncommercial character was not determinative within this inquiry but it did allow a closer examination of the purpose of the use.[90]

A purpose served by this noncommercial, private use of VTRs is to increase public access to information contained on the public airwaves.[91] The individual television viewer has access to numerous programs at any one time, but is effectively capable of viewing only one. If the viewer is forced to choose between two programs scheduled at the same time, his access to the public medium is limited because one of the programs can not be watched. This limitation is aggravated by counter-programming, a practice of the television industry by which networks schedule their best programs opposite the best programs of the competing networks.[92]

When confronted by this situation, the VTR owner is able to record one program for time-shifting, while viewing the other on a separate television. [93] Through time-shifting, the VTR owner is able to increase

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Loew's Inc., 129 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided court sub nom.*, CBS, Inc. v. Loew's Inc., 356 U.S. 43 (1958); Latman, *supra* note 10, at 788.

87. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966).

88. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 453 (C.D. Cal. 1979). The court analogized from the treatment given home use sound recording by the Congress to infer that the purpose need not be independent to preserve the fair use defense. *Id. See* H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1566, 1572.

89. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 453 (C.D. Cal. 1979)."[N]oncommercial use does not mean fair use . . . just as commercial use does not automatically bar fair use." *Id.* For this proposition the court cited Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) and Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966). Both of these cases involved the commercial use of the copyright owners' work and in neither was that use dispositive.

90. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 453-54 (C.D. Cal. 1979). Legislative history explains the inclusion in section 107 (1) of the words " 'whether such use is of a commercial nature or is for non-profit educational purposes.'. . . It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5679.

91. 17 U.S.C. § 107 (Supp. II 1978). The language of the statute must be considered with respect to the purposes for which a fair use defense would be applicable. The statute lists "purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. . . ." *Id.* (emphasis added). *See* note 62 and accompanying text *supra.*

92. *See* note 25 *supra.*

93. *Id.*

his access to works presented on the public airwaves without causing significant damage to the interests of the copyright owners of either program, since both programs are eventually watched.[94] Furthermore, time-shifting increases the number of potential viewers of broadcasted material; an increase which could eventually permit the copyright owner to obtain higher license fees from the broadcasters.[95]

In addition to avoiding the limitations caused by counter-programming, time-shifting frees the television viewer from the constraints of watching a desired program during its scheduled time slot. With a VTR the viewer can schedule his television viewing at his own discretion thereby accommodating other activities such as work.[96] Again, the result of this type of use of the copyrighted broadcast materials is to increase public access to the works of the copyright owner. Since the purpose of the use of the VTR served to further the public interest in the dissemination of material voluntarily broadcast, the court found this factor favored a finding of noninfringement.[97]

4. The Substantiality Factor

The final factor considered by the court under the fair use doctrine involved an analysis of to what extent the original work is copied. If it is found that substantially all of the original material has been copied or used without authorization, it is generally considered unfavorable to the party raising the defense of fair use.[98] Since the individual VTR owner has the ability to, and often will, copy a complete program, it would seem that there is a taking of substantially all of the original work, thereby favoring a finding of infringement with respect to this factor of the balancing test.

However, the *Universal* court concluded that the substantiality factor

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94. Controversy could arise over this proposition. *See, e.g.*, Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1204 (1970) ("Neither the first amendment per se, nor the speech interests which underlie it, justify in the name of education or culture the expropriation of authorship"). Several years later, the Supreme Court reaffirmed the public interest in having appropriate access to material broadcast on the public airwaves. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

95. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 466-67 (C.D. Cal. 1979).

96. *Id.* at 454, 466.

97. *Id.* at 453-54.

98. *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756-57 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Benny v. Loew's Inc., 239 F.2d 532, 536 (9th Cir. 1956), *aff'd per curiam by an equally divided court sub. nom.*, CBS, Inc. v. Loew's Inc., 356 U.S. 43 (1958). *Contra*, Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1353 (Ct. Cl. 1973) ("no inflexible rule excluding an entire copyrighted work from the area of 'fair use' "), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975).

must be examined in light of the harm inflicted upon the copyright owner who has had his work copied without authorization.[99] The harm factor becomes relevant because, if substantially all of the original work is copied, the copy could replace the original, resulting in economic loss to the copyright owner. If, however, the copied material does not become commercially competitive with the original work, there is no harm to the copyright owner of the original and the question of whether substantially all of the original has been used becomes irrelevant.

This reasoning was followed by the court in reaching the determination that, despite the substantiality of the recording performed with VTRs, the lack of probable harm to the plaintiffs prevented this factor from causing a finding of infringement under the fair use doctrine.[100] Since the use of the VTR copies was noncommercial and within the private home, the copies did not come into competition with the original broadcasts.[101] Therefore, the court was justified in concluding that the substantiality of the taking of the original works by individual VTR owners resulted in no significant harm to the plaintiffs and, as such, did not undermine the fair use defense.

III. New Technology

The court's analysis of the private, noncommercial use of VTRs under the four-factor balancing test comprising the fair use doctrine, generally revealed that the functions served by the recording mechanisms do not amount to a copyright infringement. This conclusion was further supported by public policy considerations with regard to the new technological advances demonstrated by the Betamax recorders.[102] Recognition by the court of these advances and the impropriety of utilizing a strict construction of the Copyright Acts to impede such advances is consistent with the promotion of the dissemination of creative works in the interest of the general public. The

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99. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 454 (C.D. Cal. 1979). *See* notes 67-77 and accompanying text *supra*.

100. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 454 (C.D. Cal. 1979). The *Universal* court gave no element preclusive effect in its fair use analysis. *Id.* at 456.

A commentator has suggested that the statutory language of § 107(3) would intimate that the use of the totality of a copyrighted work is an infringement, because the word "portion" is used within the provision which would imply less than the whole. A. Latman, The Copyright Law 213 (1979). *See* note 60 *supra*. The Senate report yields little insight to this question. It considers this factor as it relates to copying of printed material for educational purposes. S. Rep. No. 473, 94th Cong., 1st Sess. 64 (1975), *reprinted in* 13 Omnibus Copyright Revision Legislative History (Hein 1977). The House report however does yield some support for the total use of an audiovisual work by recognizing with respect to off-the-air taping for non-profit classroom use "that the fair use doctrine has some limited application in this area. . . ." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 71, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5685.

101. *See* notes 67-77 and accompanying text *supra*.

102. *See* notes 25 and 91-97 and accompanying text *supra*.

legislative history to the 1976 Act stresses that the fair use doctrine is not to be frozen, particularly during a time of massive technological innovation. Further, the legislative history suggests that the doctrine must be modified to particular fact patterns in an ad hoc manner.[103]

It is also significant in examining the new VTR technology, that a prohibition against VTR use would necessarily intrude into the private home and be most impractical to enforce.[104] The *Universal* court recognized that if it had found an infringement in the instant situation it would have set precedence for literally thousands of ongoing infringements that would be most difficult to detect and remedy. Since the social cost of enforcing an injunction prohibiting VTR use would be enormous, it was not unreasonable for the court to consider the unique nature of this technological innovation in its analysis.

Furthermore, the VTR technology permits copying to be done in a manner different from that of copying a physical object such as a book, periodical article, or sheet music. While the copier of written material must actively acquire access to the original, the VTR owner is provided with access to copyright works through the choice of the copyright owner to broadcast to the public at large. The copyright owners' fear that individuals will amass a large enough videotape library so as to preclude their participation in viewing broadcast television appears unfounded at this time.[105] Considering that the number of audiovisual works will continue to increase, the cost of blank tapes, the duration of copyright, and the anticipated desire of VTR owners to continue to time-shift, the use of the VTR does not presently threaten the copyright owner financially.[106] Thus, the court through the fair use doctrine has protected a major technological advance without causing undue harm to the copyright owner. Hopefully, the court's analysis in conjunction with the public policy of fostering technological advance will be sustained by future courts.

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103. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680. *See* note 65 *supra*.

104. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 454, 468-69 (C.D. Cal. 1979). *Cf.* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162 (1975) (To hold as infringing the use by a small restaurateur of broadcast radio music made available to his patrons by the use of a common radio with four speakers would be "wholly unenforceable and highly inequitable").

105. *See* Grover, *supra* note 13, at 26, col. 1. The syndications of old series do quite well both financially and in the ratings. One representative series "I Love Lucy" has 179 episodes which have been shown 22 times each in New York and 19 times in Los Angeles. *Id.* Charles McGregor, President of Warner Bros. Television Distribution was quoted: "We've noticed that many old shows tend to become more popular with age, probably because new generations of fans come into being." *Id.*

106. The court made a finding of fact that no harm had yet been shown and the plaintiffs' experts could not predict when such harm would occur. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 451 (C.D. Cal. 1979).

CONCLUSION

The final determination of fair use was made upon a synthesis of the total factual situation.[107] The *Universal* court utilized the four factors of section 107 and based its holding primarily upon the harm factor.[108] The purely speculative nature of the harm when balanced against the nature and purpose of the use failed to defeat the fair use defense. Significantly, in its reasoning the court stressed that this was a case involving a new technology and that under the purpose and character of the use factor analysis, use of the Betamax technology enhanced access to the copyrighted materials.[109] Thus, the utilization of the doctrine of fair use permitted the court to balance the speculative harm to the copyright owners against the more apparent harm to this technology and to the hundreds of thousands of consumers who had already purchased the machines. The public policy purpose behind the copyright acts weighs heavily on the side of fair use.[110]

Despite this decision, the ultimate resolution of its related issues must be made by Congress.[111] In reference to this case a noted commentator has stated: "It's fundamentally a part of the whole technological revolution. The old copyright system of control at the source is breaking down. It's impossible to turn time back — or smash the machines."[112] Like the *Williams*[113] court with respect to photocopying, the *Universal* court recognized that the full resolution of the issues concerning this new technology is "preeminently a problem for Congress: . . . Obviously there is much to be said on all sides. The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion."[114]

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107. *Id.* at 456-57.

108. Emphasizing that "any harm which might be possible must be weighed with other fair use factors;" *Id.* at 452; the court summarized its decision as being bound by the facts at bar which showed no harm to the plaintiffs. *Id.* at 469. *See* notes 67-76 and accompanying text *supra.*

109. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 454 (C.D. Cal. 1979).

110. *See* notes 37-39, 102-06 and accompanying text *supra.*

111. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 469 (C.D. Cal. 1979). Whether tape duplication, recording from subscription television, recording for use outside the home and tape swapping are infringements of copyright are among the issues not resolved by this decision. *Id.* at 442.

112. Professor Nimmer as quoted in *Pandora's Tape,* TIME, Oct. 15, 1979, at 86.

113. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court,* 420 U.S. 376 (1975).

114. *Id.* at 1360. Also quoted in Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 469 (C.D. Cal. 1979).

The *Universal* court also stated:

> The ramifications of this new technology are greater than the boundaries of this lawsuit. A court reviewing the limited claims of specified parties in a particular factual setting

Perhaps this decision will lead to the degradation of free broadcast television, but more likely the result will be that the copyright owners will enter this technology themselves by offering software directly to the consumers in addition to the more established outlets for their works.[115] In this case of first impression, the fair use doctrine and the legislative history accompanying its 1976 codification gave the court the tools necessary to resolve this conflict. Under the doctrine, the private non-commercial use of the Betamax when considered in conjunction with the public policy and the new technology of VTRs resulted in a finding of fair use which should be affirmed on appeal.

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cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder. *Id.* at 442.

115. *Id.* at 433-34, 469.

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*: The Copyright Misuse Doctrine

For many years, the courts have struggled with establishing criteria for deciding cases which lie in the grey area between the antitrust laws[1] and the patent and copyright laws.[2] The difficulty lies in part due to the apparent tension between these areas of law. On the one hand, the antitrust laws attempt to encourage a competitive market by eliminating monopolies,[3] while on the other hand the copyright and patent laws seek to encourage artistic and technical achievement by granting the artist or inventor the exclusive rights to their works for a limited period of time.[4]

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1. The antitrust statutes pertaining to this Comment are: Sherman Act § 1, 15 U.S.C. § 1 (1976), "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Act § 2, 15 U.S.C. § 2 (1976), "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."
Clayton Act § 3, 15 U.S.C. § 14 (1976),

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . where the effect of such . . . understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (1976), "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or effecting commerce, are declared unlawful."

2. The Patent and Copyright Acts were both passed pursuant to a constitutional mandate. U.S.CONST. art. 1, § 8, cl. 8, reads: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ." Patent Act, 35 U.S.C. § 1 *et seq.* (1976). Copyright Act of 1909, 17 U.S.C. § 1 *et seq.* (1976) (applies to all causes of action beginning prior to Jan. 1, 1978). Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (Supp. II 1978) (effective Jan. 1, 1978).

This Comment will deal with both versions of the Copyright Act. This action was commenced prior to the enactment of the new act, but the new act is relevant to the copyright misuse issue since it does express the present intent of Congress concerning the copyright grant. *See* notes 81-85 and accompanying text *infra*.

3. *See* note 1 *supra* for the relevant antitrust statutes.

4. *See* 35 U.S.C. § 154 (1976) defining the scope of the patent grant; 17 U.S.C. § 1 (1976) defines the scope of the copyright grant in the Copyright Act of 1909; 17 U.S.C. § 106 (Supp. II 1978) defines the scope of the copyright grant in the Copyright Act of 1976.

In patent law, the courts developed the misuse doctrine[5] to deny relief to a patent owner who abused the patent grant.[6] Originally, this misuse finding was based upon the law of patent,[7] but eventually the principles of antitrust law became the underlying basis for a finding of patent misuse.[8] Consequently, the cases hold that any violation of antitrust laws by a patent holder constitutes a misuse of patent.[9]

The applicability of the misuse doctrine to copyright law has not been clearly established.[10] In the case of *Broadcast Music, Inc.* (BMI) v. *Columbia Broadcasting System, Inc.* (CBS),[11] the Supreme Court of the United States endorsed a copyright misuse doctrine based upon a finding of a violation of antitrust law.[12] This article will focus upon the copyright misuse doctrine and examine its applicability to the licensing practices of the performing rights societies such as BMI and the American Society of Composers, Authors & Publishers (ASCAP). In order to gain an historical perspective, the development of the misuse doctrine in patent and copyright law will be presented in section I. In section II, the licensing provisions sanctioned by the Copyright Act of 1976 will be discussed and compared with the licensing practices of private organizations such as BMI and ASCAP. Section III will present the application of the misuse doctrine in the case of *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.* and section IV will analyse the impact of the misuse doctrine upon the copyright field. This article concludes that the Court's determination in *BMI* was inappropriate in that the copyright misuse doctrine was based upon a finding of an antitrust

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5. *See* notes 13-71 and accompanying text *infra* for a discussion of the misuse doctrine.

6. *See, e.g.*, Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942); B.B. Chem. Co. v. Ellis, 314 U.S. 495 (1942). *See also* Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938); Carbice Corp. of America v. American Patents Dev. Corp., 283 U.S. 27 (1931); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). The Court first used the term misuse in the *Morton Salt* case; the earlier cases prohibit a patent owner from extending the patent grant in violation of patent policy. For a general overview of the misuse doctrine, *see* Nicoson, *Misuse of the Misuse Doctrine in Infringement Suits*, 9 U.C.L.A. L. REV. 76 (1962).

7. *See* Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488,490 (1942). *See also* notes 22-30 and accompanying text *infra*.

8. *See* Hartford-Empire Co. v. United States, 323 U.S. 386, 415 (1945); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680, 684 (1944).

9. *See, e.g., In re* Yarn Processing Patent Validity Litigation, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Cl. 1971).

10. *See* M. NIMMER, THE LAW OF COPYRIGHT § 13.09 [A] (1978). *See also* note 51 and accompanying text *infra*.

11. Decided together with American Society of Composers, Authors & Publishers v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979), *rev'g* Columbia Broadcasting System, Inc. v. American Society of Composers, Authors & Publishers, 562 F.2d 130 (1977). The decision of the District Court is reported at 400 F.Supp 737 (S.D.N.Y. 1975).

12. 441 U.S. 1, 24 (1979).

violation without first giving adequate consideration to the parameters of the copyright grant.

I. THE DEVELOPMENT OF THE MISUSE DOCTRINE

A. Patent Misuse

One of the earlier cases dealing with the patent-antitrust interface was the case of *United States* v. *General Electric Co.*[13] This case involved an action brought by the United States claiming that the licensing practices of General Electric were in violation of the antitrust laws.[14] General Electric had granted a third party a license to manufacture and sell their patented products. This license required the third party to abide by the price and sale regulations set by the patent owner.[15]

Had the Court applied a strict antitrust analysis, this price fixing[16] and sales restriction clause would have been found to be in violation of the antitrust laws since under a traditional antitrust approach, an "antitrust rule of reason" analysis[17] would have prohibited licenses resulting in an unreasonable or undue restraint upon trade.[18] Thus, if the practice had an adverse impact upon competition, countervailing benefits derived from the practice would not justify its existence under the antitrust laws.[19]

However, the Court in *General Electric,* in recognition of the fact that the restrictions arose due to the licensing of a patented product, set forth a new standard for determining whether such a practice constituted a violation of the antitrust laws and thus established a "patent rule of reason" test. The *General Electric* patent rule of reason allowed a patent owner to license the patent with restrictions so long as the restrictions were reasonably within the reward contemplated by the Pat-

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13. 272 U.S. 476 (1926).

14. *Id.* at 478.

15. *Id.* at 479.

16. Price fixing involves competitors agreeing to set the prices for the sale of goods. *See, e.g.,* United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th. Cir. 1898), *aff'd sub nom.* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

17. The rule of reason requires a court to look at all of the circumstances involved in a particular anti-competitive activity. After consideration of the purpose and economic effect of the activity, if the court finds that it is reasonable, it will be upheld. *See* White Motor Co. v. United States, 372 U.S. 253 (1963); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); American Tobacco Co. v. United States, 221 U.S. 106 (1911). *See generally* L. SULLIVAN, ANTITRUST §§ 65, 66, 68, 69 (1977).

18. *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); American Tobacco Co. v. United States, 221 U.S. 106 (1911).

19. *See* L. SULLIVAN, ANTITRUST § 68 (1977).

ent Act.[20] This approach gave deference to the scope of the patent grant in the application of an antitrust analysis.

Another approach developed for deciding cases in the patent-antitrust interface was the formulation of the misuse doctrine. The patent misuse doctrine was based upon a determination that one who uses a patent in such a way as to exceed the limited grant of the Patent Act was not entitled to the protection of the patent grant.[21] The leading case of *Morton Salt Co.* v. *G.S. Suppiger Co.*[22] applied the misuse doctrine to deny relief to a patent owner claiming infringement.[23] In *Morton Salt,* the patent owner licensed its patented product only to licensees who agreed to use the unpatented products of the patent owner.[24] This case could have been decided by applying either strict antitrust principles[25] or a *General Electric* patent rule of reason test.[26] However, the Court instead relied entirely upon the Patent Act and found that the Morton Salt Company had misused the patent by attempting to restrain competition.[27] This tying arrangement[28] was found to be violative of patent policy since it attempted to enlarge the limited monopoly granted by the Patent Act.[29] Consequently, the Court found it unnecessary to decide whether there had been an actual violation of antitrust law. Thus, *Morton Salt* held that when patent owners use their patents in an anti-competitive manner which is found to be outside of the scope of the patent grant, a court of equity may refuse to enforce the patent against an infringer.[30]

The cases following *Morton Salt* have been less clear in differentiating between a defense based upon the patent owner's violation of an antitrust law and one based upon a misuse of the patent grant.[31] Recent patent cases have held that it is unnecessary to examine patent policy at all, and instead expressly based the patent misuse doctrine upon a finding of an antitrust violation.[32] The courts now apply a strict antitrust analysis in cases involving both patents and antitrust claims.[33]

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20. United States v. General Electric Co., 272 U.S. 476, 490 (1926).

21. *See* note 7 *supra.*

22. 314 U.S. 488 (1942).

23. *Id.* at 493-94.

24. *Id.* at 490.

25. This practice could have been viewed as a tying arrangement and invalidated under the antitrust laws. *See* note 28 *infra.*

26. For a discussion of the patent rule of reason, *see* note 20 and accompanying text *supra.*

27. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942).

28. A tying arrangement involves a distributor requiring a customer to purchase other products along with the product actually desired by the customer. *See* Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947). *See generally* L. SULLIVAN, ANTITRUST § 150 (1977).

29. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942).

30. *Id.*

31. *See, e.g.,* Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) (a patent owner "using his patent in violation of the antitrust laws . . . cannot restrain infringement.") *Id.* at 415.

32. *See* note 9 *supra.*

33. *Id.*

The rationale that patent misuse may be found based upon an antitrust analysis is grounded upon the theory that the policies of the patent and antitrust laws are basically in accord.[34] At first glance, it would appear that the courts are equating two acts with diametrically opposed purposes.[35] However, a common policy has been found to be the main underlying purpose of both of the acts.[36] The primary policy underlying the Patent Act is the encouragement of progress in the arts and sciences.[37] In order to fulfill this purpose, Congress has granted patent holders the exclusive rights to use, make and sell their patented article.[38] However, the courts have held that the reward given to the inventor is but a secondary policy of the monopoly grant and that the benefit derived by the public is the main consideration.[39] Likewise the antitrust laws have a primary purpose in promoting the public welfare.[40] Congress decided that unfettered competition and the encouragement of a free market were necessary to insure that resources are allocated and priced according to the needs and best interests of the public.[41] Therefore, both the Patent Act and the antitrust laws promote the general welfare by insuring the production and availability of goods or ideas to the public.[42]

Nonetheless, commentators have criticized the application of traditional antitrust guidelines in cases involving patents.[43] Professor S. Chesterfield Oppenheim[44] has contended that, in certain situations, the application of antitrust guidelines could result in the subrogation of the Patent Act to the antitrust laws[45] and operate as an unfair restriction upon the patent grant.[46] Consequently, he has suggested a return to the patent rule of reason[47] established in the early case of *United States* v.

34. *See* Oppenheim, *The Patent-Antitrust Spectrum of Patent and Know-How License Limitations: Accommodation? Conflict? or Antitrust Supremacy?*, 15 IDEA 1, 3 (1971). For a list of cases *see* S. OPPENHEIM AND G. WESTON, FEDERAL ANTITRUST LAW ch. 13 (3rd ed. 1968; Supp. 1970). *See also* Address by Ky P. Ewing Jr., Deputy Assistant Attorney General Antitrust Division, to the San Francisco Patent Law Association, May 5, 1979, 5 CCH TRADE REG. REP. Par. 50,398; W. BOWMAN, PATENT AND ANTITRUST ch. 1 (1973).

35. *See* notes 1-2 *supra.*

36. *See* W. BOWMAN, *supra* note 34, at 1.

37. *See* Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 837 (1950) (Douglas, J., dissenting); U.S. CONST. art. 1, § 8, cl. 8, *supra* note 2.

38. 35 U.S.C. § 154 (1976).

39. *See* Mercoid Corp. v Mid-Continent Investment Co., 320 U.S. 661, 665 (1944).

40. *See* note 1 *supra* for a listing of the antitrust statutes; *see also* W. BOWMAN, *supra* note 34, at 1.

41. *See* note 1 *supra; see also* W. BOWMAN, *supra* note 34, at 1.

42. *See* note 1 *supra; see also* W. BOWMAN, *supra* note 34, at 1.

43. *See* Oppenheim, *supra* note 34, at 8-9; Nicoson, *supra* note 6, at 76; Comment, *The Patent-Antitrust Balance: Proposals for Change,* 17 VILL. L. REV. 463,489 (1972) (the author suggests that legislation be passed requiring a rule of reason antitrust analysis in patent-antitrust cases).

44. Professor Oppenheim was a Professor of Law at the University of Michigan and has published many articles in the antitrust area of law.

45. *See* Oppenheim, *supra* note 34, at 2.

46. *Id.* at 8.

47. *Id.* at 25.

General Electric Co.[48] This would allow a patent owner to license with restrictions reasonably within the reward contemplated by the Patent Act.[49] Thus, a patent holder trying to operate in conformity with the patent grant would be protected from an unfair finding of an antitrust violation and the subsequent loss of patent royalties.[50]

B. Copyright Misuse

There has been considerable debate concerning the applicability of a misuse doctrine to the area of copyright law. Lower courts have been divided on the issue of whether copyright misuse is a valid defense to an action for infringement.[51] The case of *M. Witmark and Sons v. Jensen*[52] is one of the few precedents endorsing the defense of copyright misuse. *Jensen* held that the copyright misuse doctrine, based upon the policies underlying the copyright grant, was a valid defense to a claim of infringement.[53] In this case, ASCAP[54] brought an action for infringement against various theater operators who used copyrighted music on motion picture soundtracks without paying royalty fees for the use.[55] The Federal District Court of Minnesota found that the licenses offered by ASCAP were not within the scope of the copyright grant and were thus not entitled to the protection of the Copyright Act.[56] It was found to be unnecessary to address the antitrust issue since the licensing prac-

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48. 272 U.S. 476 (1926). *See* notes 13-20 and accompanying text *supra*. *General Electric* has been limited to the facts of the case. *See* Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Line Material Co., 333 U.S. 287 (1948).

49. *See* note 20 and accompanying text *supra*.

50. *Id.*

51. The majority of cases below have denied the copyright misuse defense. *See* Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd sub nom.* Leo Feist, Inc. v. Lew Tendler Tavern, Inc., 267 F.2d 494 (3d Cir. 1959); Buck v. Cecere, 45 F. Supp. 441 (W.D.N.Y. 1942); Society of European Stage Authors & Composers, Inc. v. WCAU Broadcasting Co., 35 F. Supp. 460 (E.D. Pa. 1940); Buck v. Newsreel, Inc., 25 F. Supp. 787 (D. Mass. 1938); Buck v. Hillsgrove Country Club, 17 F. Supp. 643 (D. R.I. 1937); Vitagraph v. Grobaski, 46 F.2d 813 (W.D. Mich. 1931); M. Witmark & Sons v. Pastime Amusement Co., 298 F. 470 (E.D. S.Car. 1924). *See also* Foreign Car Parts, Inc., of New England v. Auto World, Inc., 366 F. Supp. 977 (M.D. Pa. 1973).

Several courts have held that a copyright owner will be denied relief in an infringement action if he is in violation of the antitrust laws or has misused the copyright. *See, e.g.,* Tempo Music, Inc. v. Meyers, 407 F.2d 503 (4th Cir. 1969); M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948). *See also* Buck v. Gallagher, 36 F. Supp. 405 (W.D. Wash. 1940) (not an infringement case).

See generally Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe,* 23 ASCAP COPYRIGHT L. SYMP. 31 (1977); Fine, *Misuse and Antitrust Defenses to Copyright Infringement Actions,* 17 HASTINGS L.J. 315 (1965).

52. 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed per curiam sub nom.* M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

53. M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 850 (D.Minn. 1948).

54. *See* notes 73-75 and accompanying text *infra*.

55. M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 844 (D.Minn. 1948).

56. *Id.* at 848, 850.

tice was not within the protection of the Copyright Act itself.[57] The *Jensen* decision is analogous to the *Morton Salt*[58] case in the patent area. Both of these cases base the misuse doctrine upon limitations inherent in the monopoly grant given to the owners. While *Jensen* has been extensively cited and discussed,[59] its rationale has not been widely adopted.[60] Nevertheless, *Jensen's* distinction between the copyright issue and the antitrust issue was sound in that it applied a misuse doctrine based expressly upon the Copyright Act itself, and thereby insured that a copyright owner acting in conformity with the spirit of the Copyright Act would not be denied its protection.

A more significant case in the copyright-antitrust area is the case of *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*[61] In *Bell,* the plaintiff was a European engraver who produced eight prints which were copyrighted in the United States.[62] Defendant Catalda reproduced and sold color lithographs of these eight engravings. Bell sued for infringement and the defendant cross-claimed setting up an antitrust defense.[63]

In contrast to the approach taken by the *Jensen* court,[64] *Bell* applied a balancing test which attempted to weigh the policy of preventing piracy of copyrighted materials against the policy of enforcing the antitrust laws.[65] The Second Circuit Court of Appeals also considered the comparative guilt and innocence of the parties, the extent of the harm caused to the public, and the fairness of the result to the parties involved.[66] Thus *Bell,* unlike *Jensen,* did not recognize a misuse defense based solely upon copyright policy.[67] Instead, the antitrust violation was viewed as one factor to be weighed against the copyright owner in determining whether there in fact had been an infringement.

Under the balancing test established in *Bell,* an antitrust defense to infringement would fail in most cases.[68] In any action for infringement, the party claiming the defense has clearly used the copyrighted article without compensating the owner for the use. Thus, with the "piracy of

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57. *Id.* at 850.

58. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942). *See* notes 22-30 and accompanying text *supra.*

59. *See* United Artists Associated, Inc. v. NWL Corp., 198 F. Supp. 953, 958 (S.D.N.Y. 1961). *See also* Gibbs, *supra* note 51, at 44, 72.

60. *See* United Artists Associated, Inc. v. NWL Corp., 198 F. Supp. 953, 958 (S.D.N.Y. 1961). *See also* Gibbs, *supra* note 51, at 44, 72.

61. 74 F. Supp. 973 (S.D.N.Y. 1947), *aff'd,* 191 F.2d 99 (2d Cir. 1951).

62. 74 F. Supp. 973, 974-75.

63. *Id.*

64. M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D.Minn. 1948).

65. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 106 (2d Cir. 1951).

66. *Id.*

67. The court in *Bell* did not use the term copyright misuse but rather referred to an antitrust unclean hands doctrine which may operate to deny a copyright owner the protection of the copyright laws. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951).

68. *See* Gibbs, *supra* note 51, at 67.

the copyright"given, the scales are tipped in favor of the plaintiff at the outset. In order to advance to the next stage in the balancing test, the infringer must show a violation of antitrust on the part of the copyright owner. For the defendant to ultimately prevail, the antitrust violation would need to be substantial and thus outweigh the piracy of the copyright. The significance of both *Bell* and *Jensen,* was that express consideration was given to the policy of the Copyright Act itself. In *Jensen,* the Act was dispositive of the copyright misuse claim,[69] whereas in *Bell,* the fact that a copyright was involved was a factor within the balancing test which weighed heavily in favor of the copyright owner.[70] Either approach offered the copyright owner more protection than would the application of a strict antitrust analysis.[71] Both the *Jensen* and *Bell* courts considered the scope of the copyright grant before denying an owner the protection of the Copyright Act.

II. Blanket Licensing Under the Copyright Act of 1976

When the Copyright Act of 1976 was being drafted, the role of the performing rights societies and the nature of the blanket licensing practice was well known to Congress.[72] The performing rights societies are organizations comprised of various copyright owners. ASCAP and BMI are the two largest societies and between them account for virtually all of the copyrighted music in the country.[73]

These organizations negotiate the licensing of nondramatic performance rights to copyrighted music. They issue the licenses, collect royalties, and monitor the music performance field for unauthorized use of the music.[74] BMI and ASCAP offer blanket licenses which grant the user the unlimited performance rights to every song in their repertories for either a flat fee or a percentage of the licensee's advertising revenues.[75]

This licensing procedure has been tested[76] and as a result, ASCAP and BMI operate under consent decrees fashioned by the courts and the Department of Justice.[77] Under the terms of the decrees, the individual

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69. *See* notes 52-60 and accompanying text *supra.*

70. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 106 (2d Cir. 1951). *See also* Gibbs *supra* note 51, at 67.

71. For a discussion of the various antitrust tests, *see* note 17 *supra* and note 93 *infra.*

72. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 15 (1979).

73. *Id.* at 5.

74. *Id.*

75. *Id.*

76. *Id.* at 10, 11 n.18.

77. *See* United States v. Broadcast Music, Inc., 1966 Trade Cases Par. 71,941 (S.D.N.Y. 1966); United States v. ASCAP, 1950-1951 Trade Cases Par. 62,595 (S.D.N.Y. 1950). *See also* Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgement of 1950,* 19 Law & Contemp. Prob. 294 (1954).

copyright owners must retain the right to license their own works independently of the performing rights societies.[78] In addition, the licensee may appeal to the courts for a determination of a reasonable fee for the license[79] and also may choose not to use the license offered by the performing rights societies, but rather may contract directly with the owner.[80]

In drafting the Copyright Act of 1976, Congress established a compulsory licensing scheme for the non-commercial media, cable television, and jukebox operators who use copyrighted materials.[81] In order to collect and distribute the royalties under the compulsory license, the drafters looked to the private performing rights societies as a model and created the Copyright Royalty Tribunal to fulfill the same function in areas covered by the compulsory licenses.[82] In addition, the Copyright Act specifically authorized copyright owners to use organizations such as ASCAP and BMI to facilitate the distribution of the fees collected by the Copyright Royalty Tribunal.[83] The Act granted a limited antitrust exemption to the owners for this purpose.[84] Thus, Congress was well aware of the role played by ASCAP and BMI in the music business and obviously felt that these organizations performed a valuable service in the licensing of copyrighted music.[85] In light of these factors, it may be argued that a copyright owner operating through these organizations should not be lightly denied the protection afforded by the Copyright Act.

III. STATEMENT OF THE CASE

In *Broadcast Music, Inc.* v. *Columbia Broadcasting Systems, Inc.*,[86] an action was brought by CBS[87] against ASCAP and BMI claiming that the blanket licensing practices[88] of these organizations were in violation

78. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 5, 11 (1979).

79. *Id.* at 11, 12.

80. Columbia Broadcasting System, Inc. v. American Society of Composers, Authors & Publishers, 400 F. Supp. 737, 744 (S.D.N.Y. 1975).

81. *See* 17 U.S.C. § 111(d) (Supp. II 1978) (compulsory licensing for cable television); 17 U.S.C. § 116 (b) (Supp. II 1978) (compulsory licensing for jukeboxes).

82. *See* 17 U.S.C. § 801-10 (Supp. II 1978); *see also* Brennan, *The Copyright Royalty Tribunal*, 25 BULL. COPYRIGHT SOC. 196 (1978).

83. *See* 17 U.S.C. § 116(e)(3) (Supp. II 1978) (this section expressly mentions ASCAP and BMI). *See also* 17 U.S.C. §§ 116(c), 111(d)(5)(A) (these sections set up the royalty distribution system under the compulsory licensing scheme); Brennan, *supra* note 82, at 197.

84. *See* Brennan, *supra* note 82, at 197.

85. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 16 (1979).

86. 441 U.S. 1 (1979). *See* note 11 *supra*.

87. CBS is one of three national commercial television networks and is a major user of recorded music. CBS is also involved in publishing music and in manufacturing and selling records and tapes.

88. *See* note 75 and accompanying text *supra*.

of the antitrust laws.[89] CBS also sought a declaration of copyright misuse on the part of ASCAP and BMI.[90] The New York Federal District Court held that there was no violation of antitrust law or misuse of copyright since these organizations were not the exclusive source of licensing performance rights to copyrighted music and CBS could contract directly with the individual copyright owners if they so chose.[91] The Second Circuit Court of Appeals reversed, holding that the licensing practice was price fixing[92] and thus a per se[93] violation of section 1 of the Sherman Antitrust Act.[94] The per se rule has been applied to summarily invalidate certain categories of behavior which courts previously had found to be so plainly anti-competitive that no further antitrust analysis was required.[95] The court disposed of the copyright misuse claim in a footnote, implying that the issue coincided with the antitrust claim.[96]

The Supreme Court reversed the decision of the Second Circuit Court, holding that the application of the per se rule to this licensing practice was erroneous.[97] The case was thereby remanded for an antitrust rule of reason analysis,[98] which would require an in depth examination of the practice in order to determine if there had been a violation of antitrust law. Under the rule of reason analysis, the impact upon competition would be the main consideration and a countervailing public benefit would not suffice to justify the practice.[99]

Mr. Justice Stevens concurred with the majority in finding the per se analysis inappropriate but dissented on the issue of remanding the

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89. CBS claimed that the licensing practices of ASCAP constituted price-fixing in violation of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976). 400 F. Supp. 737, 741 (S.D.N.Y. 1975).

90. CBS sought a declaration of copyright misuse under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976). *Id.* at 741.

91. *Id.* at 782.

92. Price fixing involves competitors agreeing to set the prices for the sale of goods. *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898), *aff'd sub nom.* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

93. The per se rule is applied to certain types of anti-competitive activities which have previously been examined by the courts and found to be flagrant antitrust violations. This rule conserves judicial resources by avoiding lengthy antitrust trials in these delineated categories. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958); United States v. Topco Associates, Inc., 405 U.S. 596 (1972). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (holding that price fixing is a per se violation of the antitrust laws). *See generally* L. SULLIVAN, ANTITRUST §§ 67, 70 (1977).

94. Columbia Broadcasting System, Inc. v. American Society of Composers, Authors & Publishers, 562 F.2d 130 (1977). *See* note 1 *supra* for the text of the pertinent sections of the antitrust laws.

95. *See* note 93 *supra.*

96. Columbia Broadcasting System, Inc. v. American Society of Composers, Authors & Publishers, 562 F.2d 130, 141 n.29 (1977).

97. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 24 (1979).

98. *Id. See also* note 17 *supra.*

99. *See* L. SULLIVAN, ANTITRUST § 68 (1977). *See also* note 17 *supra.*

case.[100] Consequently he applied the rule of reason and concluded that the blanket licensing practice violated the antitrust laws.[101] The dissent made no mention of the copyright misuse claim.

None of the courts below distinguished copyright misuse from an antitrust violation but rather merged the copyright issue into the antitrust claim. Likewise, the Supreme Court failed to expressly consider the copyright misuse issue and the policy underlying the Copyright Act and implied that the copyright issue was properly based upon the antitrust issue below.[102]

IV. THE IMPACT OF THE COPYRIGHT MISUSE DOCTRINE UPON COPYRIGHT OWNERS

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.[103] is the first case from the Supreme Court endorsing the copyright misuse defense. By implication the Court based the misuse finding upon the result in the antitrust claim.[104] Although the Copyright Act of 1976 was considered for the purposes of determining whether the Second Circuit Court of Appeals had erred in applying an antitrust per se analysis below, it was in no way dispositive of the copyright misuse claim.[105] The case was remanded for an antitrust rule of reason analysis, but the Supreme Court seemed to have no difficulties with the Second Circuit Court's handling of the copyright misuse claim.[106] Thus, the Court appears to be endorsing a copyright misuse doctrine which is analogous to the patent misuse doctrine and requires no analysis of copyright policy.

Patent misuse was originally based upon patent policy; however, courts eventually found it unnecessary to examine patent policy and instead based a finding of patent misuse upon a strict antitrust analysis.[107] Nonetheless, equating patent policy with antitrust policy fails to give adequate protection to the patent owner and unjustly limits the scope of the patent grant by subrogating patent law to antitrust law.[108]

The Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[109] endorsed a copyright misuse doctrine which will operate to deny a copyright owner protection against an infringer without first considering the owner's use of the copyright in light of the scope of the

100. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 25 (1979).
101. *Id.* at 38.
102. *Id.* at 24. The Court did consider the Copyright Act of 1976, but only to determine whether the Second Circuit Court erred in applying a per se analysis in the case. *Id.* at 15-16.
103. 441 U.S. 1 (1979).
104. *Id.* at 24.
105. *Id.* at 15-16.
106. *Id.* at 24-25.
107. *See* notes 21-33 and accompanying text *supra.*
108. *See* notes 43-50 and accompanying text *supra.*
109. 441 U.S. 1 (1979).

copyright grant. Thus, as in the patent area, copyright law is being subrogated to antitrust law.

An examination of the Copyright Act of 1976[110] indicates that the copyright owners in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* were operating in a manner which was consistent with the scope of the copyright grant and which was expressly endorsed by the Copyright Act.[111] The application of strict antitrust principles threatens copyright owners who are acting in reliance upon both the Copyright Act and standard business practices.

There are several tests which could have been used by the Court to reach a fair disposition in the copyright misuse issue. All of these tests would have required a court to look first to the scope of the limited monopoly granted by the Copyright Act. In the case of *M. Witmark and Sons* v. *Jensen,*[112] the Federal District Court of Minnesota found that the copyright owner was not entitled to the protection of the copyright laws because there had been a misuse of the copyright.[113] This misuse was based expressly upon the Copyright Act and the court made no finding in the antitrust claim. This analysis requires the court to determine that the owner's practice was outside of the protection of the Copyright Act.

In the case of *Alfred Bell & Co. v. Catalda Fine Arts, Inc.,*[114] a balancing test was established which would at least require a court to weigh the policy of preventing piracy of copyrights against the policy of enforcing the antitrust laws before denying a copyright owner the protection of the Copyright Act because of a violation of antitrust.[115] Thus, there was an express recognition of the fact that a copyright was involved and the copyright owner was given the full protection of the copyright grant.

If the misuse finding is to be based upon a violation of antitrust, then there should at least be a strong copyright component in the analysis. The Court in the case of *United States v. General Electric Co.*[116] established a unique antitrust analysis which insured that patent law would not be subrogated to antitrust. A copyright rule of reason test patterned after the *General Electric* patent rule of reason[117] would likewise result in the upholding of any practice reasonably within the scope of the re-

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110. 17 U.S.C. § 101 *et seq.* (Supp. II 1978).

111. *See* notes 72-85 and accompanying text *supra.*

112. 80 F. Supp. 843 (D.Minn. 1948), *appeal dismissed per curiam sub nom.* M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949). *See also* notes 52-59 and accompanying text *supra.*

113. 80 F. Supp. 843, 850 (D.Minn. 1948).

114. 74 F. Supp. 973 (S.D.N.Y. 1947), *aff'd,* 191 F.2d 99 (2d Cir. 1951).

115. *See* notes 61-68 and accompanying text *supra.*

116. 272 U.S. 476 (1926). *See also* notes 13-20 and accompanying text *supra.*

117. 272 U.S. at 490. *See also* notes 13-20 and accompanying text *supra.*

ward contemplated by the copyright grant.[118] Under this approach, the court would not find a violation of antitrust unless the copyright owner has gone beyond the scope of the Copyright Act. A copyright owner would thus be given the full protection of the copyright grant.

CONCLUSION

The copyright misuse test sanctioned by the Court in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*,[119] is inappropriate in that it subrogated copyright law to antitrust law and results in an unfair penalty to copyright owners. The Court failed to adequately protect copyright owners operating in reliance upon the Copyright Act. Hopefully, the Court will remedy their casual handling of the misuse issue and will give a detailed analysis of the doctrine in a future case. However at this time, it would appear that the copyright misuse doctrine will be based upon a violation of antitrust and not grounded in copyright policy.

EDWARD J. GODIN

118. 272 U.S. at 490.
119. 441 U.S. 1 (1979).

North American Soccer League v. National Football League: Applying "Rule of Reason" Analysis Under the Sherman Act to Private Bans on Cross-Ownership

Since 1960, when soccer first emerged as a professional sport in the United States,[1] the business has gradually developed into a financially viable enterprise.[2] In August, 1978, the National Football League (NFL) sought to enforce a ban which would prevent all NFL franchise owners from owning any other major league team sports.[3] In response, in *North American Soccer League v. National Football League,*[4] the

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1. *See* notes 16-37 and accompanying text *infra.*

2. *See* notes 36-37 and accompanying text *infra.*

3. The proposed ban, presented as an amendment to the NFL constitution and bylaws, consists of the following:

Amend Article XI, by adding a new Section 9.4 as follows:
(A) No person (1) owning a majority interest in a member club, or (2) directly or indirectly having substantial operational control, or substantial influence over the operations of a member club, or (3) serving as an officer or director of a member club, nor (4) any spouse or minor child of any such person, may directly or indirectly acquire, retain, or possess any interest in another major team sport (including major league baseball, basketball, hockey and soccer).
(B) The prohibition set forth in subsection (A) hereof shall also apply to relatives of such persons (including siblings, parents, adult children, adult and minor grandchildren, nephews and nieces, and relatives by marriage) (1) if such person directly or indirectly provided or contributed all or any part of the funds used to purchase or operate the other sports league entity or (2) if there exists between such persons and any such relative a significant community of interest in the successful operation of the other sports league entity.
(C) The Commissioner shall investigate, to the extent he deems necessary or appropriate, any reported or apparent violation of this Section and shall report his findings to the Executive Committee prior to imposition of disciplinary action by the Committee.
(D) Beginning on February 1, 1980, any person who, after notice and hearing by the Executive Committee, is found to have violated subsection (A) or (B) above will be subject to fines of up to $25,000 per month for each of the first three months of violations; up to $50,000 per month for the next three months; and up to $75,000 per month thereafter. In addition, violations of more than six months' duration may be dealt with by the Executive Committee pursuant to Article VIII, Section 8.13 (B).
(E) If such person does not pay such fine to the League Treasurer within 20 days of its assessment, the unpaid amount thereof may be withheld, in whole or in part, by the Commissioner from available funds in possession of the League Office belonging to the member club with which the person in violation is affiliated.

4. 465 F. Supp. 665 (S.D.N.Y. 1979).

plaintiffs sought and obtained a preliminary injuction[5] against the ban,[6] alleging harm that included "fire sales"[7] of their own franchises and a seriously diminished market for soccer franchises in the United States. The injunction was issued despite the NFL's contention that the ban would prevent local team monopolies.[8] In applying the "rule of

5. The United States Supreme Court has recognized that the traditional standard for granting a preliminary injuction requires the moving party to show (1) irreparable harm, and (2) likelihood to prevail on the merits, and the Court has required of the district courts a careful weighing of the interests on both sides. However, the Court has also recognized that the standard of appellate review is merely whether the issuance of the injunction constituted an abuse of the trial court's discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). Since more specific articulation of the standard for granting the injunction has been left to the various circuits, the standards vary throughout the federal courts. *See, e.g.*, North Carolina State Ports Authority v. Dart Containerline, 592 F.2d 749, 750 (4th Cir. 1979) (balance of hardships test consists of four factors: plaintiff's likelihood of success, irreparable harm if relief denied, injury to defendant if injunction issued, public interest); Henry v. First National Bank of Clarksdale, 595 F.2d 291, 302 (5th Cir. 1979) (four requirements: substantial likelihood plaintiff will prevail, injunction necessary to prevent irreparable harm, threatened injury to plaintiffs must outweigh harm injunction might do to defendants, consistency with public interest); Minnesota Association of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare, 602 F.2d 150, 152 (8th Cir. 1979) (two alternative tests: substantial probability of success on merits and possibility of irreparable harm absent injunction, other factors such as harm to other interested parties and public interest considered; or, sufficiently serious questions going to the merits and balance of hardships tipping sharply in plaintiff's favor); Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 814-15 (3rd Cir. 1978) (reasonable probability of eventual success and irreparable injury pendente lite; possible harm to other interested persons taken into account where relevant); Kolz v. Board of Education of the City of Chicago, 576 F.2d 748, 748 (7th Cir. 1978) (movant must establish reasonable probability of success on merits, irreparable harm, lack of serious adverse effects on others, and sufficient public interest); Levesque v. State of Maine, 587 F.2d 78 (1st Cir. 1978) (likelihood of prevailing on merits; irreparable harm; promoting public interest; no irreparable harm to defendants); Roth v. Bank of the Commonwealth, 583 F.2d 527, 537-38 (6th Cir. 1978) (where balance of hardship tips decidedly toward plaintiff, ordinarily enough that plaintiff has raised questions going to the merits which are so serious, substantial, difficult or doubtful as to make them fair ground for litigation and more deliberate investigation); Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 249, 250 (2nd Cir. 1973) (clear showing of either probable success on merits and possible irreparable harm, or sufficiently serious questions going to the merits to make a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting relief); Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969) (prima facie case showing reasonable probability of success on merits, and irreparable injury absent relief).

For a discussion of the applicability of the standard in North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979), *see* note 97 and accompanying text *infra*.

6. North American Soccer League v. National Football League, 465 F. Supp. 665, 666 (S.D.N.Y. 1979).

7. The term "fire sale" is defined as "[a] sale of commodities damaged by fire." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 495 (1970). The term is used herein, and in the plaintiffs' argument to mean a distress sale of a commodity below its true market value because of some extraordinary external pressure which forces the seller to sell. *See* Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, at 43-44, North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979).

8. *See* Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, at 6; Affidavit in Opposition to Motion for Preliminary Injunction, at 16, North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979) [hereinafter cited as

reason,"[9] the district court judge for the Southern District of New York weighed the pro-competitive consequences of cross-ownership against the pro-competitive aspects of the ban and concluded that the North American Soccer League (NASL) complaint met the test of a serious antitrust challenge[10] required for a preliminary injuction.

This comment will discuss the application of the rule of reason to the unique market situation[11] for professional sports franchises and their owners, as well as the antitrust consequences of cross-ownership itself.[12] The comment will endeavor to analyze the overriding policy considerations of antitrust law[13] and to discern the possible implications of applying a rule of reason analysis to the case at bar, and to the sports industry in general. Section I traces the development of soccer as a professional business in the United States and proceeds to discuss the "motility"[14]

Rozelle Affidavit]. The National Football League has also counterclaimed that the cross-owners constitute an illegal interlocking directorate in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). *See* NFL Defendants' Pre-Trial Memorandum of Law, at 37-44, North American Soccer League v. National Football League, 78 Civ. 4560 (S.D.N.Y., filed Sept. 28, 1979). For a discussion of the issues counterclaimed *see* note 55 and accompanying text *infra*.

9. *See* notes 105-38 and accompanying text *infra*.

10. *See* notes 97 and 101 *infra*.

11. Whether the market for professional sports franchises is unique is a matter that goes to the core of the problem in *North American Soccer League*. Historically, major team sports have been owned by individuals or small syndicates composed of highly recognized individuals. An exception is the New England Tea Men, the NASL soccer franchise owned by Thomas J. Lipton, Inc. One marked quality of sports franchise owners is that the owner typically becomes a local public figure, and this is perhaps a motivating factor in purchasing a sports franchise. These characteristics are generally less true of other sports businesses, such as horse racing, where a sport that was once highly individualized in its ownership has become heavily syndicated. *See generally* J. DURSO, THE ALL AMERICAN DOLLAR: THE BIG BUSINESS OF SPORTS (1971). For a discussion of the relationship of the market definitions of professional team sports franchises and their significance in antitrust law generally, and the case at bar in particular, *see* notes 151-52 and accompanying text *infra*.

12. *See* notes 181-89 and accompanying text *infra*.

13. Antitrust laws were created to serve the common weal by promoting competition. Competition was seen as an effective means toward protecting small, locally owned businesses, preserving democratic institutions, political and social, and encouraging thrift and energy in industrial progress. L. SULLIVAN, HANDBOOK ON ANTITRUST 5-6, 11 (1977). *See also* E. KINTNER, AN ANTITRUST PRIMER xi (2d ed. 1973), where the author states:

> The philosophy of the antitrust laws is that the freedom of every person to carry on the business of his choice is in the nature of a personal liberty as much as a property right. To preserve its free exercise is fundamental to our society not merely because of its private necessity, but for its public consequence as well.

For a discussion of the purposes of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), *see* notes 119-24 and accompanying text *infra*. *See also* REPORT OF THE U.S. JUSTICE DEPARTMENT ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955).

14. The word "motility" is defined as the "capacity of moving or having the power to move spontaneously, as certain spores or microorganisms." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 856 (1970). The word is used here to denote a "sporadic" motion of soccer franchises from one geographical market area to another during the first decade of American soccer. The word was chosen because the comment displays the motion without individual inquiry into the causes of the particular relocation, and merely draws the conclusion that the franchises were moving for financial reasons indicating a period of instability throughout the industry.

of franchise operations for the NASL. Section II discusses the facts and holding of the district court in *North American Soccer League v. National Football League.* The purposes of the NFL ban on cross-ownership and the NASL's reaction to the perceived impact of such a ban on the soccer business are addressed in this section. The rule of reason as applied to the Sherman Act[15] is discussed in section III. Finally, section IV analyzes four major factors of antitrust analysis and concludes that while the ban on cross-ownership is in restraint of trade within the soccer franchise market, local ownership of multiple team sports franchises is not necessarily anti-competitive.

I. AMERICAN SOCCER AS A BUSINESS ENTERPRISE

It is undisputed that soccer is the world's most popular team sport.[16] In the United States, however, soccer has traditionally been dwarfed by the powerful giants of football, baseball, hockey and basketball.[17] Nevertheless, the interest of several sports investors was sparked in 1960, when Bill Cox, the founder of the International Soccer League (ISL), imported famous teams from Europe and South America for a summer tournament in New York.[18] By 1965, interest in the sport prompted discussion of national league formation by prominent baseball and football club owners. Of the three leagues which were eventually formed,[19] two began play in the 1967 season.[20] The North

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15. 15 U.S.C. §§ 1-7 (1976).

16. For an account of the widespread popularity of the soccer match, *see generally* K. ROTE, JR. & B. KANE, THE COMPLETE BOOK OF SOCCER 15-38 (1978); J. MICHENER, SPORTS IN AMERICA 531 (1976).

17. *See generally* J. DURSO, *supra* note 11. The dominance of these giants has so permeated the American psyche that one author claims:

> [Americans have been] brainwashed into believing that only those sports which entice spectators to sit in large stadiums are manly or endowed with high acceptability value. Football, basketball, ice hockey and baseball are the regal sports, and they are the ones to be encouraged in junior and senior high schools and supported financially in college and university.

J. MICHENER, *supra* note 16, at 346.

18. *See* K. ROTE, JR. & B. KANE, *supra* note 16, at 88.

19. Cox hosted a meeting for a number of prominent football and baseball club owners to discuss the national league idea and by May, 1966, he was ready to announce the formation of an eleven-member league. Not long afterwards, another league, centered around Jack Kent Cooke, was announced. A third was announced by Richard Millen. Cooke had been associated with Lamar Hunt, owner of the Atlanta Braves National League baseball franchise, Judge Roy Hofheinz, owner of the Houston Astros National League baseball franchise, and others in the formation of the United States Soccer Football Association (USSFA), a national body formed to approve a national franchise under the umbrella of the Federation International de Football Association (FIFA). Any league approved under the FIFA umbrella would be able to buy players from the 140 countries associated under FIFA, and would be able to participate in overseas tours and invite foreign teams to the United States. *Id.* at 89-90.

20. None of the three groups wished to brave the marketplace with professional soccer forces not only split, but vying for the same customers. Attempts at merger failed, however. The USSFA recognized the Cooke group and their North American Soccer League (NASL). The Cox and Millen groups merged to form the National Professional Soccer League (NPSL). *Id.* at 93.

American Soccer League (NASL),[21] following a successful series of pre-season exhibitions with the best teams in the world drew disappointing numbers of spectators in the regular season.[22] The National Professional Soccer League (NPSL),[23] having negotiated and signed a "ten year" television contract with the Columbia Broadcasting System (CBS), drew only half the attendance of the NASL in the same season.[24]

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21. The North American Soccer League was the league founded by the group centered around Jack Kent Cooke, a prominent figure along with Lamar Hunt in cross-ownership and general development of team sports businesses in America. *See* notes 19 and 20 *supra*, 33 and 205 *infra*.

22. The NASL members entered the 1967 season confident that their superior teams would succeed financially without television coverage, and took advantage of their relationship with the USSFA and FIFA (*supra* note 19) in importing the world's best teams for pre-season play. According to Kyle Rote, Jr., one of the first American soccer stars, and son of American football star Kyle Rote, the attendance at the pre-season exhibitions "fluctuated between encouraging and enormous." K. ROTE, JR. & B. KANE, *supra* note 16, at 91. Recognizing some public perception difficulties, however, the NASL changed its name to the United Soccer Association (USA). Comparing pre-season turnout to that of the regular season, Kyle Rote, Jr. stated:

> A total of 33,351 spectators paid to see Real Madrid play West Ham of England at the Houston Astrodome; over 20,000 saw Benfica of Portugal face Manchester United in Los Angeles and 22,000 came to Toronto's Varsity Stadium for the Glasgow Rangers - Sparta of Prague match. League owners congratulated each other for investing in soccer. But once the regular season started the figures dropped sharply. Respected first division clubs like Sunderland and Stoke City of England; Hiberians, Aberdeen and Dundee United of Scotland; Bangu of Brazil and Calgari of Italy drew a season average of less than 8,000 per game.

Id.

23. The National Professional Soccer League (NPSL) was the group that formed around Cox and Millen, who merged after failing to receive recognition from the USSFA (*supra* note 19). The NPSA received a great deal of foreign players eager to play in America, despite threats that the players would be suspended from FIFA for signing with the contraband league. The greatest European stars were unwilling to take the risk of suspension, however, so that the player quality matched neither the expectations of the fans nor the exaggerations of the league's press releases. The NPSL did avoid the franchise fees required by the USSFA and FIFA, but their real success was projected around the pirate league's having secured from CBS an agreement to feature a weekly game. The contract was described as having a term of ten years. K. ROTE, JR. & B. KANE, *supra* note 16, at 90-91.

24. The fact that soccer had not caught on in America was not the only reason for television ratings being so poor. There were inherent elements in soccer that did not lend themselves to American commercial television. As a result, the "television referee" that had been so useful in scheduling strategic time-out periods in professional football found his counterpart in televised soccer. Kyle Rote, Jr. describes the situation thus:

> Equipped with a hidden walkie-talkie, the cooperative ref was notified by the TV producer whenever an imaginary infringement should be whistled so that a commercial could be shown. Aided by some fine acting by NPSL players, this ploy worked until the middle of May, when an embarrassed NPSL and CBS admitted that they tried to tamper with soccer's non-stop action (one of its most appealing qualities) by creating the first official time-outs in the game's long history.

K. ROTE, JR. & B. KANE, *supra* note 16, at 92. James A. Michener describes the original TV efforts thus:

> In 1967 a serious effort was made to force soccer down the American throat, and CBS invested considerable funds in broadcasting league games on a regular basis. Danny Blanchflower, a famous, glib-tongued expert from England, was imported to do the commentary, and the result was a threefold disaster: (1) there was even less scoring than in hockey; (2) Blanchflower was an uninhibited realist who, when the local defensemen loused up a play, said so, to the consternation of the television people, who were accustomed to the ultra-sweet blandness of the American Broadcaster; and, worst of all,

By the beginning of the 1968 season, the two leagues had merged into the new North American Soccer League (NASL)[25] and consisted of seventeen member clubs.[26] Playing without television coverage,[27] the NASL failed to attract substantial numbers[28] in the regularly scheduled matches. However, when the league presented exhibitions featuring foreign teams, attendance soared,[29] thereby proving that a quality[30] team could bring out the American soccer fan. These exhibitions failed to prove, however, at what expense and how rapidly a quality American team could be developed.[31] Discouraged by the investment required to achieve such quality, twelve of the seventeen franchisees[32] withdrew from the business.[33] The remaining five clubs decided to limit their ex-

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> the ebb and flow of soccer provided no reasonable stopping places for commercials, and when the referee did halt the play to take care of that chore, he seemed always to do so just as the home team was about to run the opposition into a state of exhaustion. The enforced time-out, so alien to soccer, where the continuity of the play is everything, gave the worn down team time to recouperate, and the balance of the game was destroyed. CBS quickly got the silly game off the air and returned to the hard-hitting American Football, where the blood could be clearly seen as the opposition players limped off or were dragged away on stretchers.

J. MICHENER, *supra* note 16, at 378-79.

25. The merger was probably the result of an $18,000,000 antitrust suit filed against the USA (*see* note 24 *supra*), USSFA, and FIFA by the NPSL. Both leagues presumed at this point that soccer would succeed financially in the future. K. ROTE, JR. & B. KANE, *supra* note 16, at 93.

26. The seventeen teams were located in Atlanta, Baltimore, Boston, Chicago, Cleveland, Dallas, Detroit, Houston, Kansas City, Los Angeles, New York, Oakland, San Diego, St. Louis, Toronto, Vancouver and Washington, D.C. Two teams of the old NPSL (*see* note 23 *supra*), Pittsburgh and Philadelphia, suffered losses of over $500,000 each and did not participate in the merger. K. ROTE, JR. & B. KANE, *supra* note 16, at 93, 96.

All of the seventeen teams were located in one of the 35 largest market areas in North America. THE WORLD ALMANAC 194 (112th ed. 1980); 1979 CANADIAN ALMANAC AND DIRECTORY 952 (132d ed. 1979). Of the fourteen largest areas of population, the only areas not represented in the soccer league roster were the areas of the two teams that had withdrawn (Pittsburgh and Philadelphia). All of the areas rank approximately as high on the Area of Dominant Influence (ADI) and Designated Market Area (DMA) ranks. ADI and DMA are two measurements used to determine the television potential of a city. J. MICHENER, *supra* note 16, at 379-81.

27. *See* notes 23 and 24 *supra*.

28. Average attendance for 1968 was less than 4,500 per club. K. ROTE, JR. & B. KANE, *supra* note 16, at 95.

29. Huge crowds had been attracted by the touring foreign teams. More than 36,000 watched Pele of Brazil and Eusebio of Portugal face each other when Santos met Benfica. Eusebio was considered Pele's only rival as the world's finest striker. *Id.* at 95. A striker is the goal scorer in modern soccer, and scoring goals is the most difficult task. *Id.* at 156-58.

30. The financial success of the touring teams demonstrates the marked difference in quality. In addition to the success of the confrontation between Santos and Benfica, 30,000 spectators watched Santos play the NASL's Oakland Clippers. Manchester City averaged 25,000 in each of its NASL matches. *Id.* at 95.

31. To begin with, the salaries and costs of successful foreign players were far beyond what the owners had to pay for local soccer players. For some indication of the expenses of quality foreign soccer players, *see* K. ROTE, JR. & B. KANE, *supra* note 16, at 154.

32. The terms "team," "club" and "franchise" are used interchangeably in this comment to indicate the local major team sport economic unit. A franchisee is therefore a local franchise or club or team owner.

33. The five survivors were Atlanta, Baltimore, Dallas, Kansas City and St. Louis. Dallas

penditures until a larger paying audience could be attracted. After an erratic seven years of growth[34] the league appeared by 1974 to have stabilized.[35] Dramatic increases in attendance began in 1975[36] and continued through 1978, when the National Football League (NFL) sought to impose a ban preventing cross-ownership of professional team sports.[37]

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was owned by Lamar Hunt, the owner of the Kansas City Chiefs. It is to be noted that Hunt did not own the Kansas City soccer franchise, which no longer exists. The Dallas franchise is the only one of the five soccer teams that still exists. *See* notes 19 and 26 *supra,* and 200 *infra.* Hunt did, however, once own the AFL Dallas franchise. *See* note 205 *supra.*

34. The 1969 season was the shortest and most uncertain the league has experienced to date. Attendances averaged around 3,000. By 1970, Baltimore had dropped out of the league, but two former members of the American Soccer League, another national professional soccer league generally centered in lesser market areas, joined the NASL. The franchises were located in Washington and Rochester. The season was expanded from sixteen to twenty games. Attendance was up slightly. Field performances improved to the point that Pele, returning for a tour, found the NASL teams much more difficult to defeat. In 1971, the league added franchises in New York, Montreal and Toronto; Kansas City left. Attendances remained small, but optimism was up. No teams were added or lost in 1972. Washington moved its club to Miami. Attendance rose to an average of 5,000 per game. K. ROTE, JR. & B. KANE, *supra* note 16, at 98-101. Kyle Rote, Jr. sees 1973 as the breakthrough year for the NASL:

> I say this because 1973 was the year in which all the efforts of the past six years bore fruit. Attendance had nearly doubled since 1970, investors were inquiring again about franchises and the surge in youth soccer was at last recognized by the press. There was also a new team added: the Philadelphia Atoms.

Id. at 101.

35. *Id.* at 103. New franchises were added in Baltimore, Boston, Los Angeles, San Jose, Seattle, Denver, Vancouver and Washington; Montreal and Atlanta left. Fifteen teams thus shared the success of average attendance reaching 7,825, and a total of more than 1,181,000 spectators for the year. The new San Jose franchise drew 16,576 spectators per game. A tie-breaker concept was introduced to please the American fans, who were perceived to prefer a definite outcome to a match. The season remained at 20 games. *Id.* at 103-04.

36. The real revolution at the box office came in 1975 with the signing of a $4,000,000 contract between Pele and the New York Cosmos. To offset the cost of the contract, which was viewed as an investment in soccer goodwill, league arrangements called for a revenue sharing of "away" games in which Pele appeared for New York. NASL attendance totaled 1,695,651 for the year, as compared to 1,181,000 for 1974. Franchises in Chicago, Hartford, Portland, San Antonio and Tampa Bay were added in 1975. In 1976, attendance reached 2,481,000. The Denver franchise relocated in Minneapolis in 1976. In 1977 the total topped 3,555,000, and average attendance throughout the league reached 13,555 per game. Miami moved its club to Fort Lauderdale, San Antonio moved to Hawaii and San Diego relocated in Las Vegas. Pelé's three year contract ended in 1977, and he retired from playing soccer. *Id.* at 105-06.

37. At the time of the filing of the suit, the twenty-four soccer franchises were located in New York, Los Angeles, Chicago, Philadelphia, Detroit, Boston, San Francisco/Oakland, Washington, Toronto, Dallas, Houston, Minneapolis, Anaheim, San Diego, Denver, Seattle, Tampa, San Jose, Portland, Vancouver, Rochester, Memphis, Fort Lauderdale and Tulsa. In the 1979 season, however, Denver and Oakland were replaced by Atlanta and Edmundton. Soccer franchises are located in 16 of the 30 largest sports/television market areas in North America. The missing cities are San Francisco/Oakland, Montreal, Nassau County, N.Y., St. Louis, Pittsburgh, Baltimore, Newark, Cleveland, Miami, Cincinnati, Buffalo and Kansas City. All of these cities have had soccer franchises within the first decade of soccer business in America, with the exception of Nassau County, N.Y., Newark, Montreal and Buffalo. Newark has no sports franchises, Montreal has baseball and hockey only, Nassau County has hockey only, and Buffalo has football and hockey. *See* notes 26 and 33-35 *supra.* American Soccer League Franchises continue in Sacramento, Anaheim, Oakland, Phoenix, Columbus, Allentown/Bethlehem, Miami, Cleveland

II. *North American Soccer League v. National Football League*

A. The NFL's Proposed Ban on Cross-Ownership

1. The Ban in NFL History

Discouragement of cross-ownership is not a new concept with the National Football League. As early as 1967, a league policy resolution, accepted by a majority of the league's member clubs, stated that the league "reaffirm[s] its traditional position" against any person having operational control of an NFL franchise[38] and acquiring or possessing direct or indirect control of any team sports enterprise or business.[39] Although more than one NFL franchisee owned other team sports franchises in 1967, it should be noted that the resolution did not require divestiture.[40]

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and New York. The Major Indoor Soccer League, whose season begins in November and ends in March, has franchises in Buffalo, Hartford, New York, Philadelphia, Pittsburgh, Cleveland, Detroit, Houston, St. Louis and Wichita. The indoor soccer season is also a factor for the NASL franchises in Atlanta, Detroit, Fort Lauderdale, New England, Tampa Bay, California, Los Angeles, Memphis, Minnesota and Tulsa. Indoor soccer has acquiesced to many of the requirements of television, although it probably originally developed around the plans of civic center owners and operators to fill in winter dates. For 1979 and 1980, it is cable television that has developed the sport for its markets. Growth of the industry could infringe on the winter market dominated by football, but at present the matches are not included on network television. *See* note 177 and accompanying text *infra*. *See* THE COMPLETE HANDBOOK OF SOCCER 20-23, 339-41 (1980). *See also* 1978 North American Soccer League Guide, Attachment to Affidavit in Opposition to Motion for Preliminary Injunction, at 1; Affidavit in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, at 5-12 North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979); THE WORLD ALMANAC 862 (112th ed. 1980).

It is the contention of the NASL that, impressive gains over the last decade notwithstanding, professional soccer still faces many problems. While regular seasonal attendance has increased by more than 700% in the five years preceding the complaint, from around 650,000 in 1973 to approximately 4,680,000 in 1978, and gate receipts have climbed from $298,000 in 1971 to over $17,150,000 in 1978, future growth is uncertain. In his supporting affidavit, NASL Commissioner Woosnam states:

> For example, the NASL is experiencing a significant degree of change in both the ownership and location of its franchises. Before the beginning of the NASL's 1979 playing season, controlling interests in as many as five NASL clubs are likely to be sold. In addition, changes in franchise location in the near future are likely as a result of both the new owners' desires and the NASL's attempt to place itself in those markets with the highest potential for success (*i.e.*, in the top 24 markets). Moreover, additional franchises will be available for purchase in the near future as the NASL expands beyond its current 24-team configuration. This turnover in franchise ownership, coupled with the NASL's expansion plans, creates a continuing need for sources of fresh capital.

Affidavit in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, at 8-9 [hereinafter cited as Woosnam Affidavit].

38. North American Soccer League v. National Football League, 465 F. Supp. 665, 670 (S.D.N.Y. 1979).

39. *Id.* at 670 n.8.

40. During the first meeting of the NFL members, after Congress approved merger of the former American Football League (AFL) and the National Football League, the members unanimously adopted the resolution reaffirming the NFL's traditional position against cross-ownership. The American Football League had previously adopted no policy prohibiting cross-ownership but the merger agreement specified that the new member clubs would bring themselves into compliance. The first ratification came on January 16, 1967. On February 23, 1967, a motion

Subsequent league resolutions shifted the emphasis to "any interest in another *major* team sport" and added that "any person holding such financial interest at the time this resolution is adopted will in no case increase his percentage of such interest in another major team sport."[41] Again, nothing was said about divestiture. A 1976 resolution required that existing cross-owners use best efforts to dispose of their other holdings.[42] However, there were no sanctions proposed for failure to divest.[43] Additionally, the resolution defined the term major team sport as "major league basketball, hockey, baseball and soccer."[44]

2. The Present Ban

The amendment to the NFL By-Laws,[45] presented to the league for consideration in August, 1978, and which the NASL sought to enjoin,[46]

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on adopting a resolution prohibiting cross-owners from attending meetings was tabled. On May 16, 1967, a roll call on the January 16 vote produced fourteen votes in favor, one against and one abstention. Commissioner Rozelle stated in his affidavit:

> Mr. Hunt's situation was the single true "grandfather" case with respect to ownership conflicts, since he alone had a controlling position in more than one team sports enterprise in 1967. Mr. Hunt stated that he, too, intended to and would comply with the provision prohibiting possession of control; but in view of his desire to have a reasonable time to dispose of conflicting interests on an appropriate financial basis and without harm to his other interests, he was permitted an unspecified reasonable time within which to comply. Rozelle Affidavit, *supra* note 8, at 18-19.

A few existing marginal cases were resolved after a review provided by Commissioner Rozelle, and usually the owner agreed to end his other ownership as soon as feasible. *Id.*

41. North American Soccer League v. National Football League, 465 F. Supp. 665, 670 n.8 (S.D.N.Y. 1979).

42. The 1976 Resolution stated:

> RESOLVED, that no person owning a majority interest in or in direct or indirect operational control of a member club may acquire any interest in another major team sport. Additionally, any person holding such financial interest at the time this resolution is adopted will in no case increase his percentage of such interest in another major team sport and will use best efforts to dispose of current holdings. Major team sport, for purpose of this resolution, is defined as major league basketball, hockey, baseball and soccer. The adoption of the foregoing resolution shall not affect nor modify the provisions of Article III, Section 3.5 of the NFL Constitution and By-Laws.

North American Soccer League v. National Football League, 465 F. Supp. 665, 670 n. 8 (S.D.N.Y. 1979).

43. The Rozelle Affidavit, *supra* note 8, stated:

> A unique situation arose in the case of Mr. Jack Kent Cooke, who originally owned only a minority interest in the Washington Redskins but was simultaneously the owner of the Los Angeles Lakers (NBA) and Los Angeles Kings (NHL). Mr. Cooke became the majority owner of the Redskins in approximately 1974 after the death of the team's principal owner and the club's redemption and retirement of shares from his estate. Mr. Cooke at that time pledged to resolve the ownership conflict, but his attempts to do so ultimately were barred by a court order arising from marital litigation.

Id. at 20-21.

When the 1976 resolution was adopted, Hunt and Cooke again stated their intentions to continue their best efforts to remove themselves from the conflicting ownerships when able to do so "in an appropriate fashion." *Id.* at 20-21.

44. *See* note 42 *supra.*

45. *See* note 3 *supra.*

46. *See* Order to Show Cause and Temporary Restraining Order, North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979).

significantly stretches the 1976 resolution in at least three areas. First, the scope of the class of persons subject to the ban was dramatically broadened.[47] Second, the "best effort" requirement[48] for disposal of present non-football team sports holdings was replaced with a flat prohibition.[49] Third, a definite date for divestiture was set, and significant financial penalties as well as ouster from the NFL were added as sanctions for failure to divest by that date.[50]

B. The Facts of the Case

The North American Soccer League (NASL) and twenty-one of its twenty-four member clubs[51] filed a complaint in the Federal District Court for the Southern District of New York against the National Football League (NFL) and twenty-five of its twenty-eight member clubs,[52] praying for temporary injunctive relief. Specifically, the soccer league sought a preliminary court order to prevent the football team from enacting the NFL constitutional and by-law changes that were designed

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47. The class was widened to include siblings, parents, adult children, adult and minor grandchildren, nieces and nephews, and relatives by marriage. *See* note 3 *supra,* setting forth Article XI § 9.4 (B). The widening of the class involved at least one more soccer franchise owner. Mrs. Elizabeth Robbie, the wife of Miami Dolphins owner Joseph Robbie, acquired the Fort Lauderdale NASL franchise in 1975. Rozelle Affidavit, *supra* note 8, at 21-22. Also in 1975, a new NFL franchise in Seattle was awarded to the Nordstrom Family Partnership as the majority stockholder. The partnership consists of eight family members, three of whom had a prior minority interest in the NASL Seattle franchise. *Id.* at 22.

48. *See* note 42 and accompanying text *supra.*

49. *See* note 3 *supra.*

50. *See* note 3 *supra,* setting forth Article XI §§ 9.4 (D) and (E).

51. The plaintiffs in this action are the North American Soccer League and twenty-one of its twenty-four member clubs. *See* note 37 *supra.* The complaint omits the Dallas Tornado, owned by Lamar Hunt, the Fort Lauderdale Strikers, owned by Elizabeth Robbie, and the Seattle Sounders, owned by Walter Daggat and a syndicate which includes the Nordstrom family. Complaint, North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979). *See also* Rozelle Affidavit, *supra* note 8, at 2; notes 40, 43 and 47 *supra.*

52. The defendants in this action are the National Football League and twenty-five of its twenty-eight member clubs. Not joined are the Kansas City Chiefs, owned by Lamar Hunt, the Miami Dolphins, owned by Joseph Robbie, and the Seattle Seahawks, owned by the Nordstrom family. *See* Rozelle Affidavit, *supra* note 8, at 2. Pro-Football Inc., owners of the Washington Redskins, and composed of, among others, cross-owners Jack Kent Cooke and Edward Bennett Williams, is separately represented for the trial. *See* NFL Defendants' Pre-Trial Memorandum of Law, *supra* note 8, at 1. This is probably due to the controversy surrounding the purchase by Williams of the American Baseball League Baltimore Orioles subsequent to the granting of a preliminary injunction against the NFL cross-ownership ban. The controversy has led to the appointment of a committee by NFL Commissioner Rozelle to determine who is the Pro-Football control group. It is alleged by Williams that Jack Kent Cooke is in control of Pro-Football, Inc. *See* Boston Globe, March 12, 1980, at 26, col. 2. *See also* note 43 *supra.*

to implement the cross-ownership ban.[53] A preliminary injunction was issued by the district court on February 21, 1979.[54]

At the same time that the complaint for a preliminary injuction was filed, the NASL filed a complaint praying for a permanent injunction and damages.[55]

C. *The Issues Involved*

1. The Plaintiffs' Position

When the NFL sought to adopt and enforce the cross-ownership ban, the NASL saw an immediate threat to the stable and successful image that the league had earned.[56] The ban endangered the soccer league's new relationship with the television networks,[57] who, recalling their 1967 experience with the industry,[58] would certainly reconsider their position. Moreover, the pressure from the NFL immediately caused not only a halt to the negotiations with present NFL owners as prospective buyers of NASL franchises, but threatened to seriously suppress the price of NASL franchises if NASL owners had to divest in a "fire sale."[59]

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53. *See* Order to Show Cause for Preliminary Injunction at 1-2, North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979). The order states that the injunction sought is for the purpose of:

> enjoining and restraining the defendant National Football League ("NFL") and its defendant member teams, and their respective agents and attorneys and all persons acting in concert with them, from entering into, adhering to or enforcing any past, present or future agreement, including any NFL Constitution and/or By-Law provision or amendment thereof, that restricts the ability of any person to maintain, expand or acquire an ownership interest in an NASL franchise.... *Id.*

54. North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979).

55. The trial on the permanent injunction and damages was marked up for March 24, 1980, by Judge Haight in the Federal District Court for the Southern District of New York, and is pending as of this writing.

For the trial, the NFL has entered two alternative counterclaims. First, accepting a theory of the NASL as a single economic firm with which the NFL as a firm competes, the NFL asserts that the presence of Messrs. Hunt and Robbie on the governing board of each league constitutes an interlocking directorate. Secondly, the NFL asserts that if the NASL is not a single economic firm, then its members are involved in an illegal combination in restraint of trade because they are lessening competition among the various teams, and thereby harming the NFL and its teams. *See* NFL Defendants' Pre-Trial Memorandum of Law, *supra* note 8, at 38, 44.

56. Woosnam Affidavit, *supra* note 37, at 8-12.

57. Regarding the restriction of growth capital and expertise, as well as the threat to the NASL's relationship with the television networks, Commissioner Woosnam cited the collapse of the American Basketball Association, the World Football League, and the World Hockey Association as attributable to failure in these areas. Woosnam Affidavit, *supra* note 37, at 10-11.

58. *See* note 23 and accompanying text *supra*.

59. Woosnam Affidavit, *supra* note 37, at 20-24. *See also* note 7 and accompanying text *supra*.

The soccer league argued that the conduct of the NFL constituted an ownership boycott of the NASL which so patently violated section 1 of the Sherman Act[60] that the NASL was virtually assured of succeeding on the antitrust merits.[61] The NASL insisted that the cross-ownership ban was a classic per se horizontal boycott[62] violation of section 1 of the Act. Alternatively, they argued that if a rule of reason analysis were to be initially applied to the NFL's horizontal boycott, its purpose and effect would be so anti-competitive as to violate section 1, again assuring the NASL of victory on the merits.[63] The NASL contended that such was the case since the NFL ban served no legitimate objective and was motivated by anti-competitive and exclusionary purposes.[64] The NASL further stated that the ban would cause considerable and unreasonable anti-competitive effects in the U.S. market for sports ownership capital.[65]

Moreover, the NASL alleged at the hearing on the motion for preliminary injunction that the presence of irreparable harm, together with a balance of hardships in favor of the NASL, sufficiently supported their request for injunctive relief.[66] It was submitted by the NASL that the harm caused by the ban would consist of depriving the NASL and its member clubs of the critical source of sports ownership capital and entrepreneurial skill that is found among the NFL owners and the NFL resolutions would force immediate divestiture of part or all of four soccer franchises.[67] The soccer league contended that no adequate remedy at law exists to redress this harm.[68] Furthermore, according to the NASL, no meaningful injury would befall the NFL or its

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60. 15 U.S.C. § 1 (1976). The Section provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

61. Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, *supra* note 7, at 14-27.

62. A classical group boycott is defined as "a concerted effort — often, though not always, by a concerted refusal to deal — to induce suppliers or customers to withhold their trade from a competitor of the concerted group in order to make it difficult or impossible for the competitor to compete." L. SULLIVAN, *supra* note 13, at 289.

63. Memorandum of Law in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, *supra* note 7, at 28-42.

64. *Id.* at 29-36. *See also* Woosnam Affidavit, *supra* note 37, at 27-28.

65. Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, *supra* note 7, at 35-42.

66. *Id.* at 43-49. *See also* note 5 and accompanying text *supra,* and note 97 and accompanying text *infra.*

67. Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, *supra* note 7, at 43-47.

68. *Id.* at 46-48.

membership clubs if the ban were enjoined, since a policy similar to the ban, albeit considerably less severe, has been dormant for at least twelve years.[69]

2. The Defendants' Response

The NFL countered the NASL arguments with the position that per se group boycott principles of antitrust law are irrelevant to the controversy, since it is an established principle of antitrust law that sports leagues are by nature joint ventures,[70] and per se concepts do not apply to sports league conduct that is reasonably related to its functioning as a league.[71] The NFL contended that the ban existed for legitimate business reasons. First, the ban was intended to protect the commercial confidentiality among the football franchise owners by providing to the league members the ability to share strategy secrets without risk of disclosure or other detriment. Second, the ban was designed to preserve good relations with the public. These relations were deemed to include: (a) an avoidance of the "dilution of good will which a prominent NFL salesman wins for the entire NFL", (b) a protection from the tarnished image that hostility engendered by owners in their other sports can bring, and (c) an aspiration to the pro-competitive side of any future public debate over the proper role of local team sports monopolists.[72] Finally, the ban was proposed to encourage maximum cooperation and minimum animosity and suspicion among the league's members.[73]

Moreover, the football league contended that the NFL policy against cross-ownership regulated and promoted competition between sports leagues in accordance with the rule of reason.[74] The defendants contended that the plaintiffs did not precisely define the market in which

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69. *Id.* at 48-50.

70. Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 8, at 11-16. Citing a report of the Senate Judiciary Committee to the effect that leagues are necessary to give professional sports competitive and geographic balance as well as integrity, the Memorandum sets forth the analogy drawn by Professor Robert H. Bork between the league and partnerships or firms. Developing this analogy, the Memorandum states that while the Supreme Court has yet to deal with the question, several federal courts have done so. *See, e.g.*, United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (if professsional teams in league competed within league in a business manner, the league would fail as the weaker teams failed); Cappadonna v. New England Patriots Football Team, Civ. No. 72-1119-W (D. Mass., March 7, 1974). For a discussion of the plaintiffs' reply to this exception from antitrust regulation, *see* note 87 and accompanying text *infra*. For a discussion of the holding of the court on this issue, *see* note 94 and accompanying text *infra*.

71. Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 8, at 17.

72. *Id.* at 5-6. *See also* Rozelle Affidavit, *supra* note 8, at 6-14.

73. Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 8, at 6. *See also* Rozelle Affidavit, *supra* note 8, at 16-17.

74. Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 8, at 30-40.

the NASL and the NFL interact and failed to take into account the market in which the NASL and the NFL compete with one another for ticket sales, television revenues, and general fan support.[75] According to the NFL, the rule of reason analysis should address three issues. The first inquiry should be whether the ban would have any competitive effect on the market for soccer franchises. The second inquiry would be whether the ban would have any competitive effect on the market for sports attendance and television revenues. Third, in considering both markets, the predominant overall effect of the ban should be considered.[76]

The NFL submitted that money is fungible and expertise can be hired. The football league observed that the NASL franchise owner constituency includes many persons who have no ownership interests in other sports.[77] It also pointed out that the NASL has included in its management many persons with promotional skills in several areas and with previous experience in football, basketball, hockey and soccer, and that the NFL ban would not preclude the NASL from continuing to hire such persons. The NFL contended that the market definition for sports ownership capital is either of doubtful economic relevance or completely tautological and alleged that the ban would have no material effect on the soccer franchise market.[78]

Concerning the market for ticket sales and television revenues, the NFL contended that the cross-ownership ban would promote competition in three ways. First, ticket prices would tend to remain at the lowest possible level in geographical markets where separately owned teams existed. Second, competition for television revenues, including competition in the utilization of expanding telecommunications media, would be enhanced by the absence of common league strategies. Finally, the public entertainment value of sports contests would continue to improve as economic competition between the leagues increased. The NFL thought it unlikely that the NASL would vanish entirely because of the ban, due to the lack of any real impact on the soccer league. Furthermore, the relevant economies of scale[79] such as teams playing in the

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75. *Id.* at 30.

76. *Id.* at 31-40.

77. *Id.* at 34.

78. *Id.* at 35. Concerning the significance of any sub-market for NASL franchises among the NFL owners, the Memorandum states:

> The key, it would appear, is plaintiffs' view that this handful of NFL owners might *pay more* for a soccer franchise than would other purchasers, thereby helping to bid up the asking price for franchises from the reported current $2-3 million level to the higher plateau which the NASL has predicted.

Id. at 35. (Emphasis in original). The Memorandum concluded that the quality of the NFL money was no different than the money of any other investor. *Id.* at 36.

79. The term "economies of scale" or "efficiencies of scale" generally signifies the savings that are brought about by an increase in the market share when, for example, underutilized plant

same stadium could be and are effected without cross-ownership. The NFL thus concluded that cross-ownership had an anti-competitive effect on the sports dollar market and the ban obviously had an opposite, pro-competitive effect.[80]

Balancing the effects of the ban on the two markets, the NFL concluded that the competitively neutral result of any possible diminution in the value or growth of soccer franchises must be weighed against the risk of loss of the pro-competitive aspects of the ban. Since the overall effect is to promote competition, the rule of reason test had been met.[81]

Finally, the NFL alleged that the NASL did not meet the standards for the issuing of a preliminary injunction, since it did not make a showing of irreparable harm or probable success on the merits. Furthermore, the NFL contended that the standards were not met because the balance of hardship did not tip decidedly toward the plaintiffs.[82] Therefore, the NFL concluded, the motion for prelimiary injunction should be denied.[83]

3. The Plaintiffs' Reply

Concerning the NFL's "*ipse dixit* exceptions to the *per se* rule"[84] the NASL contended that the NFL had ignored the anti-competitive purpose of the ban and its anti-competitive effect.[85] Both concepts, stated the NASL, were at the center of the per se rule against group boycotts. The NASL contended that the joint venture exception[86] to the per se rule does not exist where the policy complained of restrains competition between competing sports leagues.[87] The NASL stated that the NFL

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or resources are more efficiently used. The efficiencies justify themselves and the mergers or monopolies that accompany them by the savings in the economy. For a discussion of the relative importance of economies of scale as a determinant of oligopolistic structure, see L. SULLIVAN, *supra* note 13, at 334.

80. Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 8, at 40.

81. *Id.*

82. *Id.* at 42. Here, the NFL raised the issue that the NASL did not meet the standard for a preliminary injunction for a district court in the second circuit, citing Triebwasser & Katz v. A. T. & T. Co., 535 F.2d 1356 (1976). For a discussion of the court's holding on this issue, *see* note 5 *supra,* and note 97 and accompanying text *infra.*

83. Memorandum in Opposition To Plaintiffs' Motion for Preliminary Injunction, *supra* note 8, at 48.

84. NASL Plaintiffs' Reply Memorandum in Further Support of Their Motion For A Preliminary Injunction, North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979), at 9.

85. *Id.* at 10.

86. *See* note 70 and accompanying text *supra.*

87. NASL Plaintiffs' Reply Memorandum in Further Support of Their Motion for A Preliminary Injunction, *supra* note 84, at 13. The Memorandum cites as examples of cases in which the joint venture exception was rejected: Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976) (restraints upon intra-league competition between NFL members for players services struck down); Smith v. Pro-Football, 420 F. Supp. 738, 745 (D.D.C. 1976) (per se

had in effect created a new test for the per se rule which had "no basis in reason or authority."[88]

The NASL contended that the rule of reason had no application to practices which have express anti-competitive purpose and effect. It further stated that the rule of reason was inapplicable in that the NFL's business excuses were without substance, and that the NFL, by stating that NFL owners are not the only source of soccer capital, had not rebutted the anti-competitive effects of the ban.[89]

Finally, the NASL submitted that the supporting and opposing affidavits were sufficient for the granting of an injunction, and no evidentiary hearing was required.[90] The NASL argued that the plaintiffs had established their right to the injunction, since harm had already occurred,[91] and the NASL had at least shown that substantial questions existed concerning the legality of the NFL ban.[92]

D. The District Court Holding and Reasoning

While putting aside the plaintiffs' arguments that the NFL action amounted to a horizontal boycott per se[93] as inapplicable,[94] the district

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rule applied to restrictions on competition for players' services within NFL despite joint venture status); Robertson v. National Basketball Association, 67 F.R.D. 691, 694 n.3 (S.D.N.Y. 1975) (joint venture status rejected as defense to restraints on competition for players' services). For a discussion of the district court's treatment of this issue in North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979), *see* note 94 and accompanying text *infra*.

88. Plaintiffs' Reply Memorandum in Further Support of Their Motion for A Preliminary Injunction, *supra* note 84, at 15.

89. *Id.* at 19-27.

90. *Id.* at 28. Since discovery was proceeding on the merits, and both the plaintiffs and the defendants stated that an evidentiary hearing need not precede resolution of the motion for a preliminary injunction, the district court ruled that no evidentiary hearing was required. North American Soccer League v. National Football League, 465 F. Supp. 665, 667 (S.D.N.Y. 1979).

91. Plaintiffs' Reply Memorandum in Further Support of Their Motion for A Preliminary Injunction, *supra* note 84, at 32-34. The specific harm alleged as having already occurred was the loss of such investors as Carroll Rosenbloom, owner of the Los Angeles Rams, and Ranken Smith, owner of the Atlanta Falcons. *Id.* at 33. *See also* Woosnam Affidavit, *supra* note 37, at 20-21; note 189 and accompanying text *infra*.

92. Plaintiffs' Reply Memorandum in Further Support of Their Motion for A Preliminary Injunction, *supra* note 84, at 35.

93. *See* note 62 and accompanying text *supra*.

94. Recognizing that it is settled that the Sherman Act is applicable to the facts in the case at bar as well as to professional football in general, district court Judge Haight nevertheless rejected the notion of a classic group boycott. In arriving at his conclusion, he stated:

> The problem with applying the "classic group boycott" label to the facts of this case lies in the peculiar relationship among the NFL and its member clubs. It is by now a well-recognized principle of the relevant case law (and the instant record does not demonstrate otherwise) that the members of a professional team sports league are more like "economic joint venturers" than competitors *inter se*. This is not a case where sports league members — in competition with each other, e.g., for the services of players — concertedly impose restraints on those players, e.g., Smith v. Pro-Football, Inc. ...

North American Soccer League v. National Football League, 465 F. Supp. 665, 673-74 (S.D.N.Y. 1979).

court nevertheless held that the plaintiffs had made the requisite showing that they were subject to irreparable harm,[95] that the cross-ownership ban was open to serious challenges on antitrust grounds,[96] and that the balance of hardships tipped toward the NASL.[97] The court stated that the football league had demonstrated no facts indicating that it would be harmed if the twelve year old policy against cross-ownership were to be tabled during the litigation. The preliminary injunction was therefore awarded.[98]

The court then proceeded to the two major anti-competitive effects of the cross-ownership ban alleged by the NASL. One effect is the narrowing of the already limited number of persons in the nation with adequate wealth, interest, time and skills in a limited market of which the NFL owners are a substantial part. The other consists of the pressures which the ban placed on NASL owners to "undermine the stability, credibility, and ability of the NASL to compete successfully with other sports including the NFL"[99] in the sports and entertainment markets.[100] Accordingly, the district court concluded that the NASL complaint met the test of a serious challenge on antitrust grounds.[101]

Applying the rule of reason doctrine as developed in *National Society of Professional Engineers v. United States,*[102] the district court weighed the competitive purposes and effects of the cross-ownership ban. The

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95. *Id.* at 676.

96. *Id.* at 677.

97. Within the Second Circuit, the showing that the plaintiff has to make for the granting of a preliminary injunction has been the subject of considerable debate. An apparently two-pronged test was announced as the rule of the Circuit in Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 249 (2d Cir. 1973). The test declared that the injunction should issue only on the clear showing of either probable success on the merits and possible irreparable harm, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting relief. However, in Triebwasser & Katz v. A. T. & T. Co., 535 F.2d 1356 (2d Cir. 1976), the court insisted that irreparable injury was required under both prongs. Commentators are divided as to whether the requirement of irreparable harm in the second showing is a major change of the *Sonesta* test, or whether irreparable harm had always been a part of the balance of hardships of the second prong.

Blending a discussion of *Sonesta* and *Triebwasser* with the requirements of Section 26 of the Clayton Act, 15 U.S.C. § 26 (1970), which authorizes a preliminary injunction under "general principles of equity and a showing that the danger of irreparable loss or damage is immediate", Judge Haight concluded that "the plaintiffs in this antitrust action are entitled to a preliminary injunction if they bring themselves within either of the two branches of *Sonesta,* and in so doing demonstrate a substantial threat of immediate irreparable harm." North American Soccer League v. National Football League, 465 F. Supp. 665, 668 (S.D.N.Y. 1979).

98. North American Soccer League v. National Football League, 465 F. Supp. 665, 665 (S.D.N.Y. 1979).

99. *Id.* at 676, *quoting* Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, at 39-40.

100. North American Soccer League v. National Football League, 465 F. Supp. 665, 676 (S.D.N.Y. 1979).

101. *Id.* at 677.

102. 435 U.S. 679 (1978).

court saw in this analysis that the ban would seriously limit the options of NFL owners and their families if they also owned an NASL franchise or were in the market for one.[103] Additionally, the court recognized that the ban limited the NASL franchisees seeking to interest such individuals as investors.[104]

III. THE RULE OF REASON UNDER THE SHERMAN ACT

A. The Common Law Heritage

At common law, the English courts took a broad view of restraint of trade, and almost any restraint was considered to be reasonable.[105] While American courts have generally been more hostile to contracts in restraint of trade,[106] a contract was found to be unreasonable only in

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103. North American Soccer League v. National Football League, 465 F. Supp. 665, 677 (S.D.N.Y. 1979).

104. *Id.* at 677.

105. *See generally* W. SANDERSON, RESTRAINT OF TRADE IN ENGLISH COMMON LAW (1926). In Mallan v. May, 11 Mees & W. 652, 152 Eng. Rep. 967 (1873) the court stated:

> Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is, in effect, the sale of a good will, and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry ... and such is the class of cases of much more frequent occurrence, and to which this present case becomes, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on a contract or trade within certain limits.... [I]n such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from this fear of his afterwards having a rival in the same business.

Id. at 665-66, 152 Eng. Rep. at 972.

106. *See, e.g.*, Alger v. Thatcher, 36 Mass. (19 Pick.) 51 (1837), in which the Massachusetts Supreme Judicial Court stated:

> The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations. 1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void.

Id. at 54.

narrowly defined circumstances.[107] If the restraint was greater than that which was required for the protection of the person for whom it was created, or worked undue hardship, it was unreasonable.[108] When a contract unreasonably restricted the alienation of property, or was founded on a pledge to refrain from competition, it was unreasonable so long as it was not subordinate to a contract for the transfer of the good will of a business,[109] or subordinate to an existing employer/employee relationship, or a contract for future employment.[110]

A common example of the common law "reasonable" restraint was a promise by the buyer or lessee of property or a business not to use the business or property in competition with, or to the injury of, the seller or lessor.[111] Another was the agreement by a person entering into a part-

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107. *See generally* Annot., 92 AM. DEC. 751; Dewey, *The Common Law Background of Antitrust Policy*, 41 VA. L. REV. 159 (1955). *See also* notes 112-17 *infra*.

108. *See, e.g.*, Horner v. Graves, 7 Bing. 735, 5 Moore & P. 768, 131 Eng. Rep. 284 (1831), where the court stated:

> [W]e do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection of the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either: it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable.

Id. at 742, 5 Moore & P. at 773, 131 Eng. Rep. at 287.

109. *See, e.g.*, Tode v. Gross, 127 N.Y. 480, 28 N.E. 469 (1891) (agreement to sell factory, good will, and trade secrets, and to refrain from disclosing trade secrets to others and to refrain from manufacture of the product not opposed to public policy as in restraint of trade; since actual damages were uncertain and incapable of being ascertained, stipulated damages were evidence of parties' intent to liquidate them, and would be enforceable at law); Fowle v. Park, 131 U.S. 88 (1888) (contract by which defendants, for valuable consideration, agreed not to sell a certain medicinal preparation within a certain territory held valid); Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887) (agreement of seller of manufacturing facilities nationwide not to engage in such manufacture for 99 years in any state save two, was a partial restraint and therefore valid); Beal v. Chase, 31 Mich. (9 Post) 490 (1875) (agreement, upon adequate consideration, that vendor of printing and publishing establishment's business and good will should not engage in the business in the state so long as the vendee continued in business was not unreasonable restraint of trade); Hubbard v. Miller, 27 Mich. (5 Post) 15 (1873) (where vendee purchased business and stock on the condition that the vendor should not further carry on the business within a reasonable extent of territory, such restraint of trade, being reasonable, would be enforced); Whitney v. Slayton, 40 Me. (5 Heath) 224 (1855) (when defendant sold plaintiffs a foundry and agreed not to engage in the business of iron casting within sixty miles for ten years, in a sparsely populated area, the agreement was valid); Pierce v. Fuller, 8 Mass. 223 (1811) (where, for consideration of a dollar, vendor of a horse and coach for separate consideration agreed not to run a stage on a certain road under penalty of specified liquidated damages, the contract was enforceable).

110. *See, e.g.*, Herreschoff v. Boutineau, 17 R.I. 3, 19 A. 712 (1890) (contract by defendant not to teach the French or German language, nor aid or advertise to teach them, nor be connected with any person teaching them, in Rhode Island, for a year after leaving complainants employ, held not void on grounds of public policy merely because it applied to the entire state); *but see* Keeler v. Taylor, 53 Pa. St. 467 (1866) (a contract that restricted the industry of the defendant, not in a particular locality but everywhere, not for a specified period but for a lifetime, was contrary to public policy and void).

111. *See, e.g.*, American Standard Co. v. Halderman Paper Co., 83 Fed. 619 (6th Cir. 1897) (a covenant in a lease of a paper mill, that the lessee will not, during the term, or for twenty years if

nership not to compete with the business of the partnership while it continued, or for a reasonable time after dissolution.[112] Valid covenants were enforceable at law or in equity; many were at equity, since incalculable or inappropriate damages made legal remedies inadequate.[113] Thus, the common law did not find business agreements to limit competition unlawful per se, and the rule of reason doctrine applied. The restraints were valid if reasonable and if they did not create a monopoly.[114] The reasonableness determination was based upon factors such

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a sale, make on the premises certain classes of paper which the lessor is engaged in making elsewhere, is valid, and binds assignees also, even though they are not mentioned in the covenant); Hitchcock v. Anthony, 83 Fed. 779 (6th Cir. 1897) (lessee of a dock, where he sold coal and fish, conveyed property including another dock to a lumber dealer, with an agreement not to sell coal or fish for a term of years: since agreement was limited to the dock on the property sold it was reasonable, and therefore valid).

112. *See, e.g.,* Troy Laundry Machinery Co. v. Dolph, 138 U.S. 617 (1895) (breach of partnership agreement not to compete with the business by engaging in sale of rival product held valid, but only nominal damages could be awarded for the sale of the rival goods); Matthews v. Associated Press, 136 N.Y. 333 (1893) (By-law prohibiting members from receiving or publishing regular news dispatches from any other news organization covering a like territory and organized for a like purpose, and suspending all rights and privileges if violated, held not unreasonable or oppressive, and not in restraint of trade); Lange v. Werk, 2 Ohio St. 520 (1893) (agreement not to be connected directly or indirectly, with manufacture of certain candles for a particular time, in Ohio or in the United States, or to give assistance or communicate knowledge of the business to anyone, was held void as to the nationwide restrictions but divisible and enforceable with regard to Ohio).

113. Thus, the English cases are commonly found in Chancery. *See, e.g.,* the cases listed in Avery v. Langford, 69 Eng. Rep. 281, 283 (1854); cases listed in Davies v. Davies, 56 L.T. 401 (1887), *reversed* 58 L.T. 209 (1888). American cases include Angier v. Webber, 96 Mass. (14 Allen) 211 (1867) (where seller of business agreed in writing not to do anything to impair goodwill, and subsequently held himself ready to perform the same services without actively soliciting, an injunction would issue to restrain him). *See generally* Annot., 92 AM. DEC. 751 (1887).

114. One nineteenth century jurist doubted that conspiracies to raise prices or wages were ever an offense at common law unless attempted by otherwise illegal means. One case to the contrary may be The King v. Journeymen-Taylors, 88 Eng. Rep. 9 (K.B. .1721), where the defendants were found guilty of conspiracy although the court acknowledged that the demands were not unreasonable, and the methods used were not unlawful per se. One author suggests that even that case may be consistent with the jurist's estimate, since the report of the case may inaccurately omit a statute prohibiting their methods. *See* Dewey, *The Common Law Background of Antitrust Policy,* 41 VA. L. REV. 159, 767 n. 32, *citing* WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS (1887).

The reasonableness test found its first widespread acceptance after Rousillon v. Rousillon, 14 Ch. D. 351, 42 L.T. 679 (1880) (no hard and fast rule that a contract in restraint of trade unlimited as to space is invalid; validity is determined by its reasonableness). *See* Dewey, *supra,* at 773 n. 47. But earlier cases dealt with the principle. *See, e.g.,* cases listed in notes 105 and 106 *supra.*

For a list of cases involving contracts whose purpose was to control the market and enhance the price, and which were therefore held void, *see* Annot., 92 AM. DEC. 751, 763 (1887).

as comparative position,[115] the object of combination,[116] the form of the combination,[117] and proof problems.[118]

B. The Sherman Act of 1890

In response to the public discontent with the predatory practices of large firms forcing out smaller competitors, and popular sentiment against cartels restricting output and driving up prices, Congress enacted, in 1890, the Sherman Antitrust Act.[119] The common law rule

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115. In Hubbard v. Miller, 27 Mich. (5 Post) 15, 15 Am. Rep. 153 (1873) the court stated:

> [T]he rule to be drawn from a careful analysis of the adjudged cases, and the reasons upon which they are founded, does not seem to us to involve any presumption in the accurate or legal sense of the term; and may be more correctly stated to be that all contracts in restraint of trade are void, if considered only in the abstract, and without reference to the situation or objects of the parties, or other circumstances under or with reference to which they were made; and this, though the pecuniary consideration paid may have been sufficient to support the contract and any other aspect, or any ordinary contract for a legal purpose; or even though it may be sufficient in value to compensate the restraint imposed. But if, considered with reference to the situation, business, and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specifically injurious to the public, the restraint will be held valid.

Id. at 19, 15 Am. Rep. at 156.

116. In Avery v. Langford, 69 Eng. Rep. 281 (1854) the court stated:

> The validity of the restraint in these cases depends very much upon the nature of the trade, which may require a larger or smaller district to carry it on, according to the circumstances. The restriction as to place, therefore, having reference to the nature of the trade, is the most important consideration. The duration in time of the restraint seems not to be of so much consequence.

Id. at 285.

117. *See generally* Annot., 92 AM. DEC. 751. Agreements which affected too wide a space were most commonly held to be void. *Id.* at 759.

118. *See, e.g.*, The King v. Gilbert, 102 Eng. Rep. 226 (K.B. 1801) (where indictment for buying in bulk to enhance the market listed types of products but not quantities, it would fail).

119. 15 U.S.C. §§ 1-7 (1890). *See* note 60 and accompanying text *supra*.

Concerning the significance of any attempt at understanding the legislative intent of the Sherman Act, former U.S. Solicitor General Robert H. Bork has stated:

> One frequently hears talk of the original meaning of the Sherman Act or of the intent of Congress in enacting that Act but it can hardly be stressed too much that, with respect to the Sherman Act, ... such talk of legislative intent is more than usually foolish. Congress simply had no discoverable intention that would help a court decide a case one way or another. At least some of the legislators thought that they were enacting the common law.... The common law concerning restraints of trade, moreover, was rooted in very different social policy from any which could be relevant to the Sherman Act. The preservation of competition was certainly one of the major policies motivating the passage of the Sherman Act. But the common law on the topic began, so far as any reported case shows, early in the fifteenth century, a time when the English courts can hardly be supposed to have been aggressively forwarding the idea of competition as the regulator of markets. The rule against contracts in restraint of trade, by which the early common law meant agreements not to practice a trade, was designed primarily to prevent a man from trading away his livelihood in a society where extensive governmental and guild restrictions might prevent him from finding comparable employment.

Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 783 (1965).

of reason had demonstrated itself to be an inadequate device, and its application had been far from uniform.[120] Although the Sherman Act used certain common law terminology,[121] it was not intended that the act simply incorporate the existing common law.[122] The Sherman Act moved far beyond the common law precedents by establishing absolute prohibitions, invoking the equity power of federal courts to restrain violations, and providing for effective private damage actions.[123] Section 1 of the Act makes unlawful (and criminal) "every combination ... or conspiracy in restraint of trade in interstate or foreign commerce."[124]

The courts were initially faced with determining the legislative intent of section 1, and the relationship of the section to concepts within the common law that could give its broad prohibition some functional meaning. The courts conceded that the words of the statute outlawed all restraints of trade, irrespective of their reasonableness, and also

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120. *See generally* Dewey, *The Common Law Background of Antitrust Policy,* 41 VA. L. R. 159 (1955).

121. For a discussion of the incorporation of common law terminology, *see* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 YALE L. J. 775, 783 (1965).

122. *Id.* at 784 n.23. The legislative intent of the Sherman Act and its relationship to the common law has been subject to considerable writing, just as the proposed legislation was the subject of extensive debate. *See generally,* H. B. THORELLI, THE FEDERAL ANTITRUST POLICY ORIGINATION OF AN AMERICAN TRADITION (1955); W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT (1965); Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J. L. & ECON. 7 (1966). The exact relationship of the Sherman Act to the common law, particularly with reference to the rule of reason, was the central theme in many of the earlier cases. *See* note 127 and accompanying text *infra.*

One thread that seems to be detectable in the legislative intent is to give the federal courts some jurisdiction over antitrust policies already covered by the common law. As a result, one proponent of the legislation, Senator George Frisbee Hoar of Massachusetts, when asked why Congress should enact a policy already stated in the common law, replied: "Because there is not any common law of the United States." 21 CONG. REC. 3152 (1890).

123. *See, e.g.,* United States v. Copper Corporation, 31 F. Supp. 226 (E.D.N.Y. 1939), *aff'd* 114 F.2d 413 (2d Cir. 1939), *aff'd* 312 U.S. 600 (1941) (violation of sections 1-7 are penal, and individuals are given right to recover treble damages for injury to business or property, while government is given right to prevent, by injunction, a continuance of the acts or to criminally prosecute); United States v. U.S. Steel Corp., 223 F. 55 (D.C.N.J. 1915), *aff'd,* 251 U.S. 417 (1920) (Sherman Act has charted a comprehensive plan for relief to protect trade and commerce against unlawful restraints and monopolies; criminal prosecution by the government under sections 1 and 2; an injunction in equity, on complaint of Attorney General under Section 4, against present or threatened violations of sections 1-7; civil suit under section 15). It should be noted that section 15 superseded ch. 349 § 77, 28 Stat. 570 (1894), which itself superseded Sherman Act, ch. 647 § 7, 26 Stat. 210 (1890), each of which had the same effect but was restricted in operation to the particular act cited. *See* Historical Note, 15 U.S.C.A. § 15 (1970). *See also* F. A. D. Andrea, Inc. v. Radio Corporation of America, 14 F. Supp. 226 (D.C. Del. 1936), *aff'd,* 88 F.2d 474 (3d Cir. 1936), *cert. denied,* 300 U.S. 681 (1936) (remedies under the Sherman Act are exclusive, and plaintiff not entitled to mandatory injunction granting a license under defendant's patent). It should be noted, however, that under Section 26 of the Clayton Act, 15 U.S.C. § 26 (1970), any person, firm, corporation or association was given the right to injunctive relief. *See also* note 101 and accompanying text *supra.*

124. Sherman Act, 15 U.S.C. § 1 (1970).

recognized that not every contract affecting commerce, which by its nature would restrain trade, was intended by Congress to be illegal.[125] In response to the need for functional meaning, the courts set out upon the "legislative" journey to supply the materials that the statutory text, the legislative intent, and the common law had left wanting.[126] The United States Supreme Court announced in *Standard Oil Co. of New Jersey v. United States*[127] that only those restraints in trade whose character or effect were unreasonably anti-competitive were outlawed by the act.[128]

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125. *See* Bork, *supra* note 121, at 781-82.

126. The common law developments of the American courts, although evidencing some concern for competition, were nevertheless too erratic and contradictory; no unified doctrine emerged that could be identified as the "common law" and then applied to the Sherman Act. Professor Bork describes the situation thus:

> Counsel in every case were able to cite common law precedent to support virtually every position they took. Probably for this reason, as well as the hopelessly anachronistic nature of any attempt to apply concepts evolved out of a medieval guild society to a modern commercial nation, the Sherman Act courts had never paid much more than lip service to the common law. Instead, uninstructed by the statutory text, the legislative history, or the common law, the first Sherman Act courts were required by an inscrutable but urgent legislative command to create useful social policy. They proceeded to discharge this delegated function with what appears in retrospect to have been considerable skill.

Id. at 784-85.

127. 221 U.S. 1 (1911).

128. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59 (1911). Chief Justice White made clear that the interpretation came from the common law:

> Let us consider the language of the first and second sections [of the Sherman Act], guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.... [T]he statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, or act, but all contracts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.... The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.... [I]t follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by this statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

Id. at 59-60.

Professor Bork discerns that this main tradition of rule of reason analysis was shaped by three men: Justice Peckham in United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); Judge Taft in United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898); and Chief Justice White in *Standard Oil, supra,* and in United States v. American Tobacco Co., 221 U.S. 106 (1911). Bork suggests that Peckham feigned a literal reading of the Sherman Act to stimulate a discussion on how to manage and control the flexibility of the statute. Bork finds "[b]rief but highly suggestive indication of the [Peckham's] 'rule of reason' " when Peckham indicated, in *Trans-Missouri, supra:*

> A contract [by the vendor of business property not to enter in the same kind of business for a certain time or within a certain territory] which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which

C. *The Modern Approach to the Rule of Reason*

Uncertainty concerning the applicability of the Sherman Act to the professions began with the decision of Mr. Justice Holmes in *Federal*

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the vendor sells it, which in effect, is collateral to such sale, might not be included within the letter or spirit of the statute in question.

Bork, *supra* note 122, *quoting* Mr. Justice Peckham in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 329 (1897). Mr. Justice White, not yet Chief Justice, dissented:

> But how, I submit, can it be held that the words, "Every contract in restraint of trade" *embrace all* such contracts, and yet at the same time it be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason.

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 352 (1897) (emphasis in original).

Subsequent to *Trans-Missouri,* but prior to any clarification of this case by the Supreme Court, then Circuit Court Judge Taft attempted to provide the Act with a workable standard. Instead of interpreting *Trans-Missouri,* Taft turned to the common law. Bork suggests that this was done so that Taft might join the disputes between Peckham and White, and unpresumptuously offer a construction of this statute that avoided what Taft perhaps perceived as the excessive rigidity of Peckham and the excessive fluidity of White. The common law, held Taft, voids restraints of trade that had the sole purpose of restricting competition, while it upheld those which were subordinate to another purpose. Taft thus offered as the solution to the interpretation of the rule of reason and the Sherman Act the concept of ancillary restraints. Announcing a list of five valid ancillary restraints, which Taft suggested was not exhaustive of the common law, he included an agreement by a partner not to interfere, by competition or otherwise, with the firm. *See* note 91 *supra.* Bork sees great similarities between the approaches of Peckham and Taft, despite the vast differences in terminology and expression. Taft's ancillary restraint paralleled Peckham's indirect or nonrestraint. Peckham's direct restraint paralleled Taft's nonancillary restraint. Bork finds it unclear whether either of them would find valid an ancillary restraint by parties controlling a dominant share of the industry, but he does conclude that Taft did not require market power to be a part of a cartel arrangement to make this contract illegal. While the modern law continues to find nonancillary agreements naked when they restrict competition, fix prices, or divide market without more, the concept of ancillary agreements has never been adopted. Bork suggests that Taft's concept of lawful ancillary contracts is underdeveloped, with its possibilities unexploited. He further contends that Taft's suggestion offered the Sherman Act form rather than content, and presents a viable standard for preserving contracts with socially saving value, while confining the exception to those cases with the same raison d'etre.

By 1911, after White had become Chief Justice, he took the opportunity in *Standard Oil* and in *American Tobacco,* merger and monopoly cases respectively, to generally set forth the law concerning the rule of reason and the Sherman Act. In *Standard Oil,* White's majority opinion held that the term "restraint of trade" took its meaning from the common law, but the statute was not limited to any narrow conception. Section 1 was a dragnet to assure that no "undue" restraint could escape condemnation. White listed the evils which led to the demand for antitrust legislation as:

> 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 52 (1911).

Concerning the terminology "undue restraints," one commentator has stated:

> The soft word in all of this is "undue". The function of "reason" in the rule is to discriminate between restraints which have that offensive quality and those which do not. Reason signifies analysis; the court invokes the "standard of reason" in resolving the only factual issue open for analysis, which is the question whether a particular practice restricts competition to a degree which could be called "undue". There is no suggestion that a saving grace might be judicially conferred upon an arrangement which does not specifically restrict competition on the ground that in the particular instance the public is better off.

L. SULLIVAN, *supra* note 13, at 173.

Baseball Club v. National League.[129] "Personal effort," said Holmes, "is not a subject of commerce," and professional baseball games, "although made for money would not be called trade or commerce in the commonly accepted use of those words."[130] Holmes cited the legal profession as an example of a service unrelated to production, and therefore not "commerce."[131] Professional baseball was therefore made exempt from the Sherman Act, as had been the learned professions. It was not until *Goldfarb v. Virginia State Bar*[132] that the professions were deemed to constitute a "trade or commerce" by the Supreme Court.[133] The *Goldfarb* decision did not specify, however, whether the Sherman Act would apply to the professions in the same manner that it applied to other businesses. Characterizing the perception of professional practice as interchangeable with other business behavior, the Court suggested that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently."[134]

This bit of dictum provided no significant signposts for the professions.[135] In response to this ambiguity the Supreme Court in *National Society of Professional Engineers v. United States,*[136] held that "[c]ontrary to its name, the Rule [of reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the rule of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."[137]

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129. 259 U.S. 200 (1922).

130. *Id.* at 209.

131. *Id.*

132. 421 U.S. 773 (1975).

133. *Id.* In holding that bar association fee schedules violated the Sherman Act, the Supreme Court took notice that the examination of land titles is a service, and the exchange of that service for money is commerce in the most common usage of the word.

Since the *Federal Baseball* decision, the Supreme Court has widely expanded the meaning of interstate commerce. *See, e.g.,* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). (Although activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control.) However, the baseball exemption in antitrust law survives. *See* Flood v. Kuhn, 407 U.S. 258, 279 (1972) (any change from the judicial exemption of professional baseball, unlike other professional sports, from the federal antitrust laws, given Congress' positive inaction, not disapproving, is a matter for Congress). As a result, the aberration created by Mr. Justice Holmes continues.

134. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975).

135. One writer has opined that the exact meaning of the Court could have been that the per se doctrine was to have given way to the rule of reason in cases concerning professions, or the meaning could be that "factors other than the ultimate impact on competition could be taken into consideration when the rule of reason was applied to the professions." Note, *Per Se Rule Applied to Ethical Canon Against Competitive Bidding,* 62 MARQUETTE L. REV. 260, 266 (1978).

136. 435 U.S. 679 (1978).

137. *Id.* at 678. The Court outlined the rule of reason as follows:

The test prescribed in *Standard Oil Co. v. United States* is whether the challenged con-

Examining the cross-ownership ban in *North American Soccer League v. National Football League,*[138] Judge Haight applied *Professional Engineers* to isolate the essential issue to be "whether the challenged agreement is one that promotes competition or one that suppresses competition," and looks to "the facts particular to the business, the history of the restraint, and the reasons why it was imposed" to determine the "competitive significance of the restraint."[139]

IV. THE RULE OF REASON APPLIED TO *NORTH AMERICAN SOCCER LEAGUE V. NATIONAL FOOTBALL LEAGUE*

In *North American Soccer League v. National Football League,*[140] the soccer league contended that any agreement in restraint of trade could only be justified as reasonable if it were carried out with the purpose and effect of accompanying a pro-competitive objective whose demonstrable benefits clearly outweighed the anti-competitive effects which the restrictions engendered.[141] The soccer league insisted that the cross-ownership ban was designed to accomplish anti-competitive objectives, and so severely restrained competition in the markets for sports ownership capital and entrepeneurial expertise that "no putative pro-

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tracts or acts "were unreasonably restrictive of competitive conditions. Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Id. at 690. (*Footnotes and citations omitted*).

Professional Engineers may have cleared up the ambiguity of *Goldfarb,* and restated the relevant considerations for rule of reason analysis to be strictly those concerning competition, but that position had already been made clear in Continental TV Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). One noted commentator states that the unanswered questions of *Sylvania* remain unanswered by *Professional Engineers.* The basic query is how the competitive factors are to be worked into a usable test. He sets out the following relevant questions:

> How important are market shares? Is there a threshold market share below which a Rule of Reason charge must fail, as several circuits have suggested? Alternatively, does the complaint fail if a substantial procompetitive reason for the challenged restriction can be shown? Or is a court really supposed to balance the gains to competition in one market against the losses in another — for example, interbrand against intrabrand competition? Do the courts have the tools to perform such a balancing act?

Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions,* 67 GEO. L.J. 1187, 1189 (1979). *Professional Engineers* did resolve albeit temporarily, that a gain in efficiency which does not enhance or increase competition is not a defense to restraint of trade under the rule of reason. The case emphatically reiterates the position that "the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of the members of an industry." National Society of Professional Engineers v. U.S., 435 U.S. 679, 692 (1978).

138. 465 F. Supp. 665 (S.D.N.Y. 1979).

139. North American Soccer League v. National Football League, 465 F. Supp. 665, 675 (S.D.N.Y. 1979).

140. *Id.* at 665.

141. Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, *supra* note 7, at 29.

competitive justification can save it from being found to be patently unreasonable and unlawful."[142]

If this is merely a restatement of a per se allegation of restraint of trade, then Judge Haight's rejection of that legal concept[143] turns the allegation into a statement of what the NFL must demonstrate. The football league must show that there is some pro-competitive justification for the ban. Since *Professional Engineers*[144] articulates the objectives of a balancing test under the rule of reason,[145] but accomplishes little in clarifying how the competitiveness issues should be analyzed,[146] some analytical approach must be developed. As a starting point for such a test, the Supreme Court announced in *Continental T.V. Inc. v. G.T.E. Sylvania, Inc.*[147] that the basis for a standard could be found in *Chicago Board of Trade v. United States,*[148] where Mr. Justice Brandeis stated:

> To determine [reasonableness] the court must ordinarily consider the facts peculiar to the business in which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.[149]

As several authors have pointed out, even the Brandeis questions are too general to provide a test for a balance of one type of competition against another.[150]

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142. *Id.*

143. North American Soccer League v. National Football League, 465 F. Supp. 665, 673 (S.D.N.Y. 1979).

144. 435 U.S. 679 (1978).

145. *See* note 115 and accompanying text *supra.*

146. *See* note 116 and accompanying text *supra.*

147. 433 U.S. 36 (1977).

148. 246 U.S. 231 (1918).

149. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). Professor Bork has stated in regard to the Brandeis view of the rule of reason:

> Brandeis' rule of reason, though also well outside the main tradition of the law has, unlike Holmes', not proven barren. ... A strong underlying policy orientation of Brandeis' rule seems to have been sympathy for small, perhaps inefficient, traders who might go under in fully competitive markets. His rule thus spoke for the tempering of competition by private agreement. This, of course, is an enduring strand in antitrust policy, reflecting there a strong anticompetitive element of our national social policy. But the staying power of Brandeis' rule probably owes as much to its very lack of that conceptual clarity which characterized Holmes' rule. Its less respectable, because unadmitted, anticompetitive aspects were thus often difficult to isolate and identify. This very element of blurriness, moreover, made Brandeis' version of the law convenient for judges working within the main tradition whose own doctrine lacked sufficient distinctions to validate the occasional agreement not to compete which seemed legitimate for reasons they found difficult to articulate. Brandeis' phrasing of doctrine thus sometimes served to give the Peckham-Taft-White rule of reason the flexibility which it required but lacked the economic framework to achieve.

Bork, *supra* note 121, at 815.

150. *See, e.g.,* Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. CHI. L. REV. 1, 15 (1977); Bork, *supra* note 121, at 840.

A. Market Power

In any antitrust analysis, the relevant market must be defined. That done, the analysis must then proceed to the relative abilities of the parties to affect competition within that market. Typical market definitions include a determination of the geographic market and the product market.[151] In order to adhere to the Brandeis objectives, however, the analysis should not be solely restricted to geography and traditional concepts of product definitions.[152]

Both the NFL and the NASL are the paramount leagues for their respective sports in the United States.[153] They, as well as the other major professional sports leagues in baseball, basketball and hockey, compete with other leisure time activities for the U.S. entertainment dollar. The NFL is largely dominant in the professional sports business,[154] which is a subset of the entertainment market. There are at

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151. *See* L. SULLIVAN, *supra* note 13, at 41. The adopted analysis here parallels that found in Comment, *A Proposed Rule of Reason Analysis for Restrictions on Distribution,* 47 FORDHAM L. REV. 527, 545-49 (1979), in that it consists of four parts: (1) a determination of the restricting NFL's market power as compared to that of the NASL; (2) an inquiry into the freedom of access to competitive capital and entrepreneurial expertise; (3) an examination of the economic justifications of the ban on competition; and (4) an evaluation of the excessiveness of the restraint. This structure will hopefully give specificity to the Brandeis questions. *See* note 137 and accompanying text *supra.*

152. One commentator has stated that rather than being an issue with its own significance, or a jurisdictional prerequisite, market definition is merely an aid for determining whether market power exists. *See* L. SULLIVAN, *supra* note 13, at 41. Moreover, modern legal analysis, at least of monopoly issues, begins with the opinion of Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Hand developed a two-step process consisting of first defining the market and then measuring its power. This process has been followed, at least in form, in most courts since *Aluminum Co. See, e.g.,* Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975); United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E.I. Dupont DeNemours & Co., 351 U.S. 377 (1956); Twin City Sportservice Inc. v. Charles O. Finley & Co., Inc., 512 F.2d 1264 (9th Cir. 1975); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

"Relevant Market" has been defined as "the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market." L. SULLIVAN, *supra* note 13, at 41. The market is defined in *geographic* terms to demonstrate its power limits, so that if sufficient supply would promptly enter from other geographic areas, then the market is not widely enough defined in geographic terms. Similarly, the market is defined in *product* terms to demonstrate its power limits, so that if sufficient supply would promptly enter in the form of products made by other producers which had not been included in the product market definition, then the market is not widely enough defined in product terms. *Id.*

It should be noted that the time dimension in market definitions may also be relevant: "[Time] is seldom critical in the process of defining the market geographically. But time delays may be crucial in defining a product market. Competition among alternative products which is almost non-existent in the short run may appear intense in the long run." L. SULLIVAN, *supra* note 13, at 42. This comment suggests an even narrower time element in the product market definitions for professional team sports enterprises. For a discussion of the relevance of the seasonal market for professional soccer and professional football, *see* note 197 and accompanying text *infra.*

153. *See* J. Michener, *supra* note 17, at 43; K. ROTE, JR. & B. KANE, *supra* note 16, at 87, 88.

154. K. ROTE, JR. & B. KANE, *supra* note 16, at 87, 88. Attendance records for professional football are above 60,000 fans per game. National television contracts, on all three networks, are

least two relevant submarkets in which the NFL and the NASL compete.

1. The Franchise Market

Individual owners of NFL franchises and NASL franchises stand in a potential buyer/seller relationship in the soccer franchise market. It was the NASL contention that all professional sports leagues in the United States compete directly for available sports ownership capital and experienced sports entrepreneurial talent.[155] Free access to this capital and skill for new entrants such as the NASL was argued to be a fundamental prerequisite to the new league's efforts in support of the "continuing process of experimentation and change in franchise location and ownership that is invariably required" for long term success.[156]

According to the NASL, only a relatively small number of individuals has ever expressed a serious interest in acquiring ownership of a professional sports franchise, and the demand for investment dollars and skill has far exceeded the supply.[157] The soccer league contended that the restriction on twenty-eight potential buyers which the ban imposed was unreasonable. If there were no possibility of supply substitution, the NFL market power would be obviously substantial.[158]

The first question to be considered should therefore be whether supply substitutability in this market — the attraction of suitable capital and skill from other industries or other team sports — alleviates the impact of the ban.[159] Stated more simply, the first question should be

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valued at more than $500,000,000. Franchises are estimated to be in the $30,000,000 range. *See* North American Soccer League v. National Football League, 465 F. Supp. 665, 666 (S.D.N.Y. 1979); Woosnam Affidavit, *supra* note 37, at 9. Rozelle Affidavit, *supra* note 8, at 14. Dun & Bradstreet Inc. lists the annual sales of the Green Bay Packers at $5,000,000. Dun & Bradstreet, Inc., MILLION DOLLAR DIRECTORY 1308 (1980).

The NASL, although enjoying substantial success after 1977, is still plagued by tenuous stability, little or no profits, and little network television exposure. Average attendance hovers around 20,000 per game. Franchise values are in the $2,000,000 to $3,000,000 range. *See* North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979); Woosnam Affidavit, *supra* note 37, at 9; Rozelle Affidavit, *supra* note 8, at 15. Television coverage is limited to six season matches, and the soccer bowl, plus playoff highlights. *See* THE COMPLETE HANDBOOK OF SOCCER, at 172 (1980).

155. *See* Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 7, at 22: Woosnam Affidavit, *supra* note 37, at 13-15.

156. *See* Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 7, at 22.

157. *Id.*

158. For a discussion of the market power of the NFL in the limited market of professional team sports owners, *see* notes 194-98 and accompanying text *infra.*

159. The concept of supply substitutability is one borrowed from an analysis of relevant markets in monopolization cases. The normal measure of monopoly power is the firm's share of the market. *See, e.g.,* United States v. Aluminum Company of America, 148 F.2d 416, 424-25 (2d Cir. 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). The mere fact that a firm is the sole producer of a product does not necessarily compel the conclusion that the firm might exercise monopoly power. If the

whether the relevant market for franchise sales is the soccer franchise market, the sports franchise market, or the entertainment unit market.[160] A comparison of the three in light of their product differences may shed some light on the inquiry.

Professional sports differ from other entertainment products in that the activities are more attractive to the vicarious participant.[161] Sports entrepreneurs are typically interested in sports franchises for the sport as well as the business.[162] The most marked distinction between the soccer franchise market and other sports is the price difference.[163] In defining the relevant market for sports capital, the soccer league must therefore demonstrate a demand for low-cost sports franchises which cannot be satisfied with entertainment capital.

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producer raised prices, some buyers would purchase other goods that they regard as interchangeable, rather than pay more. Therefore, the availability of the demand substitutes constrains the producer from raising prices.

By the same token, a producer who successfully raises prices may cause other products to enter the market. This entry would raise supply and therefore tend to lower the market price. Potential competitors are realistically a part of the relevant market. For a discussion of the effect of potential competition analysis in North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979), *see* notes 175-88 and accompanying text *infra.*

For a discussion of the concept of supply substitutability, *see* Comment, *The Role of Supply Substitutability in Determining the Relevant Product Market,* 65 VA. L. REV. 129 (1979). *See also* notes 164-69 and accompanying text *infra.*

For a discussion of the applicability of the supply substitutability concept to North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979), *see* notes 170-74 and accompanying text *infra.*

160. For a discussion of the positions of the NASL and NFL regarding the appropriate relevant market definitions in North American Soccer League v. National Football League, 465 F. Supp. 665 (S.D.N.Y. 1979), *see* notes 65, 75, 79-81 and 89 and accompanying text *supra.*

161. Recent studies concerning entrepreneurs in general have indicated that in a typical week 8,400 corporations are founded, and about 8,400 are discontinued. According to Joseph Mancuso, Director of the Center For Entrepreneurial Management in Worcester, Massachusetts, a true entrepreneur will rarely put money into lottery tickets, but, given a bet in which he controls his own fate, he will take the chance immediately. Robert Brockhaus, Associate Professor of Management at St. Louis University states that self-confidence is not enough, and would-be entrepreneurs typically lack knowledge of how to run a business and underestimate the amount of capital needed. Despite the losses, however, the irrepressible entrepreneur survives to invest in another venture. Mr. Mancuso predicts: "There will always be entrepreneurs, even if they're taxed at 85%." The Wall Street Journal, April 4, 1980, at 18, col. 3.

162. *See, e.g.,* J. MICHENER, *supra* note 16, at 453, where the author states:

> [T]he majority of owners that I have met are like Joe Robbie of Miami, real devotees, men and women to whom the building of a respectable team becomes a passion, and they add luster to the sporting scene. Some of them may originally have bought their teams for financial advantage, but they soon found themselves bewitched by sports. In the end they are willing to make extraordinary sacrifices in order to build a winner, and their loyalty to their team often excells that of their players.

Id.

The owner of the Dallas Cowboys was quoted as saying: "You could make more money investing in government bonds, but football is more fun." Clint Murcheson, *quoted in* J. MICHENER, *supra* note 16, at 454.

163. *See* North American Soccer League v. National Football League, 465 F. Supp. 665, 672 (S.D.N.Y. 1979).

Defining the relevant market for franchise sales may be accomplished by analyzing the concept of supply substitutability as a definitional tool for relevant markets. The normal thrust of the supply substitutability concept is that the ability to enter a market quickly and cheaply indicates that the market is broader than the existing products. The theory, which is generally applied to alleged violations of section 2 of the Sherman Act,[164] and section 7 of the Clayton Act,[165] can nevertheless have some relevance here.[166] The first significant recognition of the concept by the Supreme Court came in *United States v. Columbia Steel Co.*[167] The initial reaction of some courts was to reject the supply substitutability argument,[168] while others circumvented it by defining submarkets.[169]

The applicability of the supply substitutability doctrine to *North American Soccer League v. National Football League*[170] would be that the availability of other entertainment capital and the readiness of sport skill broadens the sports entrepreneurial market considerably, so that the twenty-eight NFL owners are an insignificant portion of the market. The supply substitutability doctrine was first applied to the market definitions for sports franchises in *Twin City Sportservice v. Charles O.*

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164. 15 U.S.C. § 2 (1970). The Section states:

> Every person who shall monopolize, or attempt to monopolize, or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

165. 15 U.S.C. § 18 (1970). Section 7 of the Clayton Act refers to illegal acquisition by a corporation of the stock of another.

166. The concept of supply substitutability is merely a tool for defining the relevant markets, and is not entwined with any other generic antitrust theory; it may therefore be applied for the same purpose to section 1 cases. *See* notes 152 and 157 *supra.*

167. 334 U.S. 495 (1948). In *Columbia Steel,* the United States sought to enjoin U.S. Steel from acquiring a major independent fabricator, contending that the company sought to be acquired would receive its entire demand from the acquiring supplier. It was for the Court to decide whether the relevant market for determining the degree of the potential market foreclosure included only plates and shapes, or included all rolled steel products. The Court, using the supply substitutability concept, opted for the broader market. The Court relied on the theory that if the rolled steel producers could make other products as easily as plates and shapes, then the removal of the acquired company's demand in the market had to be measured against the market for all comparable rolled products.

168. *See, e.g.,* L. C. Balfour v. FTC, 442 F.2d 1 (7th Cir. 1971) (test for defining market should focus on buyer's behavior and not on seller's present or potential conduct); United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958) (definition of a line of commerce which ignores buyers and focuses on seller's conduct, or theoretical potential, is not meaningful).

169. *See, e.g.,* United States v. Pennzoil Co., 252 F. Supp. 962, 975 (W.D. Pa. 1965) (since these refiners produce Penn grade crude oil, Penn grade is the relevant market, not other oils which they could produce); Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962) (even though manufacturers could quickly convert from decorative foil to florist aluminum foil, the relevant market was florist aluminum foil because other manufacturers were not producing it.).

170. 465 F. Supp. 665 (S.D.N.Y. 1979).

Finely & Co.,[171] where the owner of the Oakland Athletics, the American League Baseball franchise, alleged that the exclusive concession franchisee for the team's home games had violated sections 1 and 2 of the Sherman Act by monopolizing the sale of concession services by major league baseball, and particularly by a long-term contract that ran and moved with the franchise, irrespective of the owner or the new location. The Ninth Circuit Court of Appeals in *Twin City* adopted a supply substitutability approach and concluded that because buyers of franchises for leisure time activities other than baseball had the ability to buy franchises sold by major league baseball at a minimum changeover cost, and since other baseball clubs supplied their own concessions, then all were probably competitors and therefore part of the relevant market.[172]

If such a novel approach is to be taken, the question remains whether the movement in and out of the franchise business is one that is easily accomplished with minimal changeover cost. Some key facts seem to show that, at least historically, the soccer franchise has been so volatile, and the presence of football owners' capital along with other cross-ownership capital has been so vital to the soccer franchise business, that the movement in and out of the business is not easily accomplished without substantial loss.[173] The primary interest is the long range growth of the franchise, and not any present speculative value for a short term turnover.[174]

2. The Entertainment Markets

The second relevant market in which the NFL and the NASL compete is the entertainment market for ticket sales and television revenues.

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171. 512 F.2d 1264 (9th Cir. 1975), *rev'g and remanding* 365 F. Supp. 235 (N.D. Cal. 1972). The district court held for Finley, the owner of the Oakland baseball club.

172. *Id.* at 1271-73.

173. Thus, the ultimate factual question in the case would be whether a loss would be sustained by a purchaser from outside the sports franchise market. Testimony is expected from expert witnesses concerning the existence of the sub-market for sports franchises and its non-existence, respectively. *See* NFL Defendants' Pre-Trial Memorandum of Law, *supra* note 8, at 35-37. The Memorandum stated that plaintiffs have claimed that NFL owners are uniquely willing to pay above market price for NASL teams, and contended:

> To substantiate this novel theory, plaintiffs must show that NFL cross-owners regularly and customarily pay or offer to pay materially higher prices for NASL teams than all other potential investors. Were this true, plaintiffs no doubt would show that specified current NFL control group members stand ready to bid above other potential soccer investors.

Id. at 37.

It is contended in this comment that the plaintiffs must show that no other investors but a present team sports franchise owner can muster the expertise and be willing to suffer the losses of a fledgeling soccer franchise, thus demonstrating that the soccer franchise market cannot be easily entered into without substantial loss. *See also* Woosnam Affidavit, *supra* note 37, at 9; note 154 *supra*.

174. *See* Woosnam Affidavit, *supra* note 37, at 9.

According to the NFL, professional soccer at present competes with the NFL for fans, ticket sales and television revenues.[175] Although neither side really contests the fact that they are competitors in this market, it is here that the traditional facets of relative market tradition, that is, the geographical and product definitions, may leave a large gap in "the facts peculiar to the business to which the restraint is applied."[176]

When an analysis of present major team sports schedules is made, it is evident that the natural competitors are baseball and soccer in one set, while hockey, football and basketball compete in another.[177] With the exception of about one week of soccer playoffs overlapping the opening of the football season, and perhaps another week or so of indoor soccer overlapping the Superbowl, in time and space the NASL and NFL are not actual competitors for sports dollars, either in the stadium or on the television screen. Of course they are potential competitors if either league wishes to expand its season. However, the relevant markets can be seen to have a seasonal quality of such competitive significance that antitrust analysis could require a subdivision of the sportsdollar market into the spring/summer market and the fall/winter market.[178]

Such an analysis appears to work well for the NASL. If the NFL and the NASL are true competitors for franchise financing, but only potential competitors for sports dollars, the pro-competitive aspects of cross-ownership are enhanced and the anti-competitive aspects of the cross-ownership ban are increased, so that a balancing of the two compels a finding in favor of cross-ownership. The pro-competitive aspects of cross-ownership are enhanced by a finding that the relevant market for franchises is the soccer franchise market. This is so because cross-ownership increases the demand for franchises and increases the supply of capital for them. Conversely, the ban is anti-competitive because it destroys a significant portion of the demand for those franchises and eliminates a significant supply of capital for them.[179]

Considering the market for leisure time or sports entertainment dollars, the analysis of the pro-competitive effects of the cross-ownership ban are a little more troublesome. The key is in the finding

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175. *See* Rozelle Affidavit, *supra* note 8, at 8; Woosnam Affidavit, *supra* note 37, at 27.

176. *See* note 149 and accompanying text *supra.*

177. The 1979 soccer season began in March and ended in September. The professional baseball season ran from early April until mid-October. The basketball season ended in April and resumed in October. Football ended in January and resumed in September. Hockey ended in April and resumed in October. *See generally* THE COMPLETE HANDBOOK OF SOCCER (1979); THE COMPLETE HANDBOOK OF BASEBALL (1979); THE COMPLETE HANDBOOK OF BASKETBALL (1979); THE COMPLETE HANDBOOK OF FOOTBALL (1979); THE COMPLETE HANDBOOK OF HOCKEY (1979). The growing interest in indoor soccer may change this configuration in the future. *See* note 37 *supra.* For the present, however, the two do not compete seasonally.

178. *See* note 152 *supra.*

179. *See* note 189 *infra.*

that the markets are seasonal, and that soccer and football are merely potential competitors. Borrowing the potential competition theory employed in the analysis of governmental challenges to mergers, some clarification of this problem can be found. The thrust of this theory is that if the effect of the loss of potential competition in any relevant market substantially lessens competition or tends to create a monopoly, then a violation of section 7 of the Clayton Act exists.[180] The application of this theory to *North American Soccer League v. National Football League* would be that if cross-ownership of a football and a soccer team would eliminate the possibility of either of these teams entering the other's seasonal market, thus substantially lessening competition, then cross-ownership would be anti-competitive.

There are two distinct theories within the potential competition doctrine. These are the perceived potential entrant theory and the actual potential entrant theory. The perceived potential entrant theory concerns itself with the present effect the potential competitor has on the market. If competitors within an oligopolistic market perceive a company outside the market is a likely entrant, they will keep prices and profits lower to discourage entry. If the perceived potential entrant then acquires a substantial firm already within the relevant market, the formerly induced pro-competitive behavior in the market is lost.[181]

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180. *See, e.g.,* United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) (Government's sole case rested upon potential competition doctrine under § 7 of Clayton Act prohibiting corporate mergers which may substantially lessen competition; Government contended that if merger is prohibited, acquiring bank will find an alternate and more competitive means for entering the geographic market and that the acquired bank will ultimately develop internally or by permissible merger with smaller banks into an actual competitor of the acquiring bank and other large banks in the area); United States v. Falstaff Brewing Corp., 410 U.S. 526 (1972) (an acquisition by a company not competing in the same market as the acquired company is not legal merely because the acquiring company would never have entered the market de novo, but only by acquisition; separate consideration must be given to whether the acquiring company was a potential competitor in the sense that it was so closely positioned to the market that it exerted beneficial influence on competitive conditions in the market); *but see* BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977) (world's second largest producer of industrial gases was entitled to remand and reconsideration of FTC ruling that it divest itself of interest in American Company in the same field, since the Commission, in invoking actual potential competition doctrine, erred in employing as a standard the reasonable probability of eventual entry into the United States market for industrial gases by the multinational corporation); FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977) (evidence in action to prevent merger between petroleum producer and copper company warranted a finding that the petroleum producer was not an actual potential entrant into uranium market by original entry or toehold acquisition).

181. *See, e.g.,* United States v. Marine Bancorporation Inc., 418 U.S. 602, 624-25 (1974) (§ 7 encompasses what is commonly known as the "wings effect," *i.e.,* the probability that the acquiring firm prompted pre-merger pro-competitive effects within the target market by being perceived by the firms already in that market as likely to enter de novo; the elimination of such present pro-competitive effects may render a merger unlawful); United States v. Falstaff Brewing Corp., 410 U.S. 526, 532 (1972) (although an acquiring company's competitive conduct in the market may be the mirror image of the acquired company's conduct, it may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market); FTC v. Proc-

Actual potential entrant theory concerns itself with loss of future rather than present competition. Awareness of the potential entrant is unnecessary, and what is sought to be preserved is the prospect of a more pro-competitive form of entry. If the potential entrant acquires a larger company already in the relevant market and steps into the shoes of the established firm, competition is left the same as it was before the merger. If the potential entrant can be dissuaded from entering through a major acquisition, and instead encouraged to enter by internal development or by a minor acquisition,[182] a new pro-competitive force is added.[183] The potential competition theory therefore presents three

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tor & Gamble Co., 386 U.S. 568, 580 (1967) (finding that acquisition eliminated the acquiring company as a potential competitor is warranted when evidence shows that the acquiring company was the most likely entrant to the industry, even though it had never attempted to enter, and there was no evidence of its intent to enter); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173 (1964) (effect of merger requires an appraisal of the impact on competitive conditions in the future; such prediction is sound only if it is based upon a firm understanding of the structure of the relevant market). The potential competition theory presents the concept of the "limit-price" model, *i.e.*, competitors within the market will keep prices and profits low to discourage potential entrants. The theory has been the subject of some criticism. *See, e.g.*, Note, United States v. Falstaff Brewing Corporation, Potential Competition Reexamined, 72 MICH. L. REV. 839, 848-51 (1973).

For a discussion of the potential competition theory and the limit-price model, *see generally* L. SULLIVAN, *supra* note 13, at 651-52; Tomlinson, *Potential Competition: Analysis of an Antitrust Case,* 44 MO. L. REV. 458 (1979); Brodley, *Potential Competition Mergers: A Structural Synthesis,* 87 YALE L. J. 51 (1977); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1362-65 (1965).

182. Relevant to the discussion of potential competition is the "toehold" theory, which is best explained in FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977), where the court defined a toehold as:

> (1) a small available corporation with (2) the relevant technical expertise (3) which is not dominant or otherwise significant in the American or Foreign market and which (4) has a reasonable likelihood of serving as a viable market entry vehicle.

Id. at 112 (footnotes omitted). A toehold company, under the actual potential competition theory, can have the same pro-competitive effect if acquired by merger as would a de novo entry into the market.

183. *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); In The Matter of Beatrice Foods, Inc., 67 F.T.C. 473, 1967 TRADE REG. REP. (CCH) 72,124 (1965) (fact that the acquisition resulted in the injection of a strong national company into a market which consisted almost entirely of local companies, substantial position of acquired company in that market, and substantial increase in concentration of national companies in the market leads to conclusion that the acquisition may substantially tend to lessen competition, or tend to create a monopoly). In BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977), the court stated:

> The Supreme Court has twice declined, United States v. Marine Bancorporation, Inc.; United States v. Falstaff Brewing Corp., to pass on the validity of the theory that has come to be known as the "actual potential entrant" doctrine .... This doctrine would proscribe as violative of Section 7 of the Clayton Act, a company's acquisition of a large firm in an oligopolistic market if the acquiring company at some future date is expected to enter the company de novo or through a "toehold" acquisition of a firm lacking a significant share of the market.

Id. at 25 (citations omitted). In FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977) the Fourth Circuit Court of Appeals stated: "[T]he doctrine of *actual* potential entry as a basis for finding a violation of the antitrust laws is an evolving doctrine and not one with regard to which a body of controlling authority has yet been developed." *Id.* at 293 (emphasis in the original).

possible scenarios, one of which destroys competition, one which has no effect on competition, and one which enhances competition.[184]

Accordingly, the only anti-competitive behavior which cross-ownership can produce in the sports entertainment market occurs when it discourages season expansion altogether, as in the perceived potential competitive scenario.[185] Even there, the limit-price[186] effect is not likely

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184. Because of the NASL's relatively small market power and market share in the spring/summer sports market, it seems that the toehold theory provides a more appropriate analysis of any NASL franchise acquisition by an NFL franchise owner. Television interest ratings of American households indicate that in the 1978 sports season, 47.1 percent watched the Super Bowl, 20.1% watched ABC Monday Night Football, 15.3% watched CBS football, and 12.1% watched NBC football. The World Series in baseball was viewed by 32.8%, and 26.1% viewed the all-star game, with 12.75% watching the regular season baseball games. The other sporting events rated were horse racing, basketball, bowling, auto racing, golf, tennis and multi-sports series. It should be noted that no figures were included for soccer. THE WORLD ALMANAC 887 (112th ed. 1980). The Sports Broadcast Act, 75 Stat. 732 (current version at 15 U.S.C § 1291) (1970), exempts from the antitrust laws any joint agreement among persons engaged in the professional team sports of football, baseball, basketball and hockey to transfer their bargaining rights for television to the league to be negotiated as a unit. Conspicuously absent from the provision is the professional soccer league.

185. In this situation the purpose of the acquisition would be to prevent an entry at all. It should be noted that in order to thwart league seasonal expansion, the malefactors would have to secure a majority vote.

186. *See* note 181 and accompanying text *supra*. According to *United States v. Falstaff Brewing Co.*, 410 U.S. 526 (1972), a perceived competition case need not turn on whether target market firms actually perceived the acquiring firm as a potential market entrant, but on whether a rational firm, knowing the complete economic facts would have so perceived. *Id.* at 534. However, while objective evidence may give no direction, subjective evidence on this point is apt to be greatly influenced. The proof would center around the testimony of the managers of other target market firms, who as competitors of the acquired company, have some interest in the outcome. This is apparently the case at least with baseball, which is reported by the NFL to have essentially the same policy concerning cross-ownership as the NFL, while the old AFL (*see* note 40 *supra*) and the present NASL have regulated only cross-ownership with competing leagues in the same sport. Others, such as the National Hockey League (NHL) only prohibit ownership of two teams in the same league. *See* NFL Defendants' Pre-Trial Memorandum of Law, *supra* note 8 at 34.

United States v. Marine Bancorporation, 418 U.S. 602 (1974), required four elements of proof for sustaining the Government's case in potential competition mergers. First, the target market must be highly concentrated, so that market behavior is presumptively oligopolistic. Second, the acquiring firm must be a probable market entrant. Third, entrance by the acquiring firm must have significant pro-competitive impact. Fourth, the acquiring firm must be perceived as a potential entrant, and that potential must have had a pre-acquisition effect on behavior in the target market. *Id.* at 639. Proof of these elements confounds the practicality of litigation. It has been suggested that predicting the future competitive effects of horizontal merger, based on analysis of the relevant economic factors is unmanageable. *See* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 339 (1960).

One author has suggested a structural-presumptive approach to replace the performance and conduct approaches that create such burdensome and intractable proof problems. *See* Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L. J. 51, 68 (1977). Defining the proximate market by characterizing the proposed acquisition as a (geographic) market extension or a product extension, the author found the most severe enforcement breakdown to be in the product extension cases. *Id.* at 68. Brodley suggests two tests to measure product extension: the market similarity test and the observed entry test. The former would be measured by both production and marketing terms. (The latter is not discussed here, as it appears irrelevant to the situation

to be lost, because the oligopolistic market still contains other strong competitors in the sports market.[187] This of course lessens with the acquisition of more and more of the possible franchises in a geographical area.[188]

Discouragement of seasonal expansion altogether is unlikely for several reasons. To begin with, those cross-owners who acquire teams in the same geographic market do so usually for economies of scale[189] such

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for sports franchises entering one another's seasonal markets.) Outlining his structural analysis, Brodley suggests:

> A product extension acquisition would be presumptively unlawful where (A) the acquiring firm is either (1) one of the two largest out-of-the-market firms with market share of at least 10 percent and $100 million in a closely proximate product market, or (2) one of the 200 largest industrial corporations (or comparably sized other firm) with significant sales in the proximate market, (B) the target market is highly concentrated, and (C) the target firm has a share of at least 10 percent.

Id. at 83. Within the situation concerning the NFL owners acquiring a soccer franchise, criterion (B) may be present, and criterion (A)(1) may be met if the league's sales were considered as a unit, but it seems unlikely that it can be demonstrated that soccer has a 10% share of the spring/summer sports market. *See* note 184 *supra.*

187. It is not suggested that the potential competition theory does not apply until all of the oligopolistic market participants are eliminated, but rather that the market power as measured by market share for the NASL is not strong enough to affect the oligopolistic market.

188. Since other major team sports have larger market shares than the NASL, the effects would vary.

189. Commissioner Woosnam listed fifteen NASL and NFL franchises playing in the same geographical area, and indicated that only two of them do not share stadiums at this time. *See* Woosnam Affidavit, *supra* note 37, at Exhibit 2. Only one of the presently cross-owned teams takes advantage of the situation. The Seattle Sounders share a stadium with the Seattle Seahawks. Another cross-owned team, the Dallas Tornado, shares a stadium with the Dallas Cowboys, but the cross-owner of the Tornado, Lamar Hunt does not presently own the Cowboys, but rather owns the Kansas City Chiefs. While the cross-owners of the Fort Lauderdale Strikers and the Miami Dolphins have the potential of perhaps sharing some stadium in the future, it would seem that the remaining cross-owned franchises, the California Surf and the St. Louis (football) Cardinals do not. *See* Woosnam Affidavit, *supra* note 37, at 14-15. The NFL counters that this high degree of shared facilities is not only evidence of great cooperation, but further demonstrates that the economies of scale can be accomplished without cross-ownership. *See* Rozelle Affidavit, *supra* note 8, at 26, 27. Although the NFL insists that the shared facilities policy will continue unaffected by the ban, *see* Rozelle Affidavit, *supra* note 8, at 27, the football perception of soccer as a rival would seem to militate against such cooperation. Furthermore, the greatest economies of scale in stadium sharing can only be realized by the stadium owners. The owners of most major team sports stadiums are the public, and while the stadiums were touted as multi-purpose arenas, their usefulness is usually limited. Baseball stadiums such as Shea Stadium in New York are inadequately designed for football. Philadelphia's Veterans Stadium may be an exception. But almost any stadium adequate for football is suitable for soccer as well. For a discussion of financing and planning for major stadiums, *see* J. MICHENER, *supra* note 16, at 421-28.

Moreover, at the time of the filing of the complaint in North American Soccer League v. National Football League, 465 F.Supp. 665 (S.D.N.Y. 1979), owners of seven NFL franchises had expressed an interest in purchasing some or all of the interest in a new or existing NASL franchise. They included the NFL owner of the Cleveland Browns, who expressed a desire to organize and participate as an owner in an NASL franchise in Cleveland, to be created through expansion; the NFL owner of the Tampa Bay Buccaneers, who approached the owner of the NASL Tampa franchise with whom his team shares a stadium, and expressed an interest in purchasing part of the NASL franchise; the NFL owner of the Oakland Raiders, who expressed an interest in an NASL

as shared stadium and promotional facilities. A present motivation for this acquisition would be to eliminate the seasonal aspect of the enterprise by acquiring a spring/summer franchise and a fall/winter franchise. Accomplishment of this does not destroy season expansion, particularly with soccer and football, since different days or game times would eliminate any interference, and the determination as to whether the season should be expanded would hinge basically on considerations of market saturation. Presumably, the variety would generally tend to expand the entire sports dollar market in the area, and the economies of scale would make such an enterprise a practical risk for the cross-owner. Moreover, there is no evidence in the record that present cross-owners have resisted seasonal expansion, or whether they as a group have sufficient market power to do so successfully.

B. Freedom of Access to Capital and Skills

The plaintiffs in *North American Soccer League v. National Football League*[190] indicated that in recent years there have been at least forty-three instances of individuals or entities that have had ownership interests in two or more professional team sports at the same time.[191] Moreover, one cross-owner has been unquestionably the most powerful force in the founding, survival, and expected growth of professional soccer in the United States.[192] If the substitution of other entertainment capital is to be denied,[193] then it can be concluded that the freedom of access to capital and skills has been seriously restricted.

Of the 121 teams in the major leagues of football, baseball, basketball, hockey and soccer, twenty-eight are NFL teams. That represents

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franchise in the San Francisco Bay area; the NFL owner of the San Francisco 49ers, who concluded negotiations for the purchase of both a part of the NASL Tampa franchise and all of a new Cleveland franchise; the NFL owners of the Atlanta Falcons who expressed interest in a new Atlanta NASL franchise; and the NFL owner of the Los Angeles Rams, who had expressed an interest in the purchase of either the NASL Los Angeles or Anaheim franchises. All of these situations, save the NFL San Francisco proposal, lend themselves to shared stadium facilities. Carroll Rosenbloom, whose expressed purpose in wishing to purchase the Los Angeles Aztecs NASL franchise was to share stadium facilities with the NFL Los Angeles Rams which he already owned, also expressed interest in the Anaheim NASL club, stating that the location of the NASL franchise which he desired to purchase would be largely dependent on the ultimate location of his football team. *See* Woosnam Affidavit, *supra* note 37, at 15-16, 20-21.

190. 465 F. Supp. 665 (S.D.N.Y. 1979).

191. *See* Woosnam Affidavit, *supra* note 37, at Exhibit 1. Some individuals own interest in more than two major league team sports. More instances of cross-ownership have developed since the complaint was filed. For example, Harold Mangurian, owner of the NASL Memphis Rogues and the NBA Buffalo Braves, has purchased the Boston Celtics. *See also* note 52 *supra*.

192. For a discussion of the role of Lamar Hunt in the soccer and football industries, *see* notes 19, 21, 43, 51 and 52 and accompanying text *supra;* notes 200 and 205-06 and accompanying text *infra*.

193. For a discussion of the concept of supply substitutability and its relationship to North American Soccer League v. National Football League, *see* notes 165-74 and accompanying text *supra*.

over twenty-three percent of the entire number of franchises. Since twenty-four of the franchises are NASL teams, the actual total of ownership groups that the NASL could draw upon is only ninety-seven, without the NFL ban. If the ban were to be imposed, that number would be reduced to sixty-nine ownership groups within the team sports business whose demand for soccer franchises could be supplied by the NASL. The twenty-eight franchises represent over twenty-eight percent of the demand for soccer franchises within the team sports capital market.[194] Presently eight NFL franchises are involved with cross-ownership, and at least four with the NASL. Several NFL owners have expressed an interest in purchasing a soccer franchise.[195] Although the economies of scale available when teams share facilities presently are effected to some degree without cross-ownership,[196] at least one NFL owner has expressed serious interest in acquiring an NASL franchise for that expressed purpose.[197]

Moreover, although stadium facilities are shared presently, and sports entrepreneurial talent is pirated regularly in the industry, the self-preservative motives of the NFL in effecting the ban seem to compel a conclusion that future contracts with non-owner managers will include a covenant not to compete with the NFL in the future.[198]

C. Economic Justifications for the Ban

1. Commercial Confidentiality

Given the present state of the sports dollar aspect of the competition between the NASL and the NFL,[199] and given the past and present degrees of cross-ownership in the NFL,[200] it seems difficult to justify any ban on the basis of protection of confidentiality. This appears particularly true when, accepting a potential competition theory, it is also accepted that cross-owners do not wish to stifle league lengthening of the season.[201] Once cross-ownership is effected, it could only be a con-

194. There are 26 baseball franchises, 22 basketball franchises, 21 hockey franchises, 28 football franchises, and 24 soccer franchises in the major leagues. THE WORLD ALMANAC 862 (112th ed. 1980).

195. *See* note 189 *supra.*

196. *Id.*

197. *Id.*

198. *See, e.g.,* Rozelle Affidavit, *supra* note 8, at 8.

199. *Id. See also* notes 173-74 and accompanying text *supra.*

200. *See* notes 40, 47, 51 and 52 and accompanying text *supra.* The four presently cross-owned teams are the NASL Fort Lauderdale Strikers and the NFL Miami Dolphins, owned by the Robbie family, the NASL Dallas Tornado and the NFL Kansas City Chiefs, owned by Lamar Hunt, the NASL Seattle Sounders and the NFL Seattle Seahawks, owned by the Nordstrom family, and the NASL California Surf and the NFL St. Louis Cardinals, owned by William Bidwell. *See* Woosnam Affidavit *supra* note 37, at Exhibit I. Mr. Bidwell has a 33% interest in the California Surf. *See* North American Soccer League v. National Football League, 465 F. Supp. 665, 670 (S.D.N.Y. 1979).

201. *See* notes 176-89 and accompanying text *supra.*

flict of interest when both leagues become locked in a pernicious effort to overtake the market for the other. The possibilities of game scheduling, and a view that the sports dollar market is large enough and elastic enough to absorb both sports in the same season, preclude any automatic conclusion that interests conflict. Absent a showing in an individual case that an owner is either anti-competitive, in that he opposes seasonal expansion for reasons which destroy the limit-price model, or is actually a malefactor for the league, no anti-competitive conclusions can be drawn. In *Levin v. National Basketball Association,*[202] the district court for the Southern District of New York clearly stated that the decision to reject particular individuals for ownership of a National Basketball Association franchise, purely on animosity towards the prospective purchasers was not in violation of the law. A rejection of a pernicious owner could thereby be justified on these grounds.

2. Preservation of Good Will

The same remedy as in *Levin* appears to be available to the NFL when it fears that the reputation of a prospective buyer endangers the league. Without deciding whether the same remedy is available to the NFL against one of their present owners, it can be said that it would be no more or less available because he owned or sought to own an NASL franchise. Concerning the diminution of good will with the public when a local owner begins collecting sports franchises, the public debate that may center around such an event would concern itself with the same concepts of competition dealt with in determining if cross-ownership is in fact anti-competitive. Here again, if a theory of potential competition is accepted, the showing must be one of an intent to merge,[203] not for economies of scale, or for legitimate pro-competitive motives, but to destroy the limit-price model.[204] Absent such a showing, the NFL cannot fear that cross-ownership will put it on the anti-competitive side of that possible debate.

3. Avoiding Conflicting Interests

Both the discussion of commercial confidentiality and the preservation of good will unite with other factors to form a final justification based on the avoidance of conflicting interests. Once again, the concern regarding conflicting testimony before governmental agencies, the feared dilution of public relations effectiveness, and the siphoning-off of capital from one franchise to another hinges on the evidence that can

202. 385 F. Supp. 149 (S.D.N.Y. 1974).
203. *See* notes 183-86 and accompanying text *supra.*
204. *See* note 181 *supra.*

be brought to bear on individual cases.[205] The NFL's justifications for the ban are primarily speculative, and generalized.[206] They must be fortified with a factual showing of a natural competitive purpose between the two leagues as well as individual motives for anti-competitive purposes among the cross-owners. Even if there is some testimony that the NASL expects to outstrip the football business,[207] there is no evidence that this is to be done to eliminate football from the sports dollar market, to destroy the limit-price model, or for any other anti-competitive purpose. Moreover, the economic justifications for the ban are not in themselves pro-competitive. At best they only preserve the status quo for competition. If the market for soccer franchises is to be recognized, the justifications are actually anti-competitive.

D. The Excessiveness of the Restraint

The NASL challenged the NFL's claim that the ban is intended to prevent dilutions of ownership resources since the terms of the ban do not extend to ownership interests in either nonmajor team sports, or major nonteam sports, or any nonrelated business. The NFL answered that the drain of resources is perceived differently by the colleagues of the cross-owners in the NFL, and would undermine the spirit of cooperation among them.[208] Even if the NASL franchise owner is perceived as a great financial risk, the ban is underinclusive since there is no prohibition against similar risks in other businesses.

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205. Rozelle cited as examples of the problem of siphoning off capital from one franchise to another the Roy Boe situation and the Charles O. Finley case. *See* Rozelle Affidavit, *supra* note 8, at 13-14. Rozelle referred to the situation in which Finley, the owner of the Oakland American League Baseball franchise, paid his players about half of the industry norm and spent nothing on advertising and promotion. As a result of Finley's inaction, the management at the Oakland-Almeda County Coliseum entered suit against him for $1,500,000 in lost rental, parking and other revenues and $10,000,000 in punitive damages for not maintaining a team of the character and standing required by major league rules. See *Is Charlie O. Throwing a Spitball at Oakland?, Business Week,* May 21, 1979, at 38. However, the remedy seems to be in individual cases, and not in a prophylactic ban on a class of persons who will not necessarily succumb to such financial behavior. Although H.L. Hunt's other sons have suffered substantial losses in the silver market recently, (*see* Boston Globe, April 30, 1980 at 41, col. 1), Lamar Hunt has made it clear that his football position has not been jeopardized by the losses in the decline in the silver market, despite the family's need to mortgage other properties, including the Dallas Tornado soccer franchise. *See* Boston Herald, June 2, 1980, at 2, col. 3. H.L. Hunt, Lamar's billionaire father, when told that Lamar had lost a million dollars in one year of AFL Football ownership in Dallas, replied, "Well, at that rate he can't last longer than a hundred and fifty years." *See* J. MICHENER, *supra* note 16, at 435-36.

206. The NFL contended that Messrs. Hunt & Robbie have supplied private information of "varying sorts from one league's internal counsels to those of the other." NFL defendants' Pre-Trial Memorandum of Law, *supra* note 8, at 38. It is unclear whether specific harm was alleged. Moreover, if the leagues are not seen as competitors, the conflicts appear to be moot.

207. *Id.* at 9.

208. *Id.* at 17.

Based upon the statements in the record,[209] it seems that the actual business motives for the ban are based on the premise that it is "not anti-competitive to compete."[210] But the stated justifications[211] can be accomplished to the extent necessary to preserve the status quo concerning the level of competition between the two leagues without any ban. The ban is overinclusive and underinclusive on all of the business justifications,[212] and is not needed at all at present to preserve the level of competition that exists.[213]

The NASL contended that the NFL's pro-competitive argument ignored the reality that private parties are not allowed to enter into "restraints of trade which are not ancillary to their lawful business objectives, but which are carried out in pursuit of self-defined 'public policy' objectives."[214] It is for Congress to act if cross-ownership of athletic franchises is not in the public interest, and for the Department of Justice to act if that policy in the future violates present antitrust

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209. *See* notes 40-92 and accompanying text *supra*.

210. Rozelle Affidavit, *supra* note 8, at 8.

211. *See* notes 72-83 and accompanying text *supra*.

212. The NFL cited Consolidated Farmers Mutual Ins. Co. v. Anchor Savings Ass'n, 1980 Trade Cases (CCH) 63,125 (D. Kan. Nov. 7, 1979) for the proposition that as long as a defendant's actions are reasonable, they need not constitute the least restrictive alternative available, and that "bad business judgment does not constitute a Sherman Act violation." *See also* NFL Defendants' Pre-Trial Memorandum of Law, *supra* note 8, at 30, *quoting* Consolidated Farmers Mutual Insurance Ass'n, 1980 Trade Cases (CCH) 63,125 (D. Kan. Nov. 7, 1979). In that case the court upheld a Federal National Mortgage Association policy restricting insurers of mortgage policy to companies of a certain size, for the purpose of avoiding the task of examining the financial situations of thousands of other companies. There is no such effective business purpose to the cross-ownership ban in the situation for professional football, since the ban is not only overinclusive in restricting ownership of solvent, well-perceived soccer franchises, but also underinclusive in not restricting shaky outside nonsports businesses with unsavory images.

213. The NFL contended that the NASL was the aggressor, seeking a total reversal or abandonment of existing NFL policy. *See* Rozelle Affidavit, *supra* note 8, at 38. However, the business justifications have little or no bearing on the pro-competitive or anti-competitive atmosphere between the two leagues. In light of the market relationship between the two leagues (*see* notes 175-89 and accompanying text *supra*), the business reasons have minimal relationship to competition. The NFL quoted one authority as stating that:

> [T]he realities of the major sports leagues' operations would seem to lend support to the conclusion reached in *San Francisco Seals*. The primary goal of section 1 of the Sherman Act is to *ensure that true economic competitors maintain a healthy distance from one another*. The section was not intended to condemn all cooperative efforts in the business world. If a particular group of entrepreneurs are joint investors in a common venture which could not be carried on by anyone of them alone, the cooperation which results hardly seems improper. In these instances it is proper that the "agreements" in question are viewed as essentially internal marketing decisions. (Footnotes omitted, emphasis added).

NFL Defendants' Pre-Trial Memorandum of Law, *supra* note 8, at 21, *quoting* J. WEISTART & C. LOWELL, LAW OF SPORTS 701 (1978). The key phrase in that quotation is, however, "true economic competitors," and it is submitted that it has not been established that the two leagues truly compete.

214. *See* NASL Plaintiffs' Reply Memorandum in Further Support of Their Motion for Preliminary Injunction, *supra* note 84, at 24.

policies.[215] If anti-competitive motives for cross-ownership could presently be demonstrated in particular cases, then avoidance of the tarnished image of seemingly endorsing such behavior would be a legitimate objective. However, since the remedy would remain to individually exclude the malefactor, the ban is unnecessary.[216]

While it is not anti-competitive to compete,[217] it is central to antitrust policy that it is anti-competitive to compete by policies which merely destroy competition without legitimate economic justifications for the restraint. The ban imposes excessive restraints to preserve confidentiality, morale and the competitive status quo, and in fact destroys the status quo.[218]

CONCLUSION

The attempted imposition in August, 1978, by the National Football League (NFL), of a ban which would prohibit football franchise owners from owning other major professional team sports was viewed by the North American Soccer League (NASL) as an immediate threat to the stability it has so strenuously developed during ten years of league organization. That ten year effort, coupled with a unique history of sports entrepreneurs fostering and redeeming the fledgling soccer business, led to the soccer league's seeking an injunction in the case of *North American Soccer League v. National Football League.* The soccer league alleged that the ban on cross-ownership constituted restraint of trade in the soccer franchise market, in violation of the Sherman Antitrust Act. In finding that the plaintiffs had made the requisite showing of irreparable and substantial harm and had raised substantial serious questions concerning the antitrust merits to warrant litigation, the district court issued a preliminary injunction against the ban.

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215. *See, e.g.,* International Railways of Central America v. United Brands Co., 532 F.2d 231 (2d Cir. 1976), *cert. denied,* 429 U.S. 835 (1976) (although no public injury need be established, where per se violation of sections 1-7 of the Sherman Act have occurred, a private plaintiff cannot recover without showing that he has in fact been damaged); U. S. v. Hilton Hotels, 467 F.2d 1000 (9th Cir. 1972) *cert. denied sub nom.* Western Int'l Hotels v. United States, 409 U.S. 1125 (1973) (primary purpose of Sherman Act is not to protect private persons, but to vindicate public interest in a free market). *See also* Cromar Co. v. Nuclear Materials and Equipment Corp., 395 F. Supp. 198 (D.D.C. 1975) (plaintiff, not a competitor with defendant in market where alleged section 2 violation occurred, lacked standing to maintain antitrust action).

216. *See* note 197 and accompanying text *supra.*

217. *See* note 205 *supra.*

218. Not only are present owners required to divest, albeit over some period of time, but the restriction of the interest generated by soccer among NFL owners will have an immediate effect on the sales price of the NASL franchises which presently exist or will be created, by expansion. This will immediately affect the NASL's ability to raise capital generally. *See* Woosnam Affidavit, *supra* note 37, at Exhibit 2.

While the fact questions remain unsettled or unanswered, it appears that a viable argument for a permanent injunction on cross-ownership may be sustained on antitrust grounds by the NASL. Acceptance of the market for soccer franchises, denial of the suitability of supply substitution and adoption of a potential competition theory seem to compel such a result. When the pro-competitive effects of the cross-ownership policy are weighed against the lack of any anti-competitive motives for the cross-owners, then cross-ownership can be found to be pro-competitive.

Similarly, when the destruction of the demand among NFL owners for soccer franchises can be demonstrated to be significant, and the attempts to preserve the pro-competitive aspects that the limit-price model guarantees can be demonstrated, then the ban can be found to be anti-competitive. While quantities might also be important, the balancing in the aforementioned conditions under the rule of reason would dictate that the ban was an unreasonable restraint of trade.

Because quantities are relevant, and size determines market power, the result might not be the same with other franchises such as baseball. The ramifications of cross-ownership of team sports with more balanced market power may perhaps more easily dictate a finding for the defendants. However, the added factor of cross-owners in the several leagues not wishing to jeopardize their positions in any league, coupled with any congressional or governmental action concerning creeping monopolization by local franchise owners will probably preclude the necessity of a private ban.

DAVID S. MOYNIHAN

On Finding Civil Liability Between Professional Football Players: *Hackbart v. Cincinnati Bengals, Inc.*[1]

That violence is common in the world of professional team sports, and especially in football, is an understatement.[2] Much of this violence is inherent in the very nature of the sport,[3] and some types of violent physical contact, though not necessary to the course of play,[4] have been

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1. 435 F. Supp. 353 (D. Colo. 1977), *rev'd,* 601 F.2d 516 (10th Cir.), *cert. denied,* 100 S.Ct. 275 (1979).

2. For example, a survey of NFL player injuries over the course of six seasons (1969-74) has revealed an estimated 5,110 injuries during that period. In the 1974 season alone there was an estimated record 1,638 injuries, or twelve injuries for every ten players. Hofeld, *Athletes — Their Rights and Correlative Duties,* 1975 TRIAL LAW.GUIDE 383, 401-02. There seems little reason to believe that this injury rate has done anything but increase in the most recent seasons.

For an amusing, but enlightening hyperbole on the level of violence in present day professional sport, *see* Bouton & Kitman, *Okay Fans, Here's the Ultimate Sport,* ESQUIRE, April 1975, at 110.

3. That is to say football, even when played entirely according to the rules, necessarily involves rough body contact. The inherently violent nature of the game was expressed most eloquently by Justice Rossman of the Oregon Supreme Court:

> The playing of football is a body-contact sport. The game demands that the players come into physical contact with each other constantly, frequently with great force. The linemen charge the opposing line vigorously, shoulder to shoulder. The tackler faces the risk of leaping at the swiftly moving legs of the ball-carrier and the latter must be prepared to strike the ground violently. Body contacts, bruises, and clashes are inherent in the game. There is no other way to play it. No prospective player need be told that a participant in the game of football may sustain injury. That fact is self evident. It draws to the game the manly; they accept its risks, blows, clashes and injuries without whimper.

Vendrell v. School District No. 26C, Malheur County, 233 Or. 1, 376 P.2d 406, 412-13 (1962). *See also* Barry, *It's All Part of the Game,* SPORTS ILLUSTRATED, Oct. 6, 1975, at 40, for an article by a former college football player and coach who finally quit because he could no longer bear even seeing the injuries which most accept as part of the game. *See also* Underwood, *Punishment is a Crime,* SPORTS ILLUSTRATED, Aug. 21, 1978, at 40, for the view of Pete Williams, a college referee, that violence is not necessarily inherent in football. "Everybody says football is a violent game. It wasn't meant to be. It was meant to be a game of skill and speed and physical prowess. It has *become* a violent game. A game of intimidation. I watch the pros and it makes me sick." *Id.* (emphasis in original).

4. For purposes of this comment, "course of play" shall be defined as that period of time set forth by the official rules of the game for conduct of the competition, within which both teams are on the playing field and engaged in such competition. Course of play does not include official time outs or other official suspensions of overall playing time.

accepted as a by-product of playing the game.[5] However, there is growing concern, with good cause, over the quickly swelling tide of *excessive* violence in professional football.[6] This concern has engendered much thought about remedies to the problem of excessive violence because rules formulated and administered by the National Football League (NFL) have not been effective in either preventing or stemming increased violent conduct.[7]

Historically, legal action has not been initiated by professional football players as a means of redress for injuries or as a deterrent to unwarranted conduct by fellow athletes.[8] However, the recent case of *Hackbart v. Cincinnati Bengals, Inc.*[9] makes clear that the civil forum is available to professional football players for the resolution of their disputes arising from excessive on-field violence. The possibility that players may be held liable for inexcusable actions may not be the sole answer to the problem of excessive violence though, and legislative ac-

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5. A clear example of this gratuitous violence is the amount of physical abuse suffered by quarterbacks. While it is often completely unnecessary for a charging defender to "sack" the quarterback after he has either handed the ball off or passed it away, such is common practice. Although a rule against this late tackling of quarterbacks was instituted for the first time during the 1979-80 season, attempts at formulating rules to curb other such "legally" excessive violence have met with little success for fear of destroying the nature of the game. "We don't want to make this game into 'touch' football, says [Don] Shula," who is head coach of the Miami Dolphins professional football team. Bell, *Quarterback Injuries,* SPORT, Dec. 1978, at 13, 14.

6. After an incident in 1976 in which Oakland Raider defensive back George Atkinson clubbed Lynn Swann of the Pittsburgh Steelers on the back of the head, the Commissioner of the NFL (Pete Rozelle) wrote to Atkinson:

> In sixteen years in this office I do not recall a more flagrant foul than your clubbing the back of Swann's head totally away from the play. . . . Our sport obviously involves intense physical contact, but it requires of all players discipline and control and remaining within the rules. Every player deserves protection from the kind of unnecessary roughness that could end his career.

Johnson, *A Walk on the Sordid Side,* SPORTS ILLUSTRATED, Aug. 1, 1977, at 12. *See also* Underwood, *An Unfolding Tragedy,* SPORTS ILLUSTRATED, Aug. 14, 1978, at 68; Underwood, *supra* note 3, at 32; Underwood, *Speed is all the Rage,* SPORTS ILLUSTRATED, Aug. 28, 1978, at 30, for a comprehensive three part series dealing with "brutality" in football. *But see* Dr. W. Walter Menninger's statement for a view emphasizing the beneficial aspects of sports violence:

> Despite the recent indignation over violence in professional hockey, it should not be surprising that the spectator following should be so rabid, particulary in the congested metropolitan areas where legitimate expressions of violence are so limited. Many of the 'silent majority' who feel so frustrated, angry and helpless today can readily identify with the beleaguered, assaulted hero of the 'war on ice.' They experience a vicarious satisfaction from the open aggression and mayhem on the ice, and indeed, it is powerfully exhilerating to let one's emotions 'all hang out.' . . . until enough people decide it is not worth the price, we may expect little change in the trend toward increasing violence in hockey and other contact sports.

TIME, March 3, 1975, at 51.

7. *See* notes 38-55 and accompanying text *infra.*

8. *See* Zuckerman, *Throw 'Em to the Lions (or Bengals): The Decline and Fall of Sports Civilization As Seen Through the Eyes of a United States District Court,* 5 J.C. & U.L. 55 (1977). For a discussion of the underlying reasons for the reluctance of players to go into court *see* notes 56-76 and accompanying text *infra.*

9. 601 F.2d 516 (10th Cir.), *cert. denied,* 100 S. Ct. 275 (1979).

tion may be necessary in order to lend uniformity to the handling of these cases.[10]

This Comment will explore, in light of *Hackbart,* methods of redress for players injured as a result of unwarranted violence during the course of play in a professional football game. Given the present lack of effective internal league controls and legislative inaction, the position of this comment shall be that there must be a purposeful marriage of all possible measures, including the expansion of traditional tort theories, in order to curtail excessive violence on the playing field.

I. FACTS OF THE CASE

On September 16, 1973, the Denver Broncos and the Cincinnati Bengals were engaged in a scheduled, regular season professional football game. Near the end of the first half of play, when the Bengals were on offense and the Broncos on defense, the incident from which this case arose occurred.[11] Dale Hackbart was at the defensive free safety position for Denver while Charles "Booby" Clark was playing fullback for Cincinnati. Clark came running out of the backfield as a potential pass receiver into Hackbart's defensive zone. When the pass was intercepted near the goal line by another Denver defensive back, Hackbart assumed an offensive role and tried to block Clark from tackling the Denver ball carrier. In doing so, he fell to the ground. As Hackbart knelt to watch the play proceed upfield, Clark approached him from behind and struck a forearm blow to the back of his head. Since the flow of play was away from where Hackbart and Clark were positioned on the field, no official saw Clark hit Hackbart and no foul was called. Moreover, Hackbart did not call the incident to the officials' attention and both participants played the rest of the game.

Hackbart experienced some pain the day following the game, to the extent that he could not play golf as planned. However, he did not seek medical advice and played on specialty team assignments for the next two weeks.[12] Then, for an undisclosed reason Hackbart was placed on waivers. At this juncture he sought medical care and learned that he had sustained a neck injury.[13] When he notified the Broncos of his disability

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10. *See* notes 125-31 and accompanying text *infra.*

11. There were minor factual discrepancies, such as which position Hackbart was playing, between the trial court and appellate court decisions. Because the trial court initially dealt with the situation, the facts as herein stated were taken from that opinion. 435 F. Supp. 352, 353-54 (D. Colo. 1977).

12. Although it has no bearing upon the question of whether liability is possible in this context, the fact that Hackbart did not seek prompt medical attention and played in subsequent games could present a real problem to him on remand. Establishing a sufficiently close casual connection between Clark's action and his injury could be a considerable task on these facts.

13. The extent of Hackbart's neck injury has not been articulated in the literature concerning this case.

the team paid him the remainder of his season contract salary pursuant to an injury clause contained in the agreement.

Invoking diversity of citizenship jurisdiction, Hackbart subsequently brought suit in the Federal District Court of Colorado against Clark and the Cincinnati Bengals alleging reckless misconduct and negligence. By agreement of the parties the case was heard without a jury solely for the determination of the issue of possible liability between professional football players.[14]

II. Analysis of Holdings

The district court held that there was absolutely no duty of care between professional football players due to the extremely violent character of play in the NFL.[15] The court further said that even if it were to recognize such a duty, any allegations of reckless misconduct or negligence would be subject to the defenses of consent and assumption of the risk.[16] After this finding the trial court went on to discuss several policy reasons for refusing to consider the merits of a professional football player's claim.[17] Perceived insurmountable problems in proving the causation of injuries and the fear of a flood of litigation were among those policy issues which the trial court felt militated against allowing players to bring suit.[18] Hackbart appealed this decision.

The Tenth Circuit Court of Appeals reversed the trial court,[19] reasoning that under the doctrine espoused by the United States Supreme Court in *Erie Railroad Co. v. Tompkins*[20] a federal district court which sits in diversity of citizenship jurisdiction can not merely consider general policy notions in construing the validity of a cause of action.[21] Rather, the district court must apply the law of the state in which it sits to the controversy at bar.[22] The appeals court found that the trial court failed to originally consider Colorado tort law in deciding the case and ordered it, on remand, to consider the merits according to settled principles of Colorado law.[23]

The court of appeals then went on to discuss the appropriateness of

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14. Since the only issue in this trial was whether there should be any liability between professional football players, the plaintiff's particular damage claims were not dealt with in the opinion.

15. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 356 (D. Colo. 1977).

16. *Id.*

17. *Id.* at 357-58.

18. *Id.* For a discussion of the applicability of these policy reasons, *see* notes 34-37 and accompanying text *infra*.

19. Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 527 (10th Cir.), *cert. denied,* 100 S. Ct. 275 (1979).

20. 304 U.S. 64 (1938).

21. 601 F.2d 516, 523 (10th Cir. 1979).

22. *Id.*

23. *Id.* at 524.

resort to the civil forum by professional football players. The appeals court quoted *Marbury v. Madison,*[24] where it was stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[25] Moreover, the court's approval of civil suits as the means of settling player disputes was underscored by their quotation from Justice Douglas' concurrence in *Flast v. Cohen*:[26]

> The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. . . . [W]here wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.[27]

The Bengals appealed to the United States Supreme Court but their petition of certiorari was denied.[28]

In light of the appellate court's reasoning in *Hackbart,* the trial court's denial of a cause of action seems unfounded. Concluding that there was no duty of care between professional football players because they left the " 'restraints of civilization' . . . on the sidelines,"[29] the trial court took the position that civil courts were inappropriate forums for the resolution of player disputes.[30] Although professional football may be an inherently violent game, the appellate court correctly pointed out that "the game of football is not on trial"[31] and that the proper focus of the trial court's consideration should have been the specific act performed by defendant Clark.[32] In refusing to even consider granting the relief sought by Hackbart, the trial court seems to have made the uncalled for "abdication" of which Justice Douglas wrote.[33]

Though understandable, the additional policy considerations cited by the trial court for refusing to determine the merits of a professional football player's complaint are similarly unpersuasive. While the speed and violence of play may create problems in proving the causation of injuries,[34] this obstacle should be more appropriately dealt with by the

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24. 5 U.S. (1 Cranch) 137 (1803).
25. *Id.* at 163.
26. 392 U.S. 83 (1968).
27. *Id.* at 111.
28. Cincinnati Bengals, Inc. v. Hackbart, 100 S.Ct. 275 (1979).
29. 435 F. Supp. 352, 358 (D. Colo. 1977).
30. *Id.*
31. 601 F.2d 516, 526 (10th Cir. 1979).
32. *Id.*
33. Besides "abdication," the *Hackbart* trial court's position has been characterized as exhibiting "a resigned attitude not worthy of the judiciary." Zuckerman, *supra* note 8, at 58.
34. 435 F.Supp. 352, 358 (D. Colo. 1977).

party initiating the litigation and is not a basis for failing to recognize the claim initially.[35] Moreover, the fear that a flood of litigation would follow the allowance of such a cause of action is not a cogent reason for totally disallowing such suits.[36] Courts should be able to formulate standards and rules of liability which would work to bar the initiation of frivolous claims. Further, it is the express function of the courts to effectively deal with meritorious disputes, whatever their number, in providing relief.[37]

III. REMEDIES

A. League Sanctions

Determinations of redress for injuries inflicted by one player upon another during the course of a professional football game have not, for a variety of reasons, been traditionally viewed as being within the scope of legal sanctions. Instead, they have been made solely by designated officials within the NFL.[38] Although the NFL has made significant attempts at curbing the level of violence in the league through the promulgation of rules designed to promote safety,[39] the steady rise in on-field violence has revealed the inadequacies of these internal controls.[40]

NFL rules prohibit actions by players that range from relatively procedural matters, such as potentially dangerous blocking techniques, to the character of tolerable contact between the players.[41] Sanctions prescribed for infractions of the safety rules break down into two convenient categories: (1) those which may be imposed while the game is in progress; and (2) those imposed after the game as remedial or punitive measures.

While the contest is being played, sanctions for violations of safety rules are imposed by league selected policing agents known as "of-

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35. *See* Zuckerman, *supra* note 8, at 58.

36. 435 F. Supp. 352, 358 (D. Colo. 1977).

37. *See* notes 24-27 and accompanying text *supra.*

38. *See* Comment, *Violence in Professional Sports,* 1975 WISC. L. REV. 771.

39. More than any other professional sports league, the NFL has always shown great willingness to alter its rules to make the game as attractive as possible for fans. The two primary concerns of the NFL competition committee, which proposes rule changes . . . have always been to increase the amount of scoring and decrease the number of injuries. To prevent injuries, they have outlawed such things as the facemask tackle, the clothesline tackle and crackback block.

Bell, *supra* note 5, at 13.

40. *See* Recent Decisions, *Torts,* 12 GA. L. REV. 380, 390 n.55 (1978).

41. The safety rules most germane to the *Hackbart* facts are:

i) "Rule 12 § 2, art. 1, part c: 'All players are prohibited from striking, swinging, or clubbing on the head, neck or face with the heel, back, or side of the hand, wrist, forearm, elbow, or clasped hand.' " *Id.* at 389 n.49.

ii) "Rule 12 § 2, art. 15: 'There shall be no unsportsmanlike conduct. This applies to any act which is contrary to the generally understood principles of sportsmanship.' " *Id.*

ficials."[42] When an official notices a rule infraction he may delay play and impose a yardage loss upon the team whose member was the violator. At his discretion, an official may even expel a player from the game if the infraction is serious enough to warrant it. There are no further sanctions which on-field officials may levy, for their function is to ensure the immediate safety of the players and to keep the course of play flowing as smoothly as possible; they are not judges of the character of a player or his rule violation.[43]

Egregious infractions of the rules are considered after the game is over by the league's commissioner. The commissioner is vested with the power to punish players for conduct so severe that it is "detrimental to professional football."[44] If he finds such an infraction, the commissioner may levy a fine upon a player, suspend him from play, or terminate his contract.[45] In a similar manner, the management of the individual teams police the conduct of their players pursuant to contractual clauses.[46]

While there is feeling that the available league sanctions "are genuinely intended to discourage illegal play,"[47] reality suggests that their application has not borne out their purpose.[48] Simply stated, the rise in violent conduct during the course of play is witness to the fact that the presently imposed minor yardage losses, fairly nominative fines, and

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42. There are seven different officials on the field for each game: referee, umpire, head linesman, line judge, back judge, side judge and field judge. Each has his own responsibility, as the titles suggest. Boston Globe, Dec. 9, 1979, at 93, col. 1.

43. Gene Calhoun, an attorney and veteran Big Ten College referee feels, " 'An official's first responsibility is to the players' safety.' " Underwood, *supra* note 3, at 36.

44. *See Hearings on Organized Professional Team Sports Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d sess., at 423 (1958) [hereinafter cited as *Senate Hearings*].

For example, one illustration of this review mechanism would be the NFL Commissioner's investigation of the George Atkinson-Lynn Swann head clubbing incident. *See* note 6 *supra. See generally* Comment, *supra* note 38, at 772.

45. *See* NFL Team Player Contract, cl. 15, *reprinted in* PRACTISING LAW INSTITUTE, REPRESENTING THE PROFESSIONAL ATHLETE 27, 29 (1978) [hereinafter cited as Player Contract]; Collective Bargaining Agreement Between National Football League Players Association and National Football League Management Council, art. VIII, *reprinted in* PRACTISING LAW INSTITUTE, REPRESENTING THE PROFESSIONAL AND COLLEGE SPORTS TEAMS AND LEAGUES 17, 39-41 (1977) [hereinafter cited as Collective Bargaining Agreement].

46. Player Contract, *supra* note 45, cl. 14; *see* Collective Bargaining Agreement, *supra* note 45, art. VI.

47. Slusher, *Sport: A Philosophical Perspective,* 38 LAW & CONTEMP. PROB. 129, 130 (1973).

48. *See* Bell, *supra* note 5, at 19, where the author names Doug Plank, a defensive back for the Chicago Bears as one of the NFL's hardest hitters. Plank advocates strict enforcement of rules, by throwing unnecessarily violent players out of the game, as a means of increasing their strength as deterrents. He observes:

> [r]ight now you practically have to hit somebody on the back and trample on his head to get thrown out. If an official came up [and warned me what would happen] I might not like it, but I'd make darn sure that whatever he was watching [out for] I didn't do it in that game.

Underwood, *supra* note 3, at 40.

relatively short suspension periods do not discourage illegal play.[49] The ineffectiveness of these sanctions stems from the fact that the league has failed to strike a balance between preserving one of the most commercially attractive aspects of the game, the violent body contact which

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49. For example, in a recent attempt by the NFL to curb violence, the first player suspension (one game) in almost ten years was imposed along with a $2,000.00 fine for the intentional infliction of a forearm blow to a player's head after he was already being brought down by a tackler. The efficacy of the sanction is reflected by the player's remark that , "It don't faze me at all." Recent Decisions, *supra* note 39, at 390-91 n. 55, *quoting* Atlanta Constitution, Oct. 27, 1977, § D, at 5, col. 1.

In these incidents the fines and/or suspensions imposed by the league are quite nominal when considered in light of:

1) The length of each season and the substantial size of the average player's salary in each sport;
2) The extremely violent nature of the acts performed; and
3) The more stringent sanctions that could have been imposed through civil liability by a court of law.

It is interesting to note that there is little agreement as to the reasons behind the failure of league sanctions as effective deterrents. First, there are those who see the present rules as too lax. They stand behind making them more restrictive and sanctions for violations more ominous. "The overall picture is clear: the rules of the game do not protect the players. . . . The rules need revision." Underwood, *supra* note 3. However, there are dissenters to this theory. Jack Joyce, the National Basketball Association's Chief of Security, commenting on violence in professional basketball (which comments are certainly no less applicable to football) feels that:

> [y]ou can take adequate measures to insure its [violence's] control, but athletes are too competitive, too intense, too instinctive as performers to control themselves completely. Even if you have, say, an across-the-board fine of $50,000, I just don't see a player in the heat of the game — with the fans screaming, his adrenaline flowing and his temper flaring — suddenly start to throw a punch and then pull back because he remembers he'll have to pay a fine. No way. Violence is a realistic problem and you must approach it realistically.

O'Conner, *My Violence Expert,* SPORT, Dec. 1978, at 7.

Second, there is thought that waning respect for officials by players and inefficient enforcement of existing rules by officials are responsible for the diminished value of league sanctions as deterrents to violence. Tom Landry, coach of the Dallas Cowboys, calls upon officials to enforce the rules more vigorously. Concerning the practice of "clubbing" (the type of act involved in *Hackbart*), he feels the officials "should call a penalty for every blow to a player's head. . . ." Underwood, *supra* note 3, at 38-40. " 'If officials don't stop it,' says his assistant Erman Allen, 'some Sunday some ball carrier or receiver is going to lose his life.' " *Id.* at 40. Not only poor enforcement of the rules, but "failing respect for those who officiate the game" may sigificantly contribute to the ineffectiveness of league sanctions. *Id.* "Mean" Joe Greene of the Pittsburgh Steelers is quoted as saying, " 'Given half the chance, I'll punch one of them [officials] out, and it'd give me a whole lot of satisfaction.' He said if they got in his way he'd 'cleat 'em in the spine.' " *Id.*

Third, the onus for the failure of sanctions to deter violence frequently comes to rest upon the coaches themselves. Coaches who encourage their players to take "cheap shots" in the name of aggressiveness and competition, or to break the rules when they can get away with it, may be an underlying causative factor. This failing of coaches, whether stemming from personal ambition or otherwise, has not been effectively policed by the coaches as a group, as is recognized by Coach Lee Corso of Indiana, who stated:

> When you have a cancer, you cut it out. . . . It all starts with the coaches. What they do dictates what the players do. But we don't cut 'em out. We find a coach is a habitual crook, and we put him on probation, and the next year he's coaching an All-Star game. We glorify people who have broken the rules. Until we stop doing that, we'll have bums setting examples.

Underwood, *supra* note 3, at 36.

See also the view of Dr. Arnold Mandrell, a psychiatrist versed in biomedical and phar-

draws millions of fans annually,[50] and controlling excessively violent conduct. In failing to fashion an effective remedy,[51] the league implicitly authorizes the players to continue such conduct.

As well as being ineffective deterrents, presently available league sanctions are wholly unresponsive to situations such as those presented by the facts of *Hackbart v. Cincinnati Bengals.*[52] Even if the incident in *Hackbart* had been viewed by a game official and a foul called, there would have been no relief for the injured player. Moreover, if the commissioner had imposed a fine or suspension upon Clark after review of the situation, Dale Hackbart would not have recovered for his injuries. In fact, none of the league sanctions carries with it an element of recompense and there is absolutely no procedure within the league for handling disputes between players.[53] If these determinations continue to be left within the ambit of internal league control all of the potential Dale Hackbarts will be made to bear not only the physical injury which

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macological psychiatry, who attributes much football violence to "The Sunday Syndrome," or the extensive use of drugs to prepare a player for the game.

> [A] normal diet pill . . . contains five to 15 milligrams of amphetamine. Imagine what it is like . . . to gulp down 30 pills at one time. The result is a prespsychotic paranoid rage state. . . . A five hour temper tantrum that produces the late hits, the fights, the unconscionable assaults on quarterbacks that are ruining pro football. . . . For the player in this state the negotiation of rules becomes highly complicated, and easily broken if the referee isn't looking. That's when you get the elbows, the hands being stepped on, the knees in the face, the kicking.

Underwood, *An Unfolding Tragedy,* SPORTS ILLUSTRATED, Aug. 28. 1978, at 32-34. Mandrell asserts that amphetamines mask pain which "would act at least as a partial deterrent to such mayhem." *Id. Contra,* NFL Security Director Jack Danahy contends that "[a]lleged drug use in the league has been overstated. . . ." *Id.* at 36. NFL Director of Information Joe Brown asserts, "[a]s far as we can tell . . . [the players] are not taking amphetamines." *Id.*

50. Most players would probably agree with Dallas Cowboys' defensive back Cliff Harris, named as one of the NFL's hardest hitters, that "[h]itting is what football is all about. . . . It's the reason the game is so popular . . . ." Anderson, *N.F.L.'s Hardest Hitters,* SPORT, Dec. 1978, at 21. However, other people differ in their assessment of the reasons for football's popularity:

> In short, football . . . epitomizes the spirit and form of contemporary American society . . . . Violence is one of our society's most obvious traits, and its expression in football, where bodily contact and territorial incursion are essential, clearly accounts for part of the game's appeal . . . . To single out violence as the sole or even primary reason for the game's popularity is a tempting oversimplification . . . . Football's violence is expressed within the framework of teamwork, specialization, mechanization, and variation, and this combination accounts for its appeal.

Arens, *The Great American Football Ritual,* NATURAL HISTORY, Oct. 1975, at 77.

51. For suggestions by professional coaches of additional safety measures which could be instituted, *see* Underwood, *supra* note 3, at 56.

52. 435 F. Supp. 352 (D. Colo. 1977), *rev'd,* 601 F.2d 516 (10th Cir.), *cert. denied,* 100 S. Ct. 275 (1979).

53. Although there is no intraleague mechanism for settling disputes between players, it is notable that there exists an injury grievance procedure for the resolution of player-employer differences contained in the collective bargaining agreement between the National Football League Players' Association and the National Football League Management Council. Collective Bargaining Agreement, *supra* note 45, art. IX. *See also* Schmidt, *In Football, It's Arbitration,* TRIAL, June 1978, at 38. Perhaps player-player disputes should appropriately be resolved under the jurisdiction of an administrative/legislative board. *See* notes 125-31 and accompanying text *infra.*

is inevitably theirs, but also the economic burden which it is certain to engender — a burden which in many instances may be quite prodigious.

Significantly, it seems highly questionable whether the NFL has the legal authority to develop compensatory procedures between players. Any such measure designed to order recompense from one player to another would necessarily raise serious due process of law questions.[54] Attempts at formulating and instituting required due process protections in order to validate internal league compensation systems would largely duplicate the structure and function of safeguards currently available at law. Since development of such procedures also would be costly to the league, injured players should be allowed to take advantage of the extant resources of the legal system.[55]

B. Intervention of the Legal System History of Inaction

Since league imposed sanctions have failed to deter excessive violence and have not been responsive to the needs of injured players, the possibility of legal involvement becomes an important consideration. However, until recently, very few professional athletes have sought redress in the courts for injuries received during the course of play.[56] While there is no definitive explanation for the lack of litigation in this area, several theories have been hypothesized which merit discussion.

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54. Individuals are protected from deprivation of their property (without legal process) by the federal government under the fifth amendment to the U.S. Constitution and by state government under the fourteenth amendment. While federal government involvement in this context seems questionable, it is quite possible that a court would find sufficient state involvement under an internal league compensation scheme in professional football to hold that fourteenth amendment protections must be provided in order for the scheme to have validity.

The Supreme Court has demonstrated its willingness to apply expansive interpretations of what constitutes "state action" sufficient to mandate fourteenth amendment protections. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court ordered a private restaurant, which leased space in a publicly owned parking garage to end its practice of racial segregation as violative of the fourteenth amendment. As most professional football teams either lease stadiums which are publicly owned or were built partly with public tax dollars there may be sufficient state involvement to support a finding of state action in the affairs of either the whole league, or any one team to therefore require fourteenth amendment application. Although *Burton* involved the equal protection clause of the fourteenth amendment and this comment is concerned with the due process clause, the expanded interpretation of state action is generally regarded as being applicable. *See* Comment, *Discipline in Professional Sports: The Need for Player Protection,* 60 GEO. L. J. 771, 786-92 (1972). If state action is properly construed here, then any compensation plan between players would, in the least, have to make provision for adequate notice to and opportunity to be heard by the party charged. Provisions for representation by counsel, opportunity to present evidence, and cross examination might also be required, as in the case of administrative proceedings. *Id.*

55. For a similar suggestion with regard to employing the already extant criminal justice system rather that developing punitive measures on the league level, *see* Comment, *supra* note 38, at 788-89.

56. *See* Recent Decisions, *Torts, supra* note 40. *See also* Comment, *Tort Liability for Players in Contact Sports,* 45 U.M.K.C. L. REV. 119 (1976).

An initial consideration of action within the criminal forum may help to illuminate the situation with respect to civil cases. It has been suggested that there has been, and continues to be, a "tacit immunity" from prosecution bestowed upon athletes for their violent conduct during play.[57] Possible reasons for this forbearance from prosecution are that violence so greatly pervades certain professional sports that it has become socially tolerable;[58] that prosecutors may not wish to endanger the ongoing business relationship between professional teams;[59] or, that prosecutors may feel that the criminal law was never intended to reach the professional sports context.[60] Regardless of the rationale behind this "immunity," it appears that such a practice exists in fact.[61] Until 1975, there was no American case in which a team participant was indicted for his conduct during play.[62] The criminal law, a basic tenet of which is the deterrence of socially undesirable acts,[63] has not been effectively used to eliminate excessive violence on the playing field.[64]

The civil side has generally seen more litigation, but civil actions, like

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57. Comment, *supra* note 38, at 778.

58. *Id.* at 779. *See* note 50 and accompanying text *supra.*

59. Comment, *supra* note 38, at 779. The threat to the business relationship between professional athletic teams is underscored by the comment of Harry Sinden, an executive in the Boston Bruins professional hockey team organization, in relation to the prosecution of a Bruins' player for criminal battery committed during a game in Minnesota to the effect that "if Forbes is convicted of anything, we'd have to think twice about letting Bobby Orr, Phil Esposito and all our other players ever skate in Minnesota again." Mulvoy, *Hockey is Courting Disaster,* SPORTS ILLUSTRATED, Jan. 27, 1975, at 16. *See* note 61 *infra* for the facts of the Forbes case.

60. Comment, *supra* note 38, at 780.

61. In fact, the only reported American case during the last ten years in which an athlete has been criminally prosecuted for his violent acts during the course of play is People v. Freer, 86 Misc.2d 280, 381 N.Y.S.2d 976 (Dist. Ct. Suffolk County 1976). In that case an amateur football player was convicted of third degree assault for subsequently punching an opposing player who had punched the defendant in the process of tackling him. *Contra,* Comment, *The Consent Defense: Sports, Violence, and the Criminal Law,* 13 AM. CRIM. L. REV. 235, 247 (1975) for the view that the few existing criminal cases are part of a trend toward more criminal prosecutions in the sports context.

62. In 1975, Dave Forbes, a professional hockey player with the Boston Bruins, hit Henry Boucha, a player with the Minnesota North Stars, with the butt end of his hockey stick causing severe injury to Boucha. When Boucha fell helpless to the ice Forbes pummelled him with his fists until restrained. Forbes was charged with aggravated assault with a dangerous weapon, but a hung jury resulted in a declaration of mistrial and ultimate dismissal. The case was never retried because of the possibility of another hung jury and because the prosecutor felt that the sports community had been put "on notice" that such acts would not be tolerated within that jurisdiction. *See* Flakne & Caplan, *Sports Violence and the Prosecution,* TRIAL, Jan. 1977, at 33. Mr. Flakne was the prosecuting attorney in the *Forbes* case. For additional commentary on *Forbes, see* Comment, *supra* note 38.

Another instance of criminal proceedings brought against athletes occurred in Canada. Both Ted Green and Wayne Maki, professional hockey players, were indicted for assault and battery resulting from a stick fight during a game. Both were eventually acquitted. Regina v. Green, 16 D.L.R.3d 137 (Ont. Prov. Ct. 1970); Regina v. Maki, 14 D.L.R.3d 164 (Ont. Prov. Ct. 1970).

63. For a clear statement of the basic objectives of the criminal law *see,* Commonwealth v. Ritter, 13 Pa. D. & C. 285 (Ct. of Oyer and Terminer 1930).

64. For a more in depth analysis of the applicability of the criminal law to instances of excessive violence in sports *see* Comment, *supra* note 61; Comment, *supra* note 38.

their criminal counterparts, have been relatively few in number. As major business concerns,[65] professional football teams may have had much influence upon players with respect to discouraging their resort to civil court. Organizational threats, either expressed or implied, of contract non-renewal would have imposed a serious burden upon all but the most marketable of players in their consideration of whether or not to pursue a legal claim. This view seems quite plausible when considered in light of the economic motivation the NFL and its member teams would have in keeping such suits from being adjudicated.[66] The adverse publicity generated by legal battles between players could very well detract from the desired image that the business wishes to project concerning both the game and its participants.[67] The fear of declining rates of attendance at games might be cause enough for management to seek to deter adjudications. Additionally, the possibility that the "business" may be held liable for the acts of its "employees" under general agency or tort theory would only strengthen the teams' resolve to block legal activity.[68]

A third rationale which has been advanced for the historical dearth of

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65. At one time professional football was so small a business that it was considered a mere "avocation" for club owners. *Senate Hearings, supra* note 44. Today, however, professional football is a multimillion dollar enterprise with many monopolistic aspects. Although the legal system was slow in recognizing the economic importance of professional sports in general, the enormous growth of this business has forced litigation in several areas. *See* Nelson, *Bringing Sports Under Legal Control,* 10 CONN. L. REV. 251 (1978). One of the most important areas is antitrust law, made expressly applicable to the professional football industry in Radovich v. National Football League, 352 U.S. 445 (1957).

66. Not only might the professional football industry have reason to deter civil adjudications, as mentioned in the text, but it has been suggested that the football business may even have an economic interest in affirmatively perpetuating on-field violence. Such an interest centers around what has been termed the "gladiator syndrome;" which is to say that many spectators are attracted to the game in the first place by the thrill provided by the great certainty of violence and harm on the field. *See* Markus, *Sport Safety: On the Offensive,* TRIAL, July/Aug. 1972, at 12; Comment, *supra* note 38, at 785. Judge Matsch recognized this aspect of the game in the *Hackbart* case when he wrote that "while some . . . are attracted by the individual skills and precision performances of the teams, the appeal to others is the spectacle of savagery." 435 F. Supp. 352, 355 (1977).

67. The desired "image" would most likely be reflective of the values typically associated with athletics in general. "Sport has always been symbolized by . . . team work, promise, sacrifice and cooperation." Slusher, *supra* note 47, at 134.

68. The feasibility of a professional football team's vicarious liability for violent conduct during the course of play has not been conclusively determined. The district court in the *Hackbart* case was able to avoid the issue through its finding of no liability on the part of the defendant himself. 435 F. Supp. 352, 357 (1977). It has been suggested, however, that a team's liability in this context is a very real possibility especially since the management may be the real party responsible for a policy of violence and overaggressiveness among its players. Problems in proving whether the employee was authorized to do certain acts or whether he was acting within the scope of his employment might be "roadblocks" to the imposition of such liability, but they do not appear insurmountable. *See* Note, *The "Booby" Trap: Does The Violent Nature of Professional Football Vitiate the Doctrine of Due Care in Participant Tort Litigation? Hackbart v. Cincinnati Bengals, Inc.,* 10 U. CONN. L. REV. 365 (1978); Comment, *supra* note 38, at 776-77.

case law in this area is the civil counterpart of the "ongoing relationship" theory, previously discussed with respect to criminal prosecutions.[69] There are two levels in this hypothesis. First, a player may be unwilling to set a precedent of legal action for injuries suffered during the course of play.[70] The fear that he may be opening a "Pandora's Box" in which he would be tomorrow's unwitting defendant may be at the heart of this reluctance. Given the great amount of body contact inherent in the game of professional football it is quite reasonable for a player to believe that he may one day injure another player — an act for which he may consequently be held liable. Second, the fear that taking legal action may actually increase on-field violence by creating anger and ill feelings between players who must repeatedly face each other is also quite reasonable.[71] This whole theory seems to be greatly individual in nature, however, and its application is sure to be highly variable. Whether each player will make the necessary implicit value judgment that forbearance today may be worth no liability tomorrow is questionable. Additionally, it merits note that players who no longer plan to continue their careers have little incentive to refrain from legal action under this rationale. Those who have suffered permanently debilitating injuries or have otherwise been forced into early retirement by such injuries would feel no compulsion to forego their legal claims.

Finally, there is some thought that popular notions of violence as an inherent part of the game might lead a player to believe that he actually has no legal claim when injured by excessive violence. This belief may well have been a key factor in keeping professional athletes out of the courtroom, and it formed the basis of the trial court's opinion in *Hackbart v. Cincinnati Bengals, Inc.*[72] The *Hackbart* trial court concluded that professional football is such an implicitly violent game that no reasonable standards of conduct can be formulated for actions during the course of play.[73] The corollary which must be recognized from such a view is that the professional football player will not be heard to complain when he sustains an injury because he has voluntarily chosen to encounter all risks.[74] Although the appellate court demonstrated that the trial court plainly erred in denying access to players merely due to the violent nature of professional football,[75] in one sense the trial court may have been correct in its assertion that traditional tort theory will be difficult to apply in a violent sport context. Essentially, the three major

69. *See* note 59 and accompanying text *supra.*
70. *See* Comment, *supra* note 48, at 778 n.39.
71. *Id.* at 779.
72. 435 F. Supp. 352, 356 (D. Colo. 1977).
73. *Id.*
74. *Id.*
75. 601 F.2d 516, 524 (10th. Cir. 1979).

theories of liability applicable to sports injury cases are intentional tort (battery), reckless misconduct, and negligence, each of which presents unique problems for potential plaintiffs.[76]

1. *Intentional Tort*

The most obvious theory for an athlete injured through excessive violence to proceed upon is battery.[77] Conventional battery may be defined as an affirmative act that is intended to, and does, cause an unpermitted contact.[78] The intent requisite to battery is only the intent to bring about the contact itself, and not necessarily an intent to bring about the resulting harm.[79] Courts seem to have been reluctant to apply conventional battery theory to sports injuries. This reservation possibly stems from the recognition that intent to make offensive contact is an inherent part of team sports such as football, hockey, and to a limited extent, soccer. Application of conventional battery principles to these sports might lead to the conclusion that every contact is actionable — a clearly undesirable result if the sport is to continue being played.

It appears that courts handling sports injury cases are leaning toward a redefinition of the intent requisite to an actionable battery. For example, one instance where a court seemed to require a heightened standard of intent was *Bourque v. Duplechin.*[80] In that case, the plaintiff was playing second base during an amateur softball game when the defendant, who was running from first base to second, veered out of the base path and ran into the plaintiff. In doing so, the defendant raised his left arm and hit the plaintiff beneath the chin causing a fractured jaw and seven broken teeth. Finding that the defendant was negligent, the court

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76. In addition to the three major theories herein analyzed, Hackbart claimed that:

1) He was a beneficiary of the standard player contract, which requires all players to conform to rules and regulations;
2) Clark was guilty of the tort of outrageous conduct; and
3) Clark had tortiously interfered with his contract.

The trial court made short work of these theories. 435 F. Supp. 352, 356-57 (D. Colo. 1977). As these theories do not seem to hold much promise for the potential athlete-plaintiff, they shall not be further discussed.

77. For an early case in which a professional baseball player successfully utilized battery theory for an injury sustained at the hands of an opposing team member, *see* Averill v. Luttrell, 44 Tenn. App. 56, 311 S.W.2d 812 (1957). *See also* Griggas v. Clauson, 6 Ill. App.2d 412, 128 N.E.2d 363 (1955), in which a judgment for $2,000.00 was won by an amateur basketball player who brought suit under assault and battery theory.

Unfortunately, a battery theory was not open to Dale Hackbart because the applicable statute of limitation had expired before he brought his claim. 435 F. Supp. 352, 355 (D. Colo. 1977). The fact that the statute had tolled in *Hackbart* does not discount that such a theory is appropriate to the facts and may even have been successful.

78. W. PROSSER, THE LAW OF TORTS 35-37 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 13(a), 16(1) (1965).

79. W. PROSSER, THE LAW OF TORTS 35-37 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 13(a), 16(1) (1965).

80. 331 So.2d 40 (La. Ct. App. 1976).

distinguished his conduct from a battery by saying that "he did not intend the harm that resulted. . . . Duplechin was not motivated by a desire to injure Bourque."[81] Thus, while an intent to produce the resulting harm is not an element of conventional battery, it may be emerging as a requirement for a finding of battery within the sports context.[82]

The "redefinition" of the intent requisite to battery is also evidenced in both the trial and appellate court decisions in *Hackbart v. Cincinnati Bengals, Inc.*[83] Although battery theory was unavailable to Hackbart, the trial court made a factual determination that defendant Clark acted "without a specific intent to injure."[84] The appellate court distinguished reckless behavior from an intentional tort by saying that intentional torts require a state of mind in which there is a "substantial certainty" that the harm will result,[85] whereas reckless behavior does not. This stricter standard would acknowlege the context of the injury: therefore, it would be an adequate, reasonable safeguard against questionable claims of battery based upon contact permitted by the rules as well as against contact either generally accepted by the players or stemming from only minor rule infractions.[86]

Since Clark clearly intended to make contact,[87] Hackbart might well

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81. *Id.* at 43. However, when the circumstances surrounding the case are considered, the court's rationale may be less significant. As it happens, the court was aware that the defendant's insurance policy did not cover liability for intentional torts. Thus, if the plaintiff was to recover it would have to be under a negligence theory. Judge Cutrer's vigorous dissent points out that the majority's strained finding of negligence would have been unnecessary if they had applied conventional battery theory, as he contends they should have. *Id.* at 43-44.

82. Whether this heightened standard is the result of a purposeful attempt to mold tort theory to the practicalities of a contact sport context, or is merely reflective of underlying values remains to be seen.

This standard is to be distinguished from the consent defense to an allegation of battery. If every contact made was to be considered actionable there would probably be a multitude of suits: the determinative issue in each would be the degree to which the plaintiff consented to being hit given the particular facts. However, by raising the standard for an initial allegation of battery the number of suits brought would most likely be reduced due to the increased burden of establishing a prima facie case. For a full discussion of the consent defense, *see* notes 90-94 and accompanying text *infra.*

83. 435 F. Supp. 352 (D. Colo. 1977), *rev'd,* 601 F.2d 516 (10th. Cir.), *cert. denied,* 100 S. Ct. 275 (1979).

84. 435 F. Supp. 352, 353 (D. Colo. 1977).

85. 601 F.2d 516, 524 (10th. Cir. 1979). *See* note 100 and accompanying text *infra.*

86. The heightened intent requirement may be an effective counter to the "slippery slope" argument of opponents to judicial intervention who contend that to allow liability for violation of the rules or customs would be to allow liability for every rule infraction, whether major or minor, which involves an injury. For an application of this "slippery slope" argument to the question of criminal liability for excessive on-field violence *see* Johnson, *supra* note 6, at 13. *See also* W. PROSSER, *supra* note 78, at 36, which would take issue with this new intent requirement because "[t]he gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff." *Id.* (citations ommitted).

87. Since the incident was clearly depicted on the game films, there is little doubt as to Clark's intent. 435 F. Supp. 352, 356 (D. Colo 1977).

have prevailed under conventional battery theory. However, under the evolving standard of intent it is very unlikely that Hackbart would have been successful. In light of the trial court's finding that Clark did not intend to injure Hackbart, but instead acted only out of "anger and frustration,"[88] it is doubtful that he would be found to have committed an actionable battery.

If a defendant in a sports injury suit is shown to have acted with an intent to injure, his strongest line of defense will be that the plaintiff consented to the contact which occurred. "Consent to an act is simply willingness that it shall occur."[89] Any manifestation of consent upon which a defendant reasonably relies is as effective as express consent.[90] It may therefore be argued that a participant in contact sports impliedly consents to being hit through his very presence on the field. Although it has been recognized that voluntary participation demonstrates some level of consent to being hit, the proper rule has been suggested to be that

> [t]aking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill.[91]

Clark's actions clearly violated a rule "designed to protect the participants."[92] Furthermore, there was testimony at trial illustrating that such actions are not within the general customs or usages of professional football players.[93] Although Hackbart may have consented to the body contact normally encountered in a football game, the weight of authority would cut against a finding that he consented to Clark's blow by his mere participation in the game.[94]

It appears that intentional tort theory presents a viable method of recovery for an athlete injured through the excessively violent conduct of another player. While a heightened judicial sense of intent requisite to battery in a sports context may present evidentiary problems, it pro-

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88. 435 F. Supp. 352, 353 (D. Colo. 1977).

89. W. PROSSER, *supra* note 78, at 101. *See* RESTATEMENT (SECOND) OF TORTS § 892(1), (2) (1965).

90. W. PROSSER, *supra* note 78, at 101. *See* RESTATEMENT (SECOND) OF TORTS § 892 (1), (2) (1965).

91. RESTATEMENT (SECOND) OF TORTS § 50, comment b. *See* W. PROSSER, *supra* note 78, at 102. *See also* Nabozny v. Barnhill, 31 Ill. App.3d 212, 334 N.E.2d 258 (1975); Bourque v. Duplechin, 331 So.2d 40 (La. Ct. App. 1976); Vendrell v. School District No. 26C, Malheur County, 233 Or. 1, 376 P.2d 406 (1962).

92. RESTATEMENT (SECOND) OF TORTS § 50, comment b (1965).

93. 601 F.2d 516, 521 (10th. Cir. 1979).

94. *See* note 91 *supra*.

vides a safeguard against the initiation of suits based on mere technical rule violations, minor inadvertent contacts, or wholly frivolous claims.[95] Restriction of the consent defense to those contacts permitted by the safety rules or in common usage by players presupposes a player's expectations when he enters upon the field; however, it is a measure calculated to account for the inherently violent context presented by professional football. The adoption of such a restricted use of the defense is not intended to establish a "per se" rule whereby all contacts made outside the rules or usages of the game automatically estop the assertion of a consent defense. Rather, it is suggested that the "rules and usages" standard be employed in conjunction with a consideration of surrounding circumstances as part of an overall determination of whether it is reasonable to imply that an injured player consented to the type of act encountered. Therefore, the battery approach is an attractive one because it does not pose an insurmountable consent barrier. It does, however, provide a reasonable limitation upon the degree of tolerable violence in any given situation.

2. *Reckless Misconduct*

A likely alternative theory of liability in sports injury cases, and the principal theory employed in the *Hackbart* case,[96] is reckless misconduct. A precise definition of the theory is elusive, but reckless misconduct may be characterized as an unreasonable act intentionally performed in disregard of a risk known, or so obvious that it should be known, to the actor which creates a high probability that harm will follow.[97] Additionally, the actor's "conscious indifference" to the consequences of his action is generally thought to be an element of the tort.[98] It is not surprising that a definition of reckless misconduct seems to borrow from both intentional and negligent tort language because reckless misconduct applies "to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so in-

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95. The requirement of intent to harm in a sports battery cause of action is primarily intended to limit the number of actionable batteries and inhibit frivolous claims, while still providing a method of redress for injured players. The intent to harm requirement may be likened to the mens rea element of a criminal act. It can be shown if the parties had an argument prior to the injury, an ongoing feud over the course of several games, or an off the field private dispute. It may also be demonstrated by one player's desire to avenge a prior, unpenalized action performed by the plaintiff. However, evidence of these occurrences is not always easily obtained.

96. Reckless misconduct was primarily relied upon because the statute of limitations had expired for battery by the time the suit was initiated. 435 F. Supp. 352, 355 (D. Colo. 1977). Indeed, the *Hackbart* appellate court felt that a reckless misconduct theory was more clearly applicable to the facts of the case than battery. 601 F.2d 516, 524-25 (10th. Cir. 1979).

97. W. PROSSER, *supra* note 78, at 185. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965).

98. W. PROSSER, *supra* note 78, at 185. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965).

tended.'"[99] Thus, although reckless misconduct requires that the risk be created by more than mere inadvertence, it does not require that the actor actually intend the harm which results.[100]

The leading case involving reckless misconduct in a sport situation is *Nabozny v. Barnhill.*[101] Nabozny was the goaltender for his high school soccer team and was standing in the "penalty area" of the field when his teammate passed the ball to him. The defender who had been guarding Nabozny's teammate rushed the plaintiff in an attempt to gain possession of the ball and, in the process, kicked him in the head causing permanent damage to his skull and brain. Although the action was originally brought in negligence, the court determined the case using reckless misconduct theory.[102] The court formulated a duty between athletes which stated:

> [w]hen athletes are engaged in an athletic competition; . . . a recognized set of rules governs the conduct of competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. A reckless disregard for the safety of other players cannot be excused.[103]

Upon finding this duty, the *Nabozny* court drafted a rule whereby "a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player . . . ."[104] In clearly delineating the bounds of liability, *Nabozny* mixes a desire to provide redress with a touch of practicality. Unwilling to apply the *Nabozny* reasoning, the *Hackbart* trial court attempted to distinguish the two cases on the facts.[105] However, the trial court's position that "the

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99. W. PROSSER, *supra* note 78, at 184.

100. Reckless misconduct seems to fall somewhere between intentional misconduct and negligence along the "range of conduct" continuum. *See* Comment, *supra* note 38, at 781.

An actor who "intends" to produce a certain harm is "substantially certain" that the harm will in fact occur while a reckless actor need only know there is a "strong" or "high" probability that the harm would result. However, the difference between reckless misconduct and negligence is that reckless misconduct involves a "substantially greater" risk of harm than negligence. One commentator describes the difference in the risk of harm between reckless misconduct and negligence as one of "quality rather than in degree," W. PROSSER, *supra* note 78, at 184, while another emphasized the difference as so significant that it amounts to a "difference in kind." RESTATEMENT (SECOND) OF TORTS § 500, comment g (1965).

101. 31 Ill. App.3d 212, 334 N.E.2d 258 (1975). *See generally* Annot., 77 A.L.R.3d 1294 (1977).

102. It is not apparent why intentional tort theory (battery) was not employed in this case. Perhaps it was used, but just was not an issue on appeal.

103. 31 Ill. App.3d 212, 215, 334 N.E.2d 258, 260-61 (1975).

104. *Id.* at 215, 334 N.E.2d at 261 (1975). Note that this rule does not provide for liability in cases of negligence.

105. 435 F. Supp. 352, 358 (D. Colo. 1977).

'restraints of civilization' have been left on the sidelines"[106] in professional football seems unreasonable. The appellate court's recognition that not all reason has been abandoned[107] by football players, together with the *Nabozny* court's holding that "organized, athletic competition does not exist in a vacuum,"[108] constitutes a more realistic approach to the problem of excessive violence in sports. There is no cogent policy militating against application of a rule similar to that in *Nabozny* to a professional sports context.[109] Rather, it may well be that a professional athlete has a right to expect an even higher degree of care from his fellow professionals than one amateur does from another. After all, NFL players are paid to play football and should be expected to conduct themselves in a professional manner during the course of their duties.

The *Hackbart* trial court indicated that even had it been willing to formulate a duty of conduct between players the defense of assumed risk would apply to render the defendant not liable for his actions.[110] The defense, often confusing and misapplied, has led many courts to severely restrict its use or totally abrogate it.[111]

The theory of assumed risk may be broken into two areas for the purposes of clarity and analysis.[112] In the first instance, the defense applies where there is some recognized duty of conduct flowing from defendant to plaintiff, but where the plaintiff has either expressly or impliedly agreed to relieve the defendant of that duty and bear the risk of being harmed. If the plaintiff is willing to "take his chances," the defendant's

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106. *Id.*

107. 601 F.2d 516, 521 (10th Cir. 1979).

108. 31 Ill. App.3d 212, 215, 334 N.E.2d 258, 260-61 (1975).

109. In fact, the *Nabozny* court took careful steps in formulating its rule as it recognized that it was opening "a new field of personal injury litigation" which must be controlled. 31 Ill. App.3d 212, 215, 334 N.E.2d 258, 261 (1975). *See* Comment, *supra* note 56, at 128; Note, *supra* note 68, at 369. *But see* Comment, *Participant's Liability For Injury to a Fellow Participant in an Organized Athletic Event,* 53 CHI-KENT L. REV. 97, 108 (1976).

110. 435 F. Supp. 352, 356 (D. Colo. 1977).

111. *See* Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965), in which the court advocates a return and restriction to the original use of the assumed risk defense — in the context of employer-employee relations. The employee was held to assume many of the risks incident to working at the place of employment. *See also* McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963), in which the court said, "the term 'assumption of risk' is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with 'negligence' and 'contributory negligence.' " *Id.* at 276, 196 A.2d at 240-41.

Interestingly, Congress must have shared in this general disdain for assumed risk. "In 1939 the Federal Employers' Liability Act was amended to eliminate the defense of assumption of risk . . . ." W. PROSSER, *supra* note 78, at 457.

112. *See generally* W. PROSSER, *supra* note 78, at 439; RESTATEMENT (SECOND) OF TORTS § 596 (A), (C), (D) (1965); McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963).

Prosser speaks of three basic categories of assumed risk cases. W. PROSSER, *supra* note 78, at 440. This Comment treats his separate classes of express and implied consent as one category for the purpose of clarity in application to the sports context.

breach of a normally recognized duty is not seen as giving rise to an actionable wrong. This is the purest form of assumed risk. On the second level, the defense addresses the circumstance in which the plaintiff is aware of the risk created by defendant's breach of a recognized duty, yet has elected to voluntarily encounter it anyway. This facet of assumed risk is analogous to the notion of contributory fault.[113] At least one court, tired of the broad term "assumed risk" held that it shall not be used again and that theories of defense were to be couched in terms of the above two levels of analysis: absence of duty or presence of contributory fault.[114]

It appears that an assumed risk defense would present but a minor obstacle to recovery for an athlete-plaintiff who was injured in a situation analogous to that presented in *Hackbart*. However, there is one caveat: the presiding court must be willing to recognize a duty of care, similar to that in *Nabozny,* between the participants. If such a duty is recognized, then there seems little chance that the injured player will be deemed to have relieved the defendant of that duty merely through his presence on the field. A specific manifestation of the plaintiff's desire to release the defendant from his duty of care would be required before assumption of the risk could be found. Additionally, it is doubtful that the plaintiff could be shown to have been contributorily at fault when, as in *Hackbart,* he is attacked from the rear or some other unsuspected position. If the court fails to recognize a duty of care, then consideration of the defense becomes moot because the plaintiff will be unable to successfully assert reckless misconduct.

When violent contact occurs in a professional football game it may become nearly impossible, in a practical sense, to distinguish the subjective mental state which is a requisite to reckless misconduct from that which constitutes *conventional* battery.[115] Since the theoretical distinc-

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113. It should be noted that a contributory fault defense to an allegation of reckless misconduct is quite restricted. Contributory (or comparitive, where authorized by statute) negligence is not a defense to intentional or reckless misconduct, as most courts are unwilling to allow the greater fault inherent in reckless misconduct to be offset by the lesser fault contained in a plaintiff's mere contributory negligence. *See* W. PROSSER, *supra* note 78, at 426; RESTATEMENT (SECOND) OF TORTS § 503 (1965). Intentional or reckless contributory fault by a plaintiff would have to be shown in order to offset an allegation of reckless misconduct. *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520 (10th Cir. 1979).

114. McGrath v. American Cyanamid Co., 41 N.J. 272, 275-76, 196 A.2d 238, 240-41 (1963).

115. For purposes of litigation the two standards of subjective mental state may be considered by some to actually merge and become indistinguishable. This notion is lent credence when it is considered that evidence supportive of an intent to make contact can also be construed to support a finding of conscious disregard of a known risk. For example, a game film which depicts a player deliberately raising his arm and striking the only opponent within reach on the back of the head may be offered as evidence tending to prove that the striker did in fact intend to make an offensive contact with his adversary. In the same instance, such a film may reasonably be considered to support the allegation that an offending player, by virtue of the fact that there was only one opponent within reach, intentionally disregarded the risk that his action would hurt the other player.

tions between these two torts breaks down in this context, the application of the reckless misconduct theory may actually become a disguised usage of the conventional battery approach. However, this cause of action is adequately protected from frivolous abuse, whereas conventional battery was not, through its requirement that damages be proven in order for liability to be found.[116] When compared to the necessity of proving intent to harm under battery theory, the inclusion of this element in the reckless misconduct cause of action effectively balances its otherwise relatively lighter burden of demonstrating only an intentional disregard of a known risk. Additionally, proof of damages helps to make reckless misconduct particularly adaptable to a sports injury context where, as in *Hackbart,* the plaintiff has sustained provable damages but the violent actor did not intend to produce the egregious results which occurred.[117] It will be assumed that the defendant knew his actions were highly likely to produce serious harm; as long as the injured player is able to prove damages he will recover. Analyzed and applied in this manner, the reckless misconduct theory would provide a method of redress for injured players who could not satisfy a heightened standard for battery.

3. *Negligence*

Assuming that a court would be willing to recognize a duty of care between professional athletes similar to that in *Nabozny,* there seems little reason why a claim brought in negligence by an injured player would not be successful.[118] As the *Nabozny* court pointed out however, the theory has rarely been applied in the sports injury context.[119]

One case in which negligence theory[120] was employed by an injured athlete is *Vendrell v. School District No. 26C, Malheur County.*[121] The plaintiff, a running back on his high school football team, was carrying

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116. The elements of a cause of action in reckless misconduct are the same as those for negligence (duty, breach, legal cause and proof of loss or damages). RESTATEMENT (SECOND) OF TORTS § 501 (1) (1965). Proof of damages is an essential element of a cause of action brought in negligence, while it is not required for a case brought under a battery theory. *See* notes 78-79 and accompanying text *supra.*

117. 435 F. Supp. 352, 353 (D. Colo. 1977).

118. Although a *Nabozny* "type" duty would have to be recognized, a claim in negligence theory would fail if the actual rule espoused in the case were followed. *See* note 104 and accompanying text *supra.*

119. 31 Ill. App.3d 212, 214, 334 N.E.2d 258, 260 (1975).

120. The elements of a cause of action in negligence are:

1) a recognized and defined duty between the parties;
2) a breach of that duty by one of the parties;
3) a causal connection (legal cause) between the breach of duty and the injury; and
4) actual loss or damage to the interest of one of the parties.

W. PROSSER, *supra* note 78, at 143; RESTATEMENT (SECOND) OF TORTS § 281 (1965).

121. 233 Or. 1, 376 P.2d 406 (1962).

the ball during the course of play when he lowered his head and ran straight into a group of tacklers. As a result the plaintiff sustained a fractured cervical vertebra. He sued the school district alleging negligence in that he had received neither adequate playing instruction nor adequate protective equipment. A verdict and judgment were rendered in plaintiff's favor, however, on appeal the judgment was reversed on the grounds that the plaintiff was an experienced player who should have realized the risk inherent in being tackled. Therefore, the plaintiff was held to have assumed the risk of being injured.

The disposition of the *Vendrell* case may lend some insight to the reason why negligence has not been often used in this context. Since the *Vendrell* court's finding of assumed risk was not analytically broken down, as in the preceding section, it is not possible to determine the sense in which it actually meant to apply the defense. It seems as though the court decided that the plaintiff impliedly accepted the risks inherent in being tackled within the rules, thereby relieving the defendant of liability.[122] This position seems well taken because the facts of the case did not present an instance of excessive violence. In cases where excessive violence is a factor, such a position would be untenable. However, assumption of the risk may hold up as a defense in cases of violence occurring outside the rules or usages of the game if the plaintiff is found to be contributorily or comparatively negligent.[123] Although the *Hackbart* facts would not appear to be susceptible to application of the defense, mere contributory negligence may not be that difficult to show in other cases especially if there was an argument between the players prior to injury being inflicted. Since a defense of assumed risk, or contributory negligence itself, may be easily asserted the cause of action in negligence may have been deliberately avoided despite the fact that the plaintiff will initially have a lighter burden in establishing its elements than in causes of action brought under either reckless misconduct or battery theory.[124]

Since an action sounding in negligence is easily defensed, plaintiffs may have avoided it in favor of the theories of reckless misconduct or battery. Alternatively, its sparing use may reflect an underlying reluctance to assert liability for mere negligence in a context where inadver-

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122. "The risk of injury that was inherent in being tackled was obvious. The plaintiff was thoroughly familiar with it. He had been tackled scores of times and had been the tackler many many times. The tackle in question was made fairly and according to the rules." 233 Or. 1, 19, 376 P.2d 406, 414 (1962).

123. This is the second level of analysis of the assumed risk defense. The theory of comparative fault applied (contributory or comparative negligence) will depend upon jurisdictional variations.

124. Although he or she must prove damages, a plaintiff must only establish the creation of an unreasonable risk of harm in negligence as opposed to subjective intent to cause harm (battery) or a conscious disregard of the high probability that harm would occur (reckless misconduct).

tent contact is common, accepted, or unavoidable. Whatever the real cause for its lack of use, the negligence theory seems of relatively little importance to the athlete injured through excessive violence. Given the strength of the battery and reckless misconduct theories in this area, negligence is a tool of limited value.

IV. Civil Liability and Legislative Action

The *Hackbart* appellate court, in expressly allowing for civil liability between professional football players, has provided an important means of redress for injured athletes. However, there is merit to the assertion that court involvement alone is insufficient to remedy the problem of excessive on-field violence. The *Hackbart* trial court is not unique in its suggestion that there should be strict legislative or administrative controls over the football industry in order to effectively deter unnecessary violence.[125] Creation of a federal regulatory agency with jurisdiction over all professional contact sports has been posited as one method for attaining the needed control.[126] Although contributing to the often prodigious governmental bureaucracy, this approach would undoubtedly be effective in both controlling the volume of litigation and assuring uniformity of law between jurisdictions.[127] Moreover, an agency could develop greater expertise in handling these problems than courts will ever be able to do.[128]

Despite the benefits which legislative or administrative controls might hold, it seems unlikely that such measures will ever become reality without supportive action in the courts.[129] Judicial abstention in this area can not be expected to foster legislative activity, especially given the legislature's noticeable reluctance to act in the area of professional sports.[130] Rather, recurrent individual lawsuits by players may demonstrate the need for reform and thereby provide the impetus for in-depth legislative scrutiny and rule making.[131]

Access to the civil courts is an important step in controlling excessive violence during the course of play in professional football. Together

125. 435 F. Supp. 352, 358 (D. Colo. 1977). Such a position has been expressed by commentators as well. *See* Markus, *supra* note 66, at 13; Note, *supra* note 68, at 373-74; Comment, *supra* note 54, at 794-97.

126. Markus, *supra* note 66, at 13; Comment, *supra* note 54, at 795.

127. These were two prime fears of the *Hackbart* trial court. 435 F. Supp. 352, 358 (D. Colo. 1977).

128. Comment, *supra* note 54, at 795.

129. Markus, *supra* note 66, at 13; Note, *supra* note 68, at 374.

130. A proposal designed to set up a regulatory agency for professional baseball was not accepted by Congress, the expense of creating a new agency and forcing the sport to follow new administrative procedures being cited as underlying reasons. *See* Comment, *supra* note 54, at 796.

131. Markus, *supra* note 66, at 13; Note, *supra* note 68, at 374. For an extended discussion on the pros and cons of legislative or administrative regulation of professional sports, *see* Comment, *supra* note 54, at 794-97.

with possible legislative action, civil suits may provide incentive for the NFL to exercise more stringent control over its players. In an effort to lessen adverse publicity and prevent economic loss, the league itself may solve the problem of excessive violence at its source.

CONCLUSION

The foregoing discussion has attempted to demonstrate the need for civil judicial intervention in cases involving injuries resulting from excessively violent conduct, at least until such time as the NFL or legislature can achieve the task of regulation. Excessively violent actions during the course of play may be susceptible to the imposition of both criminal and civil liability, and their combined threat may prove an effective deterrent to the growing level of violence in professional football. Although criminal liability does not have as its aim the relief of the injured party, civil liability naturally involves an element of recompense and may fill a void left by the unsympathetic posture of both internal league sanctions and the criminal law. The likelihood of success under battery or reckless misconduct theory can only serve to increase the deterrent effect that civil liability holds toward unwarranted violence. While the imposition of liability evinces societal condemnation of this violence, it "in no way changes the character of the game."[132] Rather, it protects those generally popular aspects of professional football from rising on-field savagery.

Advocates of legislative or administrative regulation of the violence in sports might see civil liability alone as an inchoate means of control. There is little reason to believe, however, that these methods of governmental supervision are mutually exclusive. Indeed, one may even serve as a vehicle for achievement of the other.

PETER R. NADEL

Hockey's Reserve System and the Labor Exemption: *McCourt v. California Sports, Inc.*

Reserve systems in professional team sports empower club owners with varying degrees of control over athletes beyond the expiration of their contracts.[1] In the 1970's, the reserve systems in baseball,[2] hockey,[3] basketball,[4] and football[5] were challenged as being violative of the antitrust laws.[6] Although the Supreme Court continued to exempt baseball from the scope of these laws,[7] the reserve systems in hockey,[8]

1. The first case to analyze a reserve system was Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (C.C.S.D.N.Y. 1890). The reserve system employed consisted of an option clause within a player's contract which gave the club the exclusive right to bargain for the player's baseball services for the year after the contract ended. When Ewing refused to honor the option, the club sought an injuction to prevent the alleged breach of contract. The court held that while it might prevent Ewing from playing for another club, it would not issue an injuction forcing him to play because the option clause was "merely a contract to make a contract if the parties can agree." *Id.* at 204.

2. *See* Flood v. Kuhn, 407 U.S. 258 (1972). At the time of Flood's challenge, baseball employed an option clause reserve system similar to that described in note 1 *supra.* Essentially, a player could play only for the club he originally signed with unless traded by that club because once an option was exercised, the entire contract, including the option clause, was renewed. *See* note 7 *infra.*

3. Hockey's reserve system consisted of an option clause similar to that in baseball. *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

4. Basketball's reserve system was also similar to baseball's. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975).

5. Football used the "Rozelle rule" reserve system adopted in 1963, which allowed a player to play out his option year and sign with another club, but obligated a team signing a so-called "free agent" to compensate the free agent's former team with players, draft choices or cash. If the teams could not agree on the compensation, the commissioner of the National Football League, Mr. Rozelle, would resolve the dispute. *See* Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd on other grounds,* 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).

6. Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2 (1976).

7. In Flood v. Kuhn, 407 U.S. 258 (1972), the Supreme Court continued to exempt baseball from antitrust attack on *stare decisis* grounds. The earlier cases, Federal Base Ball Club v. National League, 259 U.S. 200 (1922), and Toolson v. New York Yankees, 346 U.S. 356 (1953), were held to be determinative. An arbitrator's ruling, reviewed in Kansas City Royals Baseball Corp. v. Major League Baseball Players, Ass'n, 532 F.2d 615 (8th Cir. 1976), changed the operation of the current reserve system by interpreting the option clause to allow a club to unilaterally renew a player's contract only once, rather than perpetually.

In 1976, a new reserve system was agreed upon which allows a player with six years experience in the major leagues to become a free agent by playing out his option year. The league conducts a free agent draft wherein each free agent can be picked by up to thirteen teams, including his own. A team signing a free agent must compensate the free agent's former team with a draft choice. A new collective bargaining agreement is currently being negotiated which will likely change this procedure.

8. The reserve system in hockey was challenged in Philadelphia World Hockey Club, Inc. v.

basketball,[9] and football[10] were changed as a result of these suits. This comment will focus on the latest challenge to a reserve system, *McCourt v. California Sports, Inc.*,[11] in which hockey's reserve system was unsuccessfully attacked. If courts follow *McCourt's* holding that federal labor policy deserves pre-eminence over antitrust policy and that the nonstatutory labor exemption[12] insulates reserve systems from antitrust attack, then future antitrust challenges will face increased difficulty.

Section I of this article will examine the reserve system in the National Hockey League (NHL) at the time it was challenged by the World Hockey Association[13] (WHA) as well as the bargaining process and structure of the reserve system when challenged by Dale McCourt.[14] In section II, the district court's holding in *McCourt* that the reserve system violated section 1 of the Sherman Act,[15] and that the nonstatutory labor exemption did not apply,[16] will be contrasted with the appeals court reversal which allowed the nonstatutory labor exemption to shield the NHL from antitrust attack.[17]An analysis of the reasons for the use of the nonstatutory labor exemption[18] will follow in section III. Finally, section IV will present an examination of the possibilities for future antitrust attacks to overcome its use.[19]

Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972). *See* notes 19-28 and accompanying text *infra*. Additionally, there were other suits brought by National Hockey League clubs seeking injunctions to prevent players from playing for clubs in the World Hockey League. *See, e.g.*, Boston Professional Hockey Ass'n, Inc. v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972) (injunction denied); Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972) (injunction granted); Nassau Sports v. Hampson, 355 F. Supp. 733 (D. Minn. 1972) (injunction denied).

9. In basketball, the case of Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), upset the existing system. As a result of *Robertson*, the players and League agreed to a Rozelle rule reserve system, effective until 1981. For an explanation of the "Rozelle rule," *see* note 5 *supra*.

From 1981 to 1987, the League will be governed by a right of first refusal system. A free agent's former team will have a right of first refusal which will allow it to match an offer made by another team and thereby retain the free agent. Robertson v. National Basketball Ass'n, 72 F.R.D. 64 (S.D.N.Y. 1976). *See* Panel Discussion, *Professional Sports: Has Antitrust Killed the Goose that Laid the Golden Egg?*, 45 ANTITRUST L. J. 290 (1976).

10. Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd on other grounds*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), ended the Rozelle rule reserve system. In 1977, an agreement calling for a right of first refusal system was ratified by the League and players. For an explanation of this system, *see* note 9 *supra*.

11. 600 F.2d 1193 (6th Cir. 1979), *rev'g*, 460 F. Supp. 904 (E.D. Mich. 1978).

12. The nonstatutory labor exemption is a judicial tool created to effectuate federal labor policy. The nonstatutory exemption's basis is the statutory labor exemption found in sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52 (1976), and the Norris-LaGuardia Act §§ 4, 5, 6, 13, 29 U.S.C. §§ 104, 105, 106, 113 (1976). *See* notes 91-103 and accompanying text *infra*.

13. *See* notes 20-28 and accompanying text *infra*.

14. *See* notes 29-40 and accompanying text *infra*.

15. 15 U.S.C. § 1 (1976).

16. *See* notes 41-62 and accompanying text *infra*.

17. *See* notes 63-83 and accompanying text *infra*.

18. *See* notes 84-108 and accompanying text *infra*.

19. *See* notes 108-19 and accompanying text *infra*.

I. THE RESERVE SYSTEM

In 1972, NHL contract terms concerning matters other than salary and length were fixed through the use of the Standard Player's Contract.[20] Among other terms in the contract was the option clause.[21] The option clause allowed a team to retain the services of a player on terms identical to the original contract for one year after the contract expired, except for salary, which was negotiable.[22] At the end of the option year, a new option year began; the old option year having incorporated the terms of the original contract including the option clause. Through this mechanism a team could control a player's career.[23]

This system was successfully challenged by the World Hockey Association in 1972. In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,[24] Judge Higginbotham held that the reserve system was in all likelihood a violation of the Sherman Act,[25] and entered a preliminary order preventing NHL teams from seeking injunctions against former players who had "jumped" from the NHL to the WHA.[26] In addition, the district court held that there had not been good faith bargaining between the NHL and the National Hockey League Player's Association (NHLPA) on the reserve system.[27] The court dismissed the claim of the NHL that the nonstatutory labor exemption should insulate the reserve system from antitrust attack.[28]

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20. The Standard Player's Contract was agreed to in a collective bargaining agreement. League By-Laws require every contract to be approved by the League commissioner and allow no variance from the Standard Player's Contract.

21. Another term gave the club the right to seek injuctive relief to prevent a player from refusing to honor the option clause and playing for another club. *See* note 8 *supra*. For an examination of the defenses a player in such a situation might have, *see* Comment, *Contractual Rights and Duties of the Professional Athlete — Playing the Game in a Bidding War*, 77 DICK. L. REV. 352 (1973).

22. In the event of an impasse on salary negotiations, an arbitrator was to be used.

23. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 517-18 (E.D. Pa. 1972). There was some confusion as to whether the option clause created a perpetual option, a one year option, or an option whose life coincided with the life of the collective bargaining agreement then in force. A perpetual option would clearly give a team the right to control a player's entire career. Even an option which only lasted the length of the collective bargaining agreement would give a club great leverage in negotiating with a player. If the player does not accept the club's terms, he cannot play with any other club until the collective bargaining agreement expires. *Id.*

24. 351 F. Supp. 462 (E.D. Pa. 1972).

25. *Id.* at 517-18.

26. *Id.* at 519.

27. *Id.* at 484-85.

28. *Id.* at 496-500. Regarding the nonstatutory labor exemption, the court stated:

> In providing a special exemption from Sherman Act regulations for labor unions and employers who in good faith negotiated with those unions, Congress attempted to accommodate what frequently were conflicting public policies: the fostering and preservation of competitive business conditions in a free enterprise system on one hand, counterbalanced by a legitimate concern in improving and bettering the working conditions of laborers and the reduction of industrial strife through vigorous union organization and collective bargaining. The labor exemption which could be defensively utilized by the

The NHL and NHLPA attempted to negotiate a new reserve system while the WHA's suit was proceeding to a full trial. In June of 1973, an agreement given tentative approval in March of that year by both the NHL and NHLPA was rejected by the players. In August of 1973, the NHLPA broke off negotiations to await the outcome of the WHA's suit. In November, the NHL unilaterally adopted a new reserve system in League By-Law 9A.[29]

The new reserve system envisaged greater player mobility. Essentially, an individual could become a free agent one year after the the expiration of his contract and negotiate with any other club. However, any club signing a free agent was obligated to make an equalization payment in the form of players, draft choices, or cash to the free agent's former club.[30]

In February, 1974 the NHL and WHA reached a settlement regarding the WHA's antitrust suit and a consent decree was filed.[31] However, it was not until May, 1976 that the NHL and NHLPA concluded a new collective bargaining agreement.[32]

The agreement stated that League By-Law 9A was fair and reasonable.[33] Realizing that By-Law 9A might be found illegal by a court, both parties provided that should a final, unappealable decision be made to that effect, the clubs would have the right to terminate the entire agreement.[34] The players were given the same right in the event of a merger between the NHL and WHA.[35] It was also agreed that every

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union and employer as a shield against Sherman Act proceedings when there was bona fide collective bargaining, could not be seized upon by either party and destructively wielded as a sword by engaging in monopolistic or other anticompetitive conduct. The shield cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the anti-trust laws. To allow and condone such conduct would frustrate Congress' carefully orchestrated efforts to harmoniously blend together two opposing public policies.

Id. at 499-500.

29. McCourt v. California Sports, Inc., 460 F. Supp. 904, 906 (E.D. Mich. 1978).

30. On the issue of equalization, By-Law 9A states:

Obligation to make equalization payment

9A. *6.* Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract, as prescribed by subsection 8 of this By-Law. Each Member Club may acquire the right to the services of as many free agents as it wishes, subject to the provisions of subsection 9 of this By-Law.

National Hockey League By-Law 9A, *Free Agents and Equalization,* § 9A. 6. (Adopted November 27, 1973) [hereinafter cited as *By-Law 9A*].

31. McCourt v. California Sports, Inc., 460 F. Supp. 904, 910 (E.D. Mich. 1978).

32. *Id.* at 911.

33. *See* Appendix *infra* § 9.03(b).

34. *Id.* at § 9.03(e).

35. *Id.* at § 9.03(c). The WHA folded prior to the 1979-80 season, and four former WHA clubs were absorbed intact by the NHL. The collective bargaining agreement was extended to

player would sign a Standard Player's Contract, Player's Termination Contract or Player's Option Contract.[36]

At the conclusion of a Standard Player's Contract, a team and player could agree to a new Standard Player's Contract which differed from the old contract terms only as to length and salary. Alternatively, a team might tender a Player's Termination Contract which would be for one year at the same salary. In response to the tender of a Player's Termination Contract, a player could refuse to sign and become a free agent immediately, or sign and become a free agent at the end of the year. In either instance, the player would become a free agent without any equalization requirements. Similarly, if a team did not tender any contract, the player could declare himself a free agent without equalization requirements. Regardless of what action a club took, however, a player could request to sign a Player's Option Contract which would be for a one year term at the same salary as his old contract. At the end of that year he would become a free agent with equalization requirements as outlined in By-Law 9A.[37]

Rogatien Vachon, a goalie for the Los Angeles Kings, played out his option year and then signed a five year contract worth $1,900,000 with the Detroit Red Wings.[38] When the Kings and Red Wings could not agree on the equalization payment, the matter was submitted to an arbitrator.[39] The arbitrator chose Dale McCourt as equalization payment to the Kings.[40]

1984, with the NHLPA reserving the right to terminate the equalization clause in 1982 or 1983. Should the NHLPA exercise this right, the NHL could terminate the entire collective bargaining agreement. Collective Bargaining Agreement Between the National Hockey League Player's Association and the National Hockey League, *Changes in the Collective Bargaining Agreement Since 1975*, ¶ 9 (Effective June 10, 1979).

36. *See* Appendix *infra* § 9.03(a).

37. *See* Standard Player's Contract ¶ 17, *reprinted in* McCourt v. California Sports, Inc., 600 F.2d 1193, 1194 n.2 (6th Cir. 1979).

38. McCourt v. California Sports, Inc., 600 F.2d 1193, 1196 (6th Cir. 1979).

39. *Id.* The By-Law states:

> Procedure
>
> 9A. *8.* (a) The Member Club acquiring the services of a free agent, or owning or controlling the club acquiring such services, shall immediately notify the player's previous Member Club and the President of that fact by TWX or telegram. The equalization payment shall be determined, if possible, by mutual agreement of the two Member Clubs involved. If no such agreement is reached within three business days after the date on which the player's services are acquired, each of the Member Clubs involved shall within two additional business days submit by TWX or telegram its proposal for an equalization payment to a neutral arbitrator selected from time to time by majority vote of the Board of Governors of the League.
>
> 9A. *8.* (b) Within two business days after the deadline for receipt of the Clubs' proposals, the arbitrator shall, unless notified by both Clubs in writing, by TWX or by telegram that they have reached agreement on the equalization payment, select without change one of the proposals submitted to him, and his determination shall be final and not subject to review.

By-Law 9A, *supra* note 30, at § 9A. 8. (a)(b).

40. McCourt v. California Sports, Inc., 600 F.2d 1193, 1196 (6th Cir. 1979).

II. McCOURT'S CHALLENGE

When Dale McCourt's contract was assigned as equalization for the signing of free agent Vachon, he brought suit in the United States District Court of Michigan seeking an injuction to prevent his transfer to Los Angeles.[41] The suit was directed against the NHL, the NHLPA, the Los Angeles Kings and the Detroit Red Wings. He argued that the reserve system violated section 1 of the Sherman Act[42] and that sections 4 and 10 of the Clayton Act[43] authorized injunctive relief.

The district court examined several issues including standing,[44] the antitrust implications of the reserve system,[45] the potential applicability of the nonstatutory labor exemption,[46] and the likelihood of injury to McCourt if an injunction was not issued.[47]

The NHL argued that while Vachon might have standing, McCourt, whose contract specified that he could be traded without his approval, lacked standing.[48] The court held that McCourt did have standing because the direct application of By-Law 9A prevented him from performing his contractual agreement in Detroit.[49] It also held that McCourt was threatened with a cognizable injury by his assignment to Los Angeles both by the move itself and the changed circumstances he would find in playing for Los Angeles.[50]

The court examined the reserve system under the "rule of reason."[51] It heard testimony concerning By-Law 9A from John Ziegler, President of the NHL, several agents, general managers, and at least one

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41. McCourt v. California Sports, Inc., 460 F. Supp. 904, 906 (E.D. Mich. 1978).
42. 15 U.S.C. § 1 (1976).
43. 15 U.S.C. §§ 15 and 26 (1976).
44. McCourt v. California Sports, Inc., 460 F. Supp. 904, 906-07 (E.D. Mich. 1978).
45. *Id.* at 907-10.
46. *Id.* at 910-11.
47. *Id.* at 912.
48. *Id.* at 906-07. Another standing argument, though not used, could have been that McCourt as a member of the union lacked standing to challenge an agreement his union had made. J.I. Case v. NLRB, 321 U.S. 332 (1943), is often cited for this proposition and is the basis for a well-known article urging courts to avoid reserve system challenges brought by players represented by a union. *See* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage,* 81 YALE L.J. 1 (1971). *But see* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (union member allowed to challenge discriminatory seniority system).
49. McCourt v. California Sports, Inc., 460 F. Supp. 904, 906-07 (E.D. Mich. 1978).
50. *Id.* at 912.
51. Two types of antitrust analysis exist: "per se" and "rule of reason." Certain practices such as group boycotts and concerted refusals to deal are illegal per se. A court faced with a practice which is illegal per se need not consider its effect, except for measuring damages, or the intent of the offending party. *See* Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941). Other practices must be judged under the rule of reason. The rule of reason requires a court to examine the effect of the practice and the intent of the party to determine whether, viewed in its totality, the practice is an unreasonable restraint on competition. *See, e.g.,* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911). *See generally* R. BORK, THE ANTITRUST PARADOX (1978).

economist. Mr. Ziegler testified that the By-Law was essential to preserve competitive balance between the various teams in the League.[52] Balance was required in order to maintain gate receipts.[53] The others testified to the general reluctance on the part of NHL clubs to sign free agents and risk losing their own star players as compensation. The court held that there were less restrictive methods available, such as restricting equalization payments to draft choices.[54] The court's conclusion was that By-Law 9A "inhibits and deters teams from signing free agents, decreases a player's bargaining power in negotiations, denies players the right to sell their services in a free and open market, and it depresses salaries more than if competitive bidding were allowed."[55] It was also clear that since the system employed by hockey was a mere modification of professional football's "Rozelle Rule"[56] there was case law to support a finding of an antitrust violation.[57]

The court turned to the issue of whether the nonstatutory labor exemption should be granted.[58] Without fully defining the prerequisites for granting an exemption,[59] the court found it inapplicable for two reasons. First, the evidence showed that By-Law 9A was not the product of good faith, arm's-length bargaining between the NHL and NHLPA.[60] Second, the By-Law had been unilaterally imposed by the NHL.[61] This latter concern demonstrates implicitly that the courts might have granted the exemption in the absence of good faith bargain-

52. McCourt v. California Sports, Inc., 460 F. Supp. 904, 910 (E.D. Mich. 1978).

53. However, in the twenty years preceding 1972, the Montreal club had won the Stanley Cup twelve times, Toronto four times, Detroit three times and Chicago once. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972).

54. McCourt v. California Sports, Inc., 460 F. Supp. 904, 910 (E.D. Mich. 1978). *See* Lee, *A Survey of Professional Team Sport Player Control Mechanisms Under Antitrust and Labor Law Principles: Peace at Last?,* 11 VAL. L. REV. 373 (1977); Comment, *The Sherman Act: Football's Player Controls — Are they Reasonable?,* 6 CALIF. W.L. REV. 133 (1969); Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws,* 81 HARV. L. REV. 418 (1967).

55. McCourt v. California Sports, Inc., 460 F. Supp. 904, 907 (E.D. Mich. 1978).

56. The difference between hockey's reserve system and football's Rozelle rule was that in hockey an arbitrator resolved equalization disputes, whereas in football this was the responsibility of the league commissioner. *See* notes 5 and 39 *supra.*

57. Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977). *See generally* Comment, *National Football League Restrictions on Competitive Bidding for Player's Services,* 24 BUFF. L. REV. 613 (1975); Note, *The Sherman Act and Professional Team Sports: The NFL Rozelle Rule Invalid Under Rule of Reason,* 9 U. CONN. L. REV. 336 (1977); Note, *The Rozelle Rule as an Unreasonable Restraint of Trade,* 26 KAN. L. REV. 121 (1977); Recent Decisions, *Illegal Procedure — The Rozelle Rule Violates the Sherman Act,* 59 MARQ. L. REV. 632 (1976).

58. McCourt v. California Sports, Inc., 460 F. Supp. 904, 910 (E.D. Mich. 1978).

59. Except for the court in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977), courts have been reluctant to define the elements necessary for the granting of the nonstatutory labor exemption. For a more detailed discussion of the exemption's application, *see* notes 95-106 and accompanying text *infra.*

60. McCourt v. California Sports, Inc., 460 F. Supp. 904, 910 (E.D. Mich. 1978).

61. *Id.*

ing if the union had been the reserve system's proponent. The court issued a preliminary injunction preventing application of By-Law 9A to the contract of Dale McCourt, permitting him to continue playing for the Red Wings in Detroit.[62] The NHL appealed to the Sixth Circuit Court of Appeals, and a decision was rendered on June 22, 1979.[63]

The majority of the appeals court assumed that the reserve system was a violation of section 1 of the Sherman Act.[64] The court then adopted the standard enunciated in *Mackey v. National Football League,*[65] to determine the availability of the labor exemption. The *Mackey* standard states:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona-fide arm's-length bargaining.[66]

The appeals court had no difficulty determining that the first two requirements of *Mackey* had been met.[67] The only other affected party that could claim to be outside the employer-employee relationship was the WHA. However, the WHA agreed to the new reserve system when their suit was settled in 1974.[68] Thus, the players and owners, both parties to the agreement, were the parties primarily affected.[69] The reserve system was determined to be a mandatory subject of bargaining by looking to part 8(d) of the National Labor Relations Act.[70]

The court then turned to whether there has been good-faith arm's-length bargaining, the third requirement of the *Mackey* standard. In *Mackey,* the appeals court had affirmed the lower court's finding of no good faith bargaining because there was substantial evidence to support it.[71] In *McCourt,* the appeals court rejected the findings of the

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62. *Id.* at 912.

63. McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

64. *Id.* at 1197.

65. 543 F.2d 606 (8th Cir. 1976).

66. McCourt v. California Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979), *quoting* Mackey v. National Football League, 543 F.2d 606, 614-15 (8th Cir. 1976) (citations omitted).

67. *Id.* at 1198.

68. *See* note 31 and accompanying text *supra.*

69. *See* notes 114-16 and accompanying text *infra.*

70. 29 U.S.C. § 158(d) (1976). The pertinent part reads: "wages, hours, and other terms and conditions of employment."

71. Mackey v. National Football League, 543 F.2d 606, 616 (8th Cir. 1976).

district court, expressly declaring them to be erroneous.[72] Where the district court found no good faith bargaining, the appeals court found good faith, albeit hard, bargaining.[73] Thus the majority, relying on *Mackey* for a legal standard, granted a labor exemption and vacated the preliminary injunction.[74]

Alone in dissent, Chief Judge Edwards had several disagreements with the majority. He felt that if hockey were to be granted an exemption from the antitrust laws it should be done by Congress, which could take more than legal considerations into its deliberations.[75] Additionally, he felt that drawing a legal distinction between the world of hockey and other industries in our society would be difficult to do.[76]

Judge Edwards also took issue with the second step of the *Mackey* test.[77] While the judge correctly pointed out that the United States Supreme Court has rejected the notion that all agreements which cover mandatory subjects of bargaining should be exempt,[78] he oversimplified the *Mackey* test. Although there are some agreements covering a mandatory subject of bargaining which are still illegal, the majority of these would be held illegal because of their effect on third parties.[79] The first requirement of the *Mackey* test would prohibit those agreements.[80]

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72. McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979).

73. *Id.* at 1201. As support for this finding the court cited NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

74. McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979). McCourt was expected to bring an appeal to the Supreme Court, but the Los Angeles Kings accepted other compensation from Detroit, thus rendering moot his appeal.

75. *Id.* at 1206, 1209.

76. Judge Edwards stated:

> Is there any distinction to be drawn between Clause 9A and similar restrictions in, for example, the field of dress manufacturing for the services of highly talented designers, or in the metalworking industries for the services of highly talented engineers, designers, or die shop leaders, or the entertainment field for highly talented personnel, or in the publishing field for highly talented writers?

Id. at 1206. *See also* Leavell & Millard, *Trade Regulation and Professional Sports,* 26 MERCER L. REV. 603 (1975).

77. McCourt v. California Sports, Inc., 600 F.2d 1193, 1215-17 (6th Cir. 1979).

78. Justice Goldberg, in a separate opinion in the companion cases of United Mine Workers v. Pennington, 381 U.S. 657 (1965), and Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America v. Jewel Tea Co., Inc., 381 U.S. 676 (1965), stated, "Following the sound analysis of Hutcheson, the Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." *Id.* at 710. To which the majority stated:

> This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or form and content of the agreement. . . . But there are limits to what a union or an employer may offer or extract in the name of wages. . . .

381 U.S. 657, 664-65 (1965).

79. *See* United Mine Workers v. Pennington, 381 U.S. 657, 666-67 (1965).

80. "First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship." Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976).

However, Judge Edwards' true misgivings were summed up in the following passage:

> Until this case, I do not know of any instance where profit making businesses have succeeded in justifying a cartel arrangement which suits their purposes by dint of securing that arrangement's introduction into a collective bargaining agreement and thus acquiring the right to the "labor union exemption." The majority's approval of this arrangement in this case in fact stands the labor union exemption squarely on its head.[81]

Judge Edwards is correct that the use of the labor exemption in *McCourt* was the first time that it had been used over labor's opposition.[82] His characterization of the exemption as the "labor union exemption" differs markedly from the *Mackey* court's perception, wherein collective bargaining is encouraged. This perception reflects a shift in the function of the labor exemption[83] and a judicial belief that reserve system disputes should be resolved at the bargaining table, not in court.

III. THE RATIONALE FOR THE APPLICATION OF THE LABOR EXEMPTION

The challenges[84] to reserve systems in the 1970's resulted in an awareness that owners and players, rather than courts, should ultimately decide upon an acceptable reserve system.[85] Although baseball had

81. McCourt v. California Sports, Inc., 600 F.2d 1193, 1212 (6th Cir. 1979).

82. The appeals court in *Mackey* based its belief that non-labor groups could use the labor exemption on five cases: Meat Cutters v. Jewel Tea, 381 U.S. 676, 729-30 (opinion of Justice Goldberg); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3rd Cir. 1974); National Ass'n of Broadcast Employees & Technicians v. International Alliance of Theatrical Stage Employees, 488 F.2d 124 (9th Cir. 1973); Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2nd Cir. 1970); Cordova v. Bache & Co., 321 F. Supp. 600 (S.D.N.Y. 1970); Mackey v. National Football League, 543 F.2d 606, 612 (8th Cir. 1976).

An examination of the cases reveals that the court's reliance may have been misplaced. In *Jewel Tea,* Justice Goldberg's concern for the employer's liability is not shared by the Court. In *Scooper Dooper, National Broadcast,* and *Intercontinental Container,* the restraints resulted from an agreement exempt because it was in the union's self-interest and at their behest. Management, as a signatory party, could claim the exemption derivatively. In *Cordova,* there is dicta to suggest that a collective bargaining agreement might have shielded stock brokerage firms' commission setting practices. However, in Jacobi v. Bache & Co., 377 F. Supp. 86 (S.D.N.Y. 1974), the standing defect in *Cordova* was cured and the labor exemption was held to be inapplicable. The court in *Mackey* accurately states that in appropriate circumstances the labor exemption can be used by non-labor groups, but fails to indicate that the appropriate circumstances usually involve an agreement in the union's self-interest wherein management's right to the exemption is derivative.

83. *See* notes 95-107 and accompanying text *infra.*

84. *See* notes 7-10 *supra.*

85. *See* Reynolds v. National Football League, 584 F.2d 280, 282, 289 (8th Cir. 1978); Mackey v. National Football League, 543 F.2d 606, 623 (8th Cir. 1976); Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 632 (8th Cir. 1976). *See also* Note, *The Professional Athlete: Liberty or Peonage?* 13 ALBERTA L. REV. 212 (1975); Note, *The True Story of What Happens When the Big Kids Say, It's My Football, and You'll Either Play by My Rules or You Won't Play at All,* 55 NEB. L. REV. 335 (1976); Note, *Player Restraints in Professional Sports,* 4 PEPPERDINE L. REV. 285 (1977); Comment, *Player Control Mechanisms in Professional Team Sports,* 34 U. PITT. L. REV. 645 (1973).

retained its exemption,[86] an arbitrator's interpretation of the option clause produced a less restrictive system.[87] Meanwhile, the reserve systems in basketball, football and hockey were all found to be illegal.[88] In each case it was apparent that some type of reserve system was probably needed to preserve competitive balance.[89] However, none of the systems survived judicial scrutiny. The reserve systems were replaced with new systems,[90] which are, in turn, subject to antitrust attack.

Had the nonstatutory labor exemption not been allowed in *McCourt,* the player's union could negotiate for a relaxed reserve system and, if unsuccessful, challenge the resulting reserve system in court. Continued judicial involvement would be required until an acceptable reserve system was discovered. However, if economic conditions changed, courts once again would be asked to determine whether the reserve system was valid.

Owners and players, due to their knowledge and economic self-interest, are in a better position to negotiate a reserve system amenable to both sides.[91] The possibility of a legal challenge would hamper these negotiations.[92] Thus, the use of the labor exemption would place the onus of this problem appropriately on the owners and players. The *Mackey-McCourt*[93] standard allows some court interference[94] and, simultaneously, directs owners and players to resolve their disputes at the bargaining table.

While the use of the labor exemption appears appropriate under the circumstances, it is, as Judge Edwards indicated, clearly a departure from its earlier use.[95] Earlier applications of the nonstatutory labor ex-

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86. *See* Flood v. Kuhn, 407 U.S. 258 (1972).

87. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976) (held that arbitrator's decision was proper in that grievance procedure in collective bargaining agreement covered interpretation of option clause). *See also* note 7 *supra.*

88. *See* notes 8-10 *supra.*

89. Mackey v. National Football League, 543 F.2d 606, 623 (8th Cir. 1976); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 892 (S.D.N.Y. 1975); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972).

90. *See* notes 9 and 10 *supra*; notes 19-38 and accompanying text *supra.*

91. *See* note 85 *supra.* Some commentators have written that Congress should resolve the reserve system dispute. *See* Keith, *Developments in the Application of Antitrust Laws to Professional Sports,* 10 HASTINGS L.J. 119 (1958); Note, *Flood in the Land of Antitrust; Another Look at Professional Athletics, the Antitrust Laws and the Labor Law Exemption,* 7 IND. L. REV. 541 (1974). In Flood v. Kuhn, 407 U.S. 258 (1972), congressional inaction was cited as supporting the status quo. By implication then, Congress would be a suitable forum for resolution of this issue.

92. However, in United Mine Workers v. Pennington, 381 U.S. 657 (1965), the Court stated, "But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 664-65.

93. Although the standard was expounded in *Mackey,* it was not until *McCourt* that an agreement was insulated by it. Therefore, it will be referred to as the *Mackey-McCourt* standard.

94. *See* note 66 and accompanying text *supra.*

95. *See* note 81 and accompanying text *supra.*

emption by the Supreme Court have been few.[96] Moreover, the Court has ruled narrowly on the individual cases and refused to delineate broad guidelines. Nonetheless, some general observations can be made.[97] The nonstatutory exemption flows out of the statutory exemption,[98] and the statutory exemption clearly protects some union activities from the antitrust laws.[99] Generally, the nonstatutory exemption insulates that which the statutes do not, but which is thought worthy of protection to effectuate federal labor policy.[100] Thus, an agreement between labor and management might be protected, not by the statutory exemption, but by the nonstatutory exemption. The factors involved in determining whether to insulate a particular agreement are whether the union acted in its own self-interest[101] or combined with management,[102]

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96. There are five leading Supreme Court cases on the nonstatutory labor exemption: Connell Constr. Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616 (1975); Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL-CIO v. Jewel Tea Co., Inc., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, 325 U.S. 797 (1945); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

97. *See generally* Mann, Powers & Roberts, *The Accommodation Between Antitrust and Labor Law: the Antitrust Labor Exemption,* 9 SETON HALL L. REV. 744 (1978); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. CHI. L. REV. 659 (1965); Siegal, Connolly & Walker, *The Antitrust Exemption for Labor — Magna Carta or Carte Blanche?,* 13 DUQ. L. REV. 411 (1975).

98. *See* note 12 *supra.*

99. In United States v. Hutcheson, 312 U.S. 219 (1941), the Court stated:

> So long as a union acts in its self interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgement regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232.

100. In Connell Constr. Corp. v. Plumbers and Steamfitters Local 100, 421 U.S. 616 (1975), the union sought to force Connell to subcontract with the union's employers. The agreement, signed under duress by Connell, was voided by the Court. The Court stated the basis of the exemption to be "the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Id.* at 622. *See also* note 28 *supra.*

101. In Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL-CIO v. Jewel Tea Co., Inc., 381 U.S. 676 (1965), a provision restricting meat sales to between 9 a.m. and 6 p.m. was included in the collective bargaining agreement at the insistence of the union. Jewel Tea, a large self-serve supermarket, signed the agreement and then unsuccessfully sought to have the sales provision declared void. The Court saw the issue as whether:

> 'the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor policies, and not at the behest of or in combination with non-labor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think it is.

Id. at 689-90.

In Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), an organizational sit-down strike which prevented the shipment of goods destined for out of state markets was also exempt because the Court found the strike was called to further legitimate union goals and was not intended to disrupt interstate commerce.

102. In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the UMW agreed with large mine operators to eliminate smaller ones by demanding a wage scale similar to that agreed to by the large operators. The purpose was to reduce overproduction. The Court held the agreement to be illegal.

In Allen Bradley Co. v. Local 3, 325 U.S. 797 (1945), the union sought to restrict the purchase

the degree to which competition is restrained,[103] and whether the agreement covered a mandatory subject of bargaining.[104] An agreement covering a mandatory subject of bargaining, which originates with labor, and primarily affects only the bargaining parties, will be exempt from the antitrust laws.[105] At the other end of the spectrum, an agreement which covers a nonmandatory subject of bargaining, greatly restrains competition, and is forced on the union by management will not be exempt. In between, courts must wrestle with the particular facts and determine whether the agreement should be insulated.

The *Mackey-McCourt* standard replaces the union's self-interest with good faith bargaining. No longer is the exemption to benefit labor directly and management derivatively. Now a reserve system proposed by management can be insulated despite the union's objection if good-faith bargaining results in its inclusion in the collective bargaining agreement.[106] This standard is a dramatic departure from the labor exemption's prior applications. However, while this is a novel application of the labor exemption, its use continues to favor federal labor policy over antitrust policy in a situation determined by the courts to be appropriate. The standard is not a departure from the theoretical underpinnings of the exemption, but is a unique application to somewhat unique circumstances.[107]

IV. THE FUTURE

Future antitrust challenges to reserve systems can either dispute the validity of the *Mackey-McCourt*[108] standard or show that one of its three requirements is unfulfilled. With only two circuits adhering to the standard,[109] a suit might well be brought in a different circuit where its precedential value is merely persuasive. Even then, the Supreme Court

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and sale of electrical equipment in the New York City area by the union's employers to firms which were unionized. This produced an artificially high price and was held by the Court to be illegal.

103. In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the agreement destroyed some of the smaller mine owners. In Local Union No. 189, Amalgamated Meat Cutters & Butchers of North America, AFL-CIO v. Jewel Tea Co., Inc., 381 U.S. 676 (1965), the agreement was seen as beneficial to the small grocery store owners.

104. In both United Mine Workers v. Pennington, 381 U.S. 657 (1965) and Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North American, AFL-CIO v. Jewel Tea, Co., Inc., 381 U.S. 676 (1965), the agreements concerned mandatory subjects of bargaining. The difference was in the restraint's affect on third parties.

105. *See* Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL-CIO v. Jewel Tea, Co., Inc., 381 U.S. 676 (1965).

106. This may occur dispite the Court's often quoted remark in United States v. Women's Sportwear Mfr's. Ass'n., 336 U.S. 460 (1949), that "benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *Id.* at 464.

107. *See* Justice Blackmun's accolade to baseball in Flood v. Kuhn, 407 U.S. 258, 260-64 (1972).

108. *See* note 93; notes 71-73 and accompanying text *supra.*

109. The Sixth and Eighth Circuit Courts of Appeal.

will eventually be asked to ratify the *Mackey-McCourt* standard or reject it and clarify what their rejection obfuscates. The basis for challenging the *Mackey-McCourt* standard would be its departure from previous judicial applications,[110] together with the lack of judicial supervision, which by its clear-cut guidelines, *Mackey-McCourt* eliminates.

The standard dispenses with consideration of the particulars of a challenged reserve system. Therefore, if an extremely restrictive system were adopted, a court following the *Mackey-McCourt* reasoning would not examine its harshness. The court's only function would be to determine whether the three guidelines of the *Mackey-McCourt* standard were fulfilled. This limited analysis appears to contradict the wider scope of Supreme Court inquiry, which generally concerns itself with balancing the restraint involved against the implications for federal labor policy.[111] The Court has steadfastly refused to set forth a definitive guideline such as the *Mackey-McCourt* one. Whether the good-faith bargaining prong of the *Mackey-McCourt* standard provides sufficient judicial leeway to overcome this objection is debatable.

The other ground for challenging the *Mackey-McCourt* standard results from its use by the owners to the detriment of the players. It is unquestionably true that the labor exemption has been used by nonlabor groups. However, it has only been so used when management was defending itself from a suit brought by a competitor and where the restraint resulted from a term within a collective bargaining agreement pushed by labor in its own self-interest.[112] In such a situation, the union acting in its own self-interest would be exempt. Fairness requires that an employer who bargained in good faith be similarly exempt. The *Mackey-McCourt* standard's substitution of good-faith bargaining in place of union self-interest is not supported by case law.[113]

If the validity of the standard is judically upheld, then plaintiff's attorney will need to show that the standard has not been met. Of the three prongs of the standard, the issue of whether the reserve system is a mandatory subject of bargaining is the most clear cut. With few exceptions,[114] courts have held reserve systems to be mandatory subjects of bargaining and, unless a particular reserve system incorporated some term which is clearly nonmandatory, courts will continue to so hold. Similarly, it would be difficult to show that a reserve system did not

110. *See* notes 96-106 and accompanying text *supra.*

111. In Flood v. Kuhn, 407 U.S. 258 (1972), Justice Marshall wrote in dissent, "Petitioner suggest there are limits to the antitrust violations to which labor and management can agree. These limits should be explored." *Id.* at 295-96.

112. *See* note 82 *supra.*

113. *Id.*

114. *See* Mackey v. National Football League, 407 F. Supp. 1000, 1009 (D. Minn. 1975); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 889 (S.D.N.Y. 1975).

"primarily affect only the parties to the agreement."[115] While the earlier systems restricted player movement between rival leagues, it is unlikely that a future system would do so. One might try to establish injury to third parties by using the language of section 4 of the Clayton Act.[116] However, the extent to which the requirements of proximate cause required by section 4 mirrors the meaning of "primarily affects only the parties" is unclear. If the requirements of the two are identical, it will be difficult to show the required proximate cause and injury to third parties.[117] Thus, the most likely ground upon which to challenge a reserve system is the issue of good faith bargaining. Since the issue of whether good faith bargaining exists depends upon the facts of the particular case, and a trial court's determination of factual issues will be overturned only if clearly erroneous,[118] plaintiff's attorney must be prepared to convince the court that good faith bargaining has not occurred.[119]

CONCLUSION

Although the *Mackey-McCourt* standard is susceptible to legal challenge and does not eliminate the possibility of successful future antitrust suits, its affect on negotiations will reveal its usefulness. With negotiators aware of the current judicial trend toward exempting reserve systems resulting from collective bargaining agreements, added pressure is on both sides to produce an acceptable agreement. Moreover, since good faith bargaining will be the most likely issue at the center of any subsequent antitrust challenge, the owners have much to lose if they refuse to bargain in good faith. Therefore, the success or failure of future negotiations involving reserve system disputes will indicate the extent of judicial foresight shown by the court in *Mackey* and *McCourt*.[120]

RICHARD L. WULSIN

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115. McCourt v. California Sports, Inc., 600 F.2d 1193, 1197 (6th Cir. 1979), *quoting* Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976).

116. 15 U.S.C. § 15 (1976).

117. The most likely third parties to challenge a reserve system would be the lessor of a sports facility or a concessionaire therein. It is doubtful that either could succeed.

118. FED. R. CIV. P. 52(a).

119. A comparison of *Mackey* and *McCourt* is illustrative of the difficulty of assessing a court's perception of whether good faith bargaining occurred. *See* notes 71-73 and accompanying text *supra*.

120. Negotiations concerning baseball's reserve system are currently in progress and should provide insight into the feasibility of resolving reserve system disputes through the collective bargaining process.

APPENDIX

9.03 (a) Each hockey player employed by each Club in the National Hockey League shall enter into the form of Standard Players Contract, including, where applicable, the addendum thereto for certain amateurs and, pursuant to the provisions of paragraph 17 thereof, a Players Option Contract or a Players Termination Contract, as the case may be, attached hereto as Exhibits 3A, B, C, D, which are hereby recognized as valid and binding. Nothing in this Agreement shall prevent individual negotiations between a player and his Club with respect to salary or with respect to the special option provision contemplated under paragraph 17(e) of the Standard Players Contract. To the extent of any inconsistency between any provision of the Standard Players Contract, including where applicable, the Addendum thereto for certain Amateurs, Players Option Contract, Players Termination Contract, and any provision of this Agreement (other than the duration thereof), this Agreement shall govern. There shall be no duplication or compounding of benefits to a player where both this Agreement and the Standard Players Contract provide for similar benefits.

(b) The Association, recognizing that the Clubs have entered into this Agreement in reliance on Section 9.03(a), represents that it has been duly authorized to collectively agree to paragraph 17 of the Standard Players Contract and the Addendum to the said contract for certain Amateurs, the Players Option Contract and Players Termination Contract, and to the applicability of the provisions of Section 9A of the National Hockey League By-Laws as fair and reasonable terms of employment, regardless of whether the contract between the player and the Club was entered into before or is entered into after the effective date of this agreement. The Association hereby so agrees in its capacity as the exclusive bargaining representative of hockey players in the National Hockey League under this Agreement.

(c) It is expressly understood that if the National Hockey League enters into an agreement to merge with the World Hockey Association, the National Hockey League Players Association shall forthwith be entitled to terminate either this entire agreement, or its agreement contained in this Section 9.03 with respect to the said paragraph 17, the said Addendum for certain Amateurs, the Players Option Contract, the Players Termination Contract, and the said Section 9A upon written notice to the Clubs within 15 days after notice of said agreement to merge. If the Association elects to terminate as provided in the preceding sentence, the subjects covered by the said termination shall then be reopened for collective bargaining at the request of either party.

(d) Since a player is unconditionally released upon termination of a Players Termination Contract, without any equalization payment under Section 9A of the National Hockey League By-Laws being payable, it is understood that the contemporaneous signing of a Standard Players Contract and a Players Termination Contract does not alter the right of the player to his unconditional release at the termination of the latter contract.

(e) The parties hereto recognize that recent court decisions affecting professional sports other than hockey, may give rise to uncertainty as to whether the provisions of Paragraph 17 of the Standard Players Contract, the other related contracts referred to in subparagraphs (a) and (b) above, and Section 9A of the National Hockey League By-Laws are lawful subjects of collective bargaining. The Association further recognizes that the provisions of this agreement beneficial to the Association and the players were entered into by both parties in the good faith belief that subparagraphs (a) and (b) above are lawful subjects of collective bargaining and are valid, and that the Clubs agreed to said beneficial provisions in reliance thereon. In the event of a final judicial determination not subject to appeal that Paragraph 17 of the Standard Players Contract, the related contracts referred to above or Section 9A of the National Hockey League By-Laws are not lawful subjects of collective bargaining or are otherwise invalid, the Clubs may within 30 days thereafter terminate this Collective Bargaining Agreement upon written notice to the Association. If the Clubs elect to terminate as provided in the preceding sentence the parties shall promptly thereafter commence collective bargaining negotiations in an effort to arrive at a new collective bargaining agreement.

BOOK REVIEW

THE USES OF PSYCHIATRY IN THE LAW:
A CLINICAL VIEW OF FORENSIC PSYCHIATRY
By Walter Bromberg. Westport Connecticut:
Quorum Books. 1979. Pp. x, 442. $25.00. Clothbound.

The extensive involvement of psychiatry in all aspects of the legal process is the subject of this carefully written and documented book. Dr. Bromberg, a practicing psychiatrist for over fifty years, has extensive experience as an expert witness before both criminal and civil tribunals. From his wealth of experience, Dr. Bromberg has compiled an informative volume, useful to both the legal practitioner and the psychiatric witness.

In the most enlightening chapter for attorneys, entitled "The Psychiatrist Before the Law," Bromberg articulates the view, espoused by the medical profession in general and the discipline of psychiatry in particular, that medicine and the law can rarely if ever come to terms with their inherent differences. Those differences originate in the psychiatrist's "priestly" assumption of authority in medical matters and the lawyer's responsibility for attacking the credibility of opposing witnesses directly or through stratagems and tricks in the cross-examination procedures. As Bromberg points out, to the lawyers such tricks and stratagems are essential to appropriate client representation. However, to the doctor, the same stratagems approach indecency and constitute personal attacks for which no defense is readily available.

Drawing upon his wide experience as an expert witness, Bromberg has grouped attorneys into five functional types: the country lawyer, the plodder, the unctuous apologizer, the blusterer, and the know nothing.[1] Each of these attorney types has his/her distinctive style primarily designed to discomfit the naive and beleaguered psychiatrist. Those members of the legal profession who have participated in proceedings in which the mental status of an individual is an issue may well recognize themselves or their colleagues among Bromberg's types. As if the behavior and demeanor of attorneys did not sufficiently intimidate psychiatrists, according to Bromberg, being confronted by the need to explain "views of the psychological life" to laymen who are not accustomed to thinking in terms of conscious and unconscious mentation

1. W. BROMBERG, THE USES OF PSYCHIATRY IN THE LAW: A CLINICAL VIEW OF FORENSIC PSYCHIATRY 13-14 (1979).

exacerbates the problem. Furthermore, Bromberg, like other clinicians, maintains that the logic of the two disciplines differs: attorneys employ deductive logic while physicians employ inductive reasoning. The difficulty then resulting is that "legal thinking tends to be atomistic, while medical thinking points toward a holistic view of man."[2]

The balance of this second chapter is devoted to illustrating the difficulties faced by the expert psychiatric witness in qualification, direct examination, cross-examination, depositions and the neuropsychiatric report. Bromberg uses as examples testimony from two murder trials, one of which is the trial of Jack Ruby who was ultimately convicted of the killing of Lee Harvey Oswald.

In the succeeding thirteen chapters Bromberg discusses the various issues which necessitate expert psychiatric testimony. The translation of the psychiatric concept of psychosis into the legal concept of insanity is found to be troublesome for practitioners in both fields. Responsibility for criminal acts is premised on the principle that one is deemed sane unless proved otherwise. Fundamental to the jurisprudence of all cultures, including primitive tribes, is the belief that a person of unsound mind is unable to form the requisite *mens rea.* The most widely accepted test of insanity in American jurisprudence is the M'Naughton Rule modified by the irresistible impulse test. This test, originally known as the "right and wrong test," requires that one pleading insanity as a defense show that at the time of the commission of the act he or she was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Extensive criticism by both medical and legal practitioners of the restrictive nature of the M'Naughton Rule has resulted in the development of variations on that rule such as the Durham test, the Currens test and the American Law Institute test. During recent years the latter, which states that a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, has been adopted by several states and federal circuits. However, psychiatrists remain displeased with the necessity of their translating the abstract phenomena of mental illness into the more concrete phenomenon of insanity. As Bromberg points out, the obviously psychotic person who commits a crime presents few problems for the courts or for the experts. However, those cases in which the psychosis does not amount to legal insanity are less easily resolved and are the subject of several chapters.

The doctrine of diminished responsibility is a by-product of the in-

2. *Id.* at 14.

fluence which dynamic psychiatry has exerted on legal decisions. Under this doctrine a lesser degree of mental illness than insanity may reduce the degree of criminality of an act. As an example of the application of the doctrine of diminished responsibility, Bromberg cites the murder case of *People v. Wells*[3] in which the accused was found not to have the mental capacity to "malice aforethought" and hence was convicted of murder in the second degree. Without psychiatry's continued development and involvement with the law as it relates to criminal responsibility, the concept of partial or diminished responsibility would not have been adopted in this country.

Psychiatrists and the judiciary are not always at odds. This is shown by the guidelines established by both groups for determining a criminal defendant's competency to stand trial. The following criteria for competency were suggested for the New York City Bar:

> (1) Is the defendant oriented as to time and place?
> (2) Can the defendant perceive, recall and relate?
> (3) Does the defendant have at least a rudimentary understanding of the process of trial and the roles of the judge, jury, prosecutor and defense attorney?
> (4) Can the defendant, if he wishes, establish a working relationship with his attorney?
> (5) Does the defendant possess sufficient intelligence and judgment to listen to the advice of counsel and, based on that advice, appreciate that one course of conduct may be more beneficial to him than another?
> (6) Is the defendant's mental state sufficiently stable to enable him to withstand the stresses of the trial without suffering a serious, prolonged or permanent breakdown?[4]

The task of the psychiatrist is to interpret the defendant's mental life as it relates to the trial, the defense and the role of the attorney. He gathers data from the defendant's history, verbalizations, reactions to questions, mental capacity and mental function. The assessment of these data in relation to integrity of the ego provides an estimate of the defendant's ego strength. Thus, in this instance, although the language of psychiatry differs from that of the judiciary, the concepts expressed in that language do not differ.

In his discussions of mental competency, Bromberg seems to deplore the fact that in cases involving the testamentary capacity of deceased persons, psychiatric opinion is given little more weight than that of relatives or of the witnesses to the execution of a will. Some psychiatrists, on the other hand, have complained that "psychiatric ex-

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3. 33 Cal.2d 330 (1949).
4. W. BROMBERG, *supra* note 1, at 111-12.

pertness in will matters abuses the profession.'"[5] Bromberg views suspicion by some of the use of psychiatric testimony in will contests, as resulting from the fact that the participants have an overwhelming interest in the money at stake. Somehow the monetary interest is assumed to attach itself to the experts involved. The use of psychiatric opinion in other cases of mental competency such as simple guardianship and conservatorship proceedings does not elicit suspicion. Quite the contrary, expert psychiatric testimony is required by most guardianship and conservatorship statutes. Since the expenditure of the estates of the prospective wards is the issue in such proceedings, one would expect that the motives of testifying psychiatrists would be suspect as in the case of will contests.

The employment of psychiatric testimony in personal injury actions would seem to give rise to much suspicion of the opinions advanced. The amount of compensation to the expert witnesses in such actions is frequently dependent upon the amount of plaintiff's recovery. Whether those members of the profession who testify in personal injury actions are viewed as greedy or not, they are faced with the legal concepts of negligence and proximate cause. The concept of proximate cause has been particularly troublesome of the medical profession. The recent trends toward the use of the term "substantial factor" has served to reduce the confusion which the term proximate cause has persistently aroused. In the chapter on Personal Injury, Bromberg not only discusses the confrontation of the disciplines of law and psychiatry, he also provides an extensive description of the sorts of cases in which psychiatric and neuropsychiatric testimony constitutes the linchpin of plaintiff's or defendant's proof. This discussion is particularly enlightening to both legal and medical practitioners by setting forth the fundamentals of proof required as well as the means by which psychiatric testimony can provide those fundamentals.

In summary, regardless of the reader's bias, he or she will find this book a source of stimulating ideas and practical approaches to answering legal questions which depend upon psychiatric explanations.

MARIEN E. EVANS*

5. *Id.* at 253.

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BOOKS RECEIVED

REPRESENTING PROFESSIONAL AND COLLEGE SPORTS TEAMS AND LEAGUES. New York, New York: Practising Law Institute. 1977. Pp. 720. Paperbound. Prepared for distribution at a PLI workshop on topics related to this book's title, a number of articles have been collected by various experts in the field of sports law. The topics range from a comprehensive study of current developments in the antitrust and labor areas as relating to professional sports, to college sports and the law. Other topics include an article on the Federal legislature and administrative agencies' roles in professional sports; representing the smaller professional sports leagues such as tennis, soccer and golf; the role of legal house counsel; the role of an attorney in the negotiation of television contracts; tax law implications of the team owner; and trends in media rights. Finally, an article is included discussing general problems of representing professional teams. While the primary function of the book was to serve as a supplement to the workshop programs, it was also designed as a reference manual for attorneys and related professionals to be used beyond the confines of the workshop.

COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1979. New York, New York: Practising Law Institute. 1979. 2 volumes, Supplement. $20.00. Paperbound. This course handbook was prepared for distribution at the Counseling Clients in the Entertainment Industry Workshops held in Los Angeles and New York City in March-April 1979. The two volumes and supplement mirror the program schedule of those workshops and are a compilation of presentations given by the faculty of PLI: scholars, businessmen, lawyers and practitioners versed in the mechanics of the entertainment industry. The handbook was intended both as an educational supplement to each program of the workshop and as a reference guide for those unable to attend. Each program covered includes an outline or the text of the presentation followed by a selection of exhibits and sample forms of documents, contracts, agreements and purchase rights pertinent to the particular topic. The presentations cover a wide range of subjects: the business and personal management contract, sound recordings, music publishing, performing rights in nondramatic musical compositions, motion pictures, theatrical productions and television production. The prac-

tical focus of this handbook and its comprehensive selection of exhibits and sample forms provides convenient and useful reference materials for the practitioner in the entertainment field.

LEGAL AND BUSINESS PROBLEMS OF THE RECORD INDUSTRY 1978. New York, New York: Practising Law Institute. 1978. Pp. ix, 584. $20.00. Paperbound. This PLI course handbook covers customary contract patterns and problems in the record industry. Included considerations are oral agreements which may be enforceable, actions which may constitute inducement to breach or interference with contractual relations, and agreements by minors which may be binding. Typical contract problems between a company and an artist include questions of duration, exclusivity, ownership of sound recordings, and exploitation of master recordings. An article by Alfred W. Schlesinger considers the Six Thousand Dollars Per Year provision given to an employer to enjoin those whose personal services are of a unique character from breaching their contract, provided said contract was in writing with a minimum compensation to the employee of $6,000 per year. The handbook also looks into the Copyright Law as it applies to sound recordings. An informative article on Rights in Group Names considers the breakup of a popular group and the continued use of the group name by one or more of its members. Sample record industry agreement forms are included from various companies. The impact of the Copyright Act of 1976 and tax considerations are discussed. A caveat is given that any changes effected by the Revenue Act of 1978 are not reflected in this volume. A chapter on Music in Films is taken from the book Producing, Financing and Distributing Film, by Paul A. Baumgarten and Donald C. Farber. Included in this section are sample film music agreements such as a Composer Agreement, an Agreement for the Purchase of all Elements from an Independent Contractor, a Synchronization License, Recording Artist Agreements, a "Canned" Music Agreement and a Commercial Music Agreement.

Proof of Antitrust Injury in Customer Tie-in Claims — A Reappraisal

*Michael Dore**

The Supreme Court applies traditional antitrust principles in determining whether a customer has had the requisite antitrust injury to succeed in a private antitrust claim. The author examines the recent cases and argues that in this situation a strict per se analysis is inappropriate. He concludes that the court must examine the particular tie-in sale in question prior to determining its impact upon the customer.

During the 1977 term a unanimous Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[1] indicated that private plaintiffs must demonstrate a very special type of damage before they can recover under the antitrust laws. The Court referred to this damage as "antitrust injury,"[2] and indicated that it could be found only when a plaintiff suffers "injury of the type the antitrust laws were intended to prevent . . . that flows from that which makes defendants' acts unlawful."[3] This injury involves the diminution of competition in a relevant product and geographical market as opposed to the mere impairment of the relative economic position of any individual competitor. In essence, the court required that liability determinations in antitrust cases be governed by the traditional maxim that the antitrust laws were designed for "the protection of *competition,* not *competitors.*"[4] While the Court's announcement of the "antitrust injury" rule came in the context of a Clayton Act merger case, the *Brunswick* decision made it clear

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1. 429 U.S. 477 (1977).
2. 429 U.S. at 489.
3. *Id.*
4. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original).

that the principles announced by the Court are applicable to all types of private civil antitrust claims.[5]

This Article will explore the extent to which these antitrust damage principles should effect the judicial treatment which is afforded to the business practice of conditioning the sale of one product on the purchase of a second separate product.[6] The Court has traditionally dealt with such "tie-in" sales as per se violations of the antitrust laws.[7] It is the opinion of the author, however, that while the *Brunswick* principles permit per se treatment of such alleged tie-in violations in antitrust actions brought by competitors of the seller, the impact which such violations have upon customers upon whom the tie-in is imposed can only be determined by examining the purpose and effect of the particular tie-in transaction before the court.

I. THE ROLE OF THE COURTS IN FOSTERING PRIVATE ANTITRUST ENFORCEMENT

The Sherman Act,[8] and subsequently the Clayton Act,[9] were developed as legislative responses to what Congress perceived as the problem

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5. Brunswick was a manufacturer of bowling equipment which sold this equipment to bowling alley operators. During the 1960's, the bowling industry went into decline, and Brunswick was forced to repossess the equipment which it had previously sold to individual bowling alleys. Brunswick was unsuccessful in reselling this repossessed equipment. In an effort to overcome this problem, Brunswick acquired and operated the bowling alleys which had defaulted in payment of its charges for the bowling equipment.

Competitors of the acquired alleys sued Brunswick under § 7 of the Clayton Act claiming that the size of the Brunswick Corporation, in providing a deep pocket to the acquired alleys, threatened to substantially lessen competition in the bowling alley market. The claimants proved a diminution of potential competition in violation of § 7 of the Clayton Act and that the acquired alleys would not have remained competitors with the claimants but for Brunswick's entry into the market. The Third Circuit Court of Appeals in N.B.O. Indus. Treadway Companies v. Brunswick Corp., 523 F.2d 262 (3rd Cir. 1975) indicated that claimants would be permitted to recover on the basis of losses which they suffered by virtue of Brunswick's presence in the bowling alley market. The Supreme Court reversed, indicating that even if the acquisitions were unlawful, and if these acquisitions resulted in the plaintiff's receipt of diminished bowling alley revenues, recovery for the unlawful presence of a competitor in the marketplace would not be permitted where the only anti-trust damage caused by the defendant was the potential diminution of future competition. 429 U.S. at 487-88.

6. *See generally* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

7. Before per se treatment is accorded to alleged tie-in violations three requirements must be met. The first requirement is that two separate products be present. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). The second is that the seller must possess sufficient economic power in the market for the tying product. *See* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977). The third is that a not insubstantial amount of commerce in the tied market must be involved. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). For an excellent discussion of the intricacies of tying arrangements, *see* Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd sub nom.* Rader v. Dunkin' Donuts, Inc., 531 F.2d 1211 (3d Cir. 1976); *see also* note 47 *infra*.

8. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976).

9. Clayton Antitrust Act, 15 U.S.C. §§ 12, 13, 14-21, 22-27, 44 (1976).

of the uncontrolled power of unregulated trusts.[10] Under these statutes, both the government[11] and private parties[12] are permitted to bring civil suits[13] to prevent or penalize conduct which improperly distorts the competitive balance in the marketplace.[14] Private parties are permitted to sue whenever their business or property is injured by virtue of activity prohibited by the antitrust laws.[15] The government, on the other hand, is permitted to maintain suit not only when its own business or property is damaged,[16] but also when it believes that a particular business practice has a sufficiently pernicious effect on competition to justify the expenditure of the Justice Department's or the Federal Trade Commission's limited enforcement resources.[17]

Throughout the history of the antitrust laws, Congress has been anxious to foster private enforcement actions.[18] However, while the judiciary has been willing to join in the advancement of private actions,[19] this favorable attitude is evidenced only when injury to the plaintiff's

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10. 1 M. HOFFMAN AND A. WINARD, ANTITRUST LAW AND TECHNIQUES, 313 (1963); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

11. Clayton Antitrust Act, 15 U.S.C. § 15(a) (1976). This section was enacted to overturn the decision in United States v. Cooper Corp., 312 U.S. 600 (1941), which held that the United States could not sue for damages under the antitrust laws. *See* 1955 U.S. CODE CONG. AND AD. NEWS 2330. The most recent discussion of the question of who are "persons" entitled to sue under the United States antitrust laws is contained in Pfizer v. Government of India, 434 U.S. 308 (1978).

12. Clayton Antitrust Act, 15 U.S.C. § 15 (1976).

13. The antitrust laws have both a criminal and civil aspect. Criminal suits, however, can be brought only by the government, are subject to different standards of proof, and are beyond the scope of this note.

14. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charger of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions.").

15. Clayton Antitrust Act, 15 U.S.C. § 15 (1976).

16. Clayton Antitrust Act, 15 U.S.C. § 15(a) (1976).

17. *See generally Symposium — How Government Cases Get Selected — Or, Why Me?* 46 ANTITRUST L.J. 562 (1977).

18. Bruce's Juices, Inc. v. American Can Co., 310 U.S. 743, 751-52 (1947) ("It is clear Congress intended to use private self-interest as a means of enforcement . . . when it gave to any injured party a private cause of action. . . ."); Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595, 599 (S.D.N.Y. 1952) ("In authorizing private remedies for persons injured by infractions of the antitrust laws, Congress intended to provide not only for private redress but also to impose sanctions to secure the more effective enforcement of antitrust legislation."); *see* Clayton Antitrust Act, 15 U.S.C. § 16 (1976) (judgment or decree from prior government action *prima facie* evidence in subsequent private action).

19. Among the methods utilized to accomplish this end is the imposition of a relatively low standard of proof as to the amount of damages in antitrust actions. *See* Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); *see generally* Flintkote Co. v. Lysfjord, 246 F.2d 368, 368 (9th Cir. 1957), *cert. denied,* 355 U.S. 835 (1957) ("The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction."). *Id.* at 398.

business or property is causally related to a proven antitrust violation.[20] It is not sufficient for a plaintiff to demonstrate that it suffered injury following an antitrust violation, and that this injury was suffered within the affected area of the economy.[21] Rather, the courts require that the injury must be directly caused by the competitive distortion within the affected market area.[22]

II. PER SE TREATMENT OF ALLEGED TIE-IN VIOLATIONS

The Sherman Act provides that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or within foreign nations, is declared to be illegal."[23] In light of the breadth and imprecision of this language, it was necessary for the Supreme Court to apply a standard of decision which took into account the fact that every commercial contract of necessity "restrained" trade to a certain degree.[24]

In response to this need to adapt the broad language of the Sherman Act to the realities of the marketplace, the Court developed a "rule of reason" analysis,[25] which it applied to certain alleged antitrust transgressions. Under this test, before antitrust liability could be found, the Court considered:

> The facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained.[26]

Not all practices, however, were to be governed by this rule of reason approach. The Court noted that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm

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20. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); Molinas v. The National Basketball Ass'n., 190 F. Supp. 241 (S.D.N.Y. 1961).

Even when competitive impact has been demonstrated not all judicial decisions have been uniformly favorable to private plaintiffs. *See* Stanton v. Texas Co., 294 F.2d 344 (5th Cir. 1957) (no punitive damages recoverable in private antitrust action); Locklin Radiant Color Co. v. Day Glo Color Corp., 429 F.2d 873 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971) (interest not recoverable in private antitrust actions).

21. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

22. John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 499 (9th Cir. 1977).

23. 15 U.S.C. § 1.

24. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

25. Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

26. *Id.* at 238.

they have caused or the business excuse for their use."[27] This category of trade practices was characterized as "per se" violations of the antitrust laws, and such practices were prohibited in all contexts.[28]

One of the trade practices dealt with under the per se rubric is the conditioning of the sale of one product (the tied product) on the purchase of a second, separate product (the tying product).[29] The Supreme Court has indicated that when sufficient economic power is present[30] such "tie-in" transactions "flout the Sherman Act's policy that competition rule the marts of trade"[31] and therefore, are prohibited without resort to analysis of the purpose of the particular tie-in sale or its effect in the marketplace.[32]

III. DISTORTION OF COMPETITION AND THE DAMAGE FLOWING FROM TIE-IN VIOLATIONS

While the Court has indicated that tie-in transactions are inherently disruptive of competition, such sales on condition are, in fact, imposed for a number of reasons, and may in certain circumstances have positive effects upon the competitive economy.[33] It has been noted that in addition to the pernicious effects of such tie-in transactions, they may also "protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction"[34] and that "if the tied and tying products are functionally related they [(tie-ins)] may reduce costs due to economies of joint production and distribu-

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27. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

28. *See* United States v. General Motors Corp., 384 U.S. 127, 145-46 (1966); United States v. Topco Associates, 405 U.S. 596, 607-10 (1972).

29. *See generally* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958); other than tie-ins, the only business practice which can unequivocally be characterized as per se violation of the antitrust laws is price-fixing. Even this category of conduct, however, is no longer always prohibited in all contents. *See* Columbia Broadcasting System, Inc. v. American Society of Composers, Authors, and Publishers, 441 U.S. 1 (1979); Eastern Scientific Co. v. Wild Herrbrugg Instruments, 572 F.2d 883 (1st Cir. 1978), *cert. denied*, 439 U.S. 833 (1978). With respect to the question of whether or not group boycotts still constitute per se violations of the antitrust laws, *see* Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773 (1974).

30. *See* note 7, *supra*.

31. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953) ("By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market.")

32. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 524 (1969) (Fortas, J. dissenting).

33. *See generally* Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); P. AREEDA, ANTITRUST ANALYSIS, 569-72 (2d ed. 1974).

34. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 514 n.9 (1969) (White, J. dissenting).

tion."[35] Regardless of the possibility that tie-in sales may have these ancillary and acceptable impacts in the competitive marketplace,[36] the Court has continued to hold that tie-in transactions are per se violations of the antitrust laws which cannot be "justified" by the rationale which motivated the imposition of the tie-in in a particular situation.[37]

It has been noted that "the fundamental restraint against which the tying prescription is meant to guard is the use of power over one product to obtain power over another, or otherwise to distort freedom of trade and competition in the second product."[38] Indeed, it has been asserted that "even if the customer is indifferent among brands of the second product, and therefore loses nothing by agreeing to use the seller's brand of the second, in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product."[39] On the basis of this analysis, tie-in arrangements have been consistently prohibited and private parties have been permitted to institute suit to prevent their enforcement and to recover damages flowing from them.

Recovery for tie-in violations has traditionally been permitted for buyers who pay an excessive price for the tied product,[40] as well as competitors of the seller whose sales are reduced by virtue of the distortion caused by the tie-in in the market for that tied product.[41] There can be no real question that when the complaining party is a competitor of the seller in the market for the tied product the competitor's loss of customers in that market satisfies the conditions announced in *Brunswick* for antitrust injury. This is so because potential customers of this competitor are removed from the market for the tied product and

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35. *Id.*

36. *Id.* ("The fact that tie-ins are not entirely unmitigated evils should be borne in mind.").

37. There has been some confusion in the cases concerning the role of "business justification" as a defense to tie-in arrangements. In fact, business justification does not diminish the per se rule applicable to tie-in transactions. *But see* Kolene Corp. v. Motor City Metal Treating, Inc., 307 F. Supp. 1251, 1270-71 (E.D. Mich. 1969), *aff'd* 440 F.2d 77 (6th Cir. 1971), *cert. denied,* 404 U.S. 886 (1971) ("There is now found, in amelioration of the adamant application [of] the per se rule to tying contracts in anti-trust laws the doctrine of business justification. . . ."). Rather, the doctrine of business justification may provide an explanation of the rationale for selling two apparently separate products as one, and thus preclude the finding that a tie-in of two separate products actually exists. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 506 (1969) ("It may turn out that the arrangements involved here serve legitimate business purposes. . . ."); Cantor v. Detroit Edison Co., 428 U.S. 579, 613 (1976) (Blackmun, J. concurring) (justification for the alleged tie-in might exist if "the sale of light bulbs [the tied product] is in any way crucial to the respondent's successful operation"). *See* Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir. 1961), *cert. denied,* 368 U.S. 931 (1961).

38. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 512 (1969) (White, J. dissenting); *see* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 145 (1955).

39. 394 U.S. at 512-13.

40. *See, e.g.,* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

41. Telex Corp. v. International Business Machines Corp., 510 F.2d 894 (10th Cir. 1975).

no equivalent relief is provided to this competitor for the loss of this business opportunity.

The injury, if any, which flows to customers allegedly victimized by tie-in transactions, however, does not always flow so directly from the competitive distortion in the tied market. The "injury" in such cases may be no more than a high price paid for the tied product which is simultaneously relieved by benefits bestowed upon the customer through other aspects of the transaction. As such, this customer may have suffered no "antitrust injury" under the *Brunswick* rationale. Thus, in order to determine whether the competitive position of this customer has, in fact, been diminished in such a manner that antitrust recovery can be permitted, the purpose and effect of the particular tie-in transaction must be examined.

IV. COMPETITIVE DISTORTIONS IN THE TIED MARKET — LACK OF IMPACT UPON CUSTOMER CLAIMANTS

The Supreme Court has announced that, in its view, tie-in violations are inherently disruptive of the marketplace, and are per se violations of law.[42] While this judgment has been criticized, it remains the starting point from which tie-in claims must be evaluated.

The fact that, in the Supreme Court's view, competition in the market for the tied product is always disrupted by tie-in violations does not confer an unrestricted right to sue upon all tie-in customers who are associated with this market distortion.[43] While competitors of the tie-in seller are inevitably damaged through the loss of access to particular customers in the tied market, the competitive impact upon the customer himself is not so readily apparent.

The courts traditionally have awarded customer tie-in victims damages based on proof of the "overcharge," which was imposed upon them for the tied product.[44] Proof of this overcharge was made out by demonstrating either the fair market value of the tied product,[45] or the price at which the seller would have parted with the tied product, but for the power which he exerted over the buyer by virtue of his imposi-

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42. Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). *But see* R. POSNER, ANTITRUST LAW AND ECONOMIC PERSPECTIVE, 171-84 (1976).

43. *See generally* Sherman, *Antitrust Standing: From Loeb to Malamud,* 51 N.Y.U. L. REV. 374 (1976).

44. *See* Lessig v. Tidewater Oil Co., 327 F.2d 459, 471-72 (9th Cir. 1964); *see generally* Comment, *Private Enforcement of Antitrust Laws: Damages Recoverable for an Illegal Tying Arrangement,* 78 DICKENSON L. REV. 305 (1973).

45. Gray v. Shell Oil Co., 469 F.2d 742, 751 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973).

tion of the tie.[46] The mere fact that an antitrust plaintiff possessed a hypothetical ability to obtain the tied product at a lower price, however, and that he was "compelled"[47] to pay a higher price for this product from a particular seller, does not *ipse dixit* demonstrate that this customer has suffered antitrust injury.[48]

There will be cases where the tie-in was imposed upon a customer, with the purpose and effect of causing the victim to pay the seller full price for the tying item and a greater price for the tied product than the victim would otherwise have been required to pay.[49] This impact, however, will not always be visited upon alleged customer victims of tie-in violations.

One example of a situation where the "damage" which flows to the customer "victim" of the alleged tie-in does not result from competitive distortions in the tied market is where the tied and tying products are functionally related, and their conjunctive sale reduces the seller's cost through the economies of joint production and distribution.[50] In such circumstances, while the plaintiff may be able to demonstrate that he paid an "excessive" price for the tied item, a failure to analyze the overall reduced cost of the entire package to the buyer and the seller's potential increased expenses in separating the tying and tied products will result in a failure to determine whether the seller has truly caused a dis-

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46. Siegel v. Chicken Delight, Inc., 311 F. Supp. 847, 852 (N.D. Cal. 1970), *rev'd,* 448 F.2d 43 (9th Cir. 1971).

47. There is presently a dispute in the federal courts over the question of whether "coercion" is a separate and distinct element of the tie-in violation. In order to establish this element of individual coercion, a plaintiff is required to demonstrate that the unique facts under which it dealt with a particular seller were such that the plaintiff was forced to submit to the seller's offer of sale of two distinct products only in conjunction with one another. Conflicting decisions on the coercion issue are contained in Hill v. A-T-O, Inc., 535 F.2d 1349 (2d Cir. 1976); Miliones v. Amerata Hess Corp., 1976-2 Trade cas. ¶ 61,069 (S.D.N.Y. 1975); and Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd, sub nom.* Rader v. Dunkin' Donuts, Inc., 531 F.2d 1211 (3rd Cir. 1976).

It has been noted that this entire dispute as to whether coercion is an element of a tie-in violation is in fact, an argument over a "term of art." *See Developments in the Law — Class Actions,* 89 HARV. L. REV. 1318, 1509 n.278 (1976) ("The term 'coercion' may perhaps best be understood not as a description of the subjective experience of the bargaining process, but as a measure of a court's confidence that the evidence before it does, indeed, establish that a defendant connected the sale of two products — in purchasing the tied product the plaintiff acted so automatically, it was if [sic] he were coerced.").

The question of whether or not coercion constitutes a separate element of a tie-in violation usually arises in the context of certifying customer tie-in claims for class action status. The problem of proving individual coercion seldom presents any serious difficulties in private antitrust actions in which the tie-in customer is able to demonstrate the existence of two separate products, the seller's economic power in the tying market, and the necessary competitive distortion in the market for the tied product. *But see* Smith Kline Corp. v. Eli Lilly and Co., 575 F.2d 1056 (3rd Cir. 1978).

48. *See* Areeda, *Antitrust Violations Without Damage Recoveries,* 89 HARV. L. REV. 1127, 1136-39 (1976); *cf.* Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957) (recovery of damages for price discrimination).

49. *See, e.g.,* Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

50. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 514 n.9 (1969) (White, J. dissenting).

tortion in the market for the tied product that resulted in damage to the customer plaintiff. This, of course, is only one of the many potential circumstances in which a customer "victim" in a tie-in transaction has suffered no antitrust injury.[51]

Thus, a finding of a tie-in and damage to the economy flowing from that tie-in, does not necessarily establish a customer claimant's right to recover, even where the customer can demonstrate that he paid more for the tied product than he would have paid had he purchased that product in a different hypothetical market situation. The only way for this customer claimant to establish his right to recover is to demonstrate that the tie-in resulted in a distortion in the market for the tied product and that this distortion diminished his competitive position by imposing burdens upon him in the tied market which were not eliminated by benefits conferred upon him with respect to the price of the tying product or some other aspect of the transaction.[52]

Some courts in tie-in cases have begun to explore the parameters of this customer injury analysis, but this examination has come primarily in the context of damage assessment and has not been consistently utilized as an aid to the determination of whether a particular plaintiff has demonstrated the impact upon his business or property which is a prerequisite to finding an antitrust violation.[53]

In *Siegel v. Chicken Delight, Inc.*[54] the Ninth Circuit recognized that mere proof of the "excess" price paid for the tied product did not establish a measure of damages in customer tie-in cases until price discounts in the tying product had been taken into account.[55] The problem with this analysis, however, is that it permits proof of the "excessive" price of the tied product to constitute proof of antitrust injury, and im-

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51. Another example of a situation in which the customer's payment of an "excessive" price for the tied product may not evidence the presence of antitrust injury is where the conjunctive sale of the tying and tied product protects the reputation of the tying product. In such circumstances, analysis of prices obtainable on a given date for the separate "products" does not permit a fair judgment of the competitive effect of the challenged practice on the overall market for both the tying and the tied product. *Id. Cf.* Dore, *The Total Product Approach to Analysis of Alleged Tie-in Arrangements,* 34 WASH. & LEE L. REV. 409 (1977) (arguing that the unique relationship between the items involved in a "tie-in" sale may preclude a finding that two separate products were involved).

52. This impact analysis would essentially track the method of inquiry suggested by Justice Black in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 500 (1969) in circumstances where per se liability had not been made out by the tie-in claimant. There Justice Black noted: "A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated." In customer tie-in cases this analysis would be used not to determine the purpose and effect of the practice of tie-ins but rather the purpose and effect of the particular tie-in transaction before the court. *See* note 64 and accompanying text *infra.*

53. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1930).

54. 448 F.2d 43 (9th Cir. 1971).

55. *Id.* at 52-53; *see also* Martino v. McDonald's System, Inc., 1980-1 Trade cas. ¶ 63,218 (N.D. Ill. 1980) (recognizing the need for the court to evaluate the relationship between the price of the tied and tying products).

poses upon the defendant the obligation of showing that the plaintiff's business or property was not in fact diminished by the totality of the conduct engaged in by the defendant.[56] Thus, a tie-in defendant is required to offer evidence of the lack of any competitive injury to the customer plaintiff even before that plaintiff has made out a *prima facie* case by adequately demonstrating competitive impact.

Despite the fact that tie-ins create distortions in the market for the tied product, the price relationship between the tying and the tied product is simply not a matter of affirmative defense required to be raised by the party who allegedly imposed the tie. Rather, this price relationship is a central element of the plaintiff's case which is necessary to establish liability because it is essential to the plaintiff's demonstration that his competitive position has been diminished.[57] If the purpose and effect of the tie-in transaction removed the customer from the market for the tied product, but did so in a manner in which the customer was spared from any impact on its own business or property, competition would have suffered, and a per se violation would have been made out,[58] but the particular customer involved would not have demonstrated antitrust injury which flowed directly from the alleged distortion in the tied market.[59] It is only when the purpose and effect of the particular tie-in transaction presented to the court has been analyzed and the relationship between the tying and tied products and the prices paid for these products has been studied that a court can determine whether or not the effect which the tie-in has had upon the customer plaintiff can properly be characterized as "antitrust injury."

CONCLUSION

The courts have not been anxious to accord per se treatment to alleged tie-in violations,[60] and attempts have been made to avoid the imposition of such per se liability through a variety of means. Included among these means have been some rather questionable analyses of the

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56. While injury and damage are the same, injury and damages are very different. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946).

57. *See* text accompanying notes 50-52 *supra*. Recently, district courts have begun to recognize the significance of the price relationship between the tied and tying product. *See* Martino v. McDonald's System, Inc., 1980-1 Trade cas. ¶ 63,218 (N.D. Ill. 1980). While these cases have not always fully examined the difficult factual questions raised by a tie-in customer claimant's charges of distortion in the tied market, *see* Kypta v. McDonald's Corp., 1980-1 Trade cas. ¶ 63,267 (S.D. Fla. 1980) they have begun the process of analyzing the actual competitive impact of challenged tie-in sales rather than merely assuming that determination of the overcharge paid for the tied product will properly resolve the question of whether or not competitive injury has been established.

58. *See* note 64 and accompanying text *infra*.

59. 429 U.S. at 489.

60. *See, e.g.*, Rex Chain Belt, Inc. v. Harco Products, Inc., 512 F.2d 993 (9th Cir. 1975); Crawford Transport Co. v. Chrysler Corp., 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

economic power held by the defendant in the tying market,[61] as well as highly dubious analyses of the competitive distortion which the tie-in caused in the market for the tied product.[62]

The analysis set forth in this Article will permit courts to analyze the reality of whether or not an individual customer plaintiff has, in fact, suffered antitrust injury and is entitled to recover damages. It will permit the court to award damages to such plaintiffs on the basis of a careful study of the purpose and effect of the alleged tie-in violation, and its impact on the actors in the market for the tied product rather than upon a mechanical application of the requirements of "per se" liability.[63]

Such an examination of the purpose and effect of the particular transaction before the court will not require an extensive analysis of the impact of the particular transaction on the marketplace (the court's characterization of tie-ins as per se violations of the antitrust law would preclude any such inquiry),[64] but rather an analysis of the impact which the competitive distortion present in any individual case had upon any individual customer plaintiff. Under this analysis, courts will be permitted to withhold damages from those plaintiffs who have not suffered directly from the competitive distortions which the tie-in caused in the market for the tied product and this result will be achieved on the basis of a studied, reasoned, and careful analysis of the transactions involved, rather than mere application of catch-all labels.[65]

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61. Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964).

62. Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir. 1974).

63. For an example of a case in which the Supreme Court overruled its prior application of the per se doctrine to a business practice which it no longer believed inevitably resulted in distortions in the competitive marketplace, *see* Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (non-price vertical resale restrictions governed by rule of reason).

64. The limits of the judicial inquiry permitted under the rule of reason analysis is carefully delineated in National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

65. It should be noted that concentration upon the distortion in the market for the tied product and the ultimate impact which this distortion has upon the individual customer claimant would not necessarily reduce the tie-in customer's potential for antitrust recovery. At present, the competitive realities facing a tie-in customer are not always properly analyzed by the courts and it has been held even if customers are faced with an obligation to pay an excessive price for the tied product, unless these customers must purchase this tied product in conjunction with the tying item, no antitrust violation can be found. Under the analysis of some courts such "economic arm twisting" cannot be found to constitute a tie-in violation because from an abstract perspective, if one disregards the economies of the marketplace, customers are free to take either product by itself. Smith Kline Corp. v. Eli Lilly and Co., 427 F. Supp. 1089, 1111-1114 (E.D. Pa. 1976), *aff'd* 575 F.2d 1056 (3rd Cir. 1978).

This analysis requires each customer claimant to demonstrate that with respect to his individual situation there was a total destruction rather than merely a distortion of the market for the tied product. Under the rationale of the antitrust laws such a demonstration should not be required and just as the price relationship between the tied and tying products should be examined to determine whether a customer claimant has been injured by the tie, it should also be examined to determine whether, in fact, a sale on condition has been imposed in an individual case. Ignoring this relationship serves neither the interest of customer claimants nor the interests of competition which the antitrust laws were designed to foster. *Cf.* Hill v. A-T-O, Inc., 535 F.2d 1349 (2d Cir. 1976) (examining the economic realities of a defendant's "free" giveaway program).

Backhauling: A Legal Justification

*Kent S. Bernard**

Backhauling is a commercial trucking practice wherein a customer procures products from a manufacturer rather than having the manufacturer deliver the same. The issue of whether a backhauling cost allowance inherently results in discriminatory and illegal pricing structures in violation of the Robinson-Patman Price Discrimination Act is pointedly addressed by the author. Examined are a myriad of Federal Trade Commission decisions which have done little to clear up this area. In ending, the author presents an economic and theoretical justification for backhauling allowances which many will consider equitable as well as practicable.

In today's climate of concern over the high cost of goods and the efficient use of energy (particularly, gasoline and diesel fuel), there is renewed interest in the idea of backhauling.[1] The term is a shorthand ex-

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1. Exemplifying this concern is the so-called "trucking deregulation bill," which specifically authorizes backhauling in transportation of food and grocery products. The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), amended Section 8(a) entitled "Food Transportation." The amendment reads:

> Sec. 8.(a) Subchapter II of chapter 107 of title 49, United States Code, is Amended by adding at the end thereof the following new section:
>
> § 10732. Food and grocery transportation
>
> (a) Notwithstanding any other provision of law, it shall not be unlawful for a seller of food and grocery products using a uniform zone delivered pricing system to compensate a customer who picks up purchased food and grocery products at the shipping point of the seller .... [S]uch compensation shall be available to all customers of the seller on a nondiscriminatory basis and does not exceed the actual cost to the seller of delivery to such customer.

When it was argued that such specific provisions governing food and grocery transportation could

pression for the practice of giving a customer an allowance if he picks up material at the seller's plant or distribution point rather than having the seller make delivery. The term itself arose because often purchasers had trucks which would make a delivery to one location, and then have to return empty. If they could haul something back, the return half of the trip would not be totally wasted. That cost saving could be passed on to consumers.

In common parlance, lawyers speak of a backhaul allowance. Under the antitrust laws, the legality of granting allowances is normally considered under section 2, subsections (d) or (e) of the Robinson-Patman Act.[2] However, both the courts[3] and the Federal Trade Commission[4]

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be read as implying that backhaul allowances were otherwise illegal, Senator Russell Long of Louisiana, when debating the bill, specifically rejected any such implication. He stated:

> Mr. LONG. Mr. President, today we consider S.2245, the Motor Carrier Regulatory Reform Act of 1980. One section is eliminating energy waste and empty backhauls in the grocery distribution industry and that is section 8, the efficient food transportation provision. The need for this section has been addressed in detail in various hearings and I will not reepeat [sic] that record here.
>
> Existing law does not make unlawful the type of compensation specified in this section, whether the goods picked up by the customer are food or grocery products or some other materials, nor does existing law establish this type of compensation or allowance as the only permitted form of pickup compensation or allowance. Thus, even though this section is expressly limited to food and grocery products, its enactment should not be construed to mean that the payment of similar compensation — or the granting of a comparable allowance — to customers picking up other materials is unlawful. In addition, the enactment of this section should not be construed as meaning that other types of pickup compensation or allowance formulas are unlawful either as to food or grocery products or any other material. In other words, the purpose of this section is to reaffirm what is now the law as to food and grocery products but not to express or infer anything else with respect to any form of pickup compensation or allowance applied either to food and grocery products or any other product line.

126 CONG. REC. S3638 (daily ed. April 15, 1980) (remarks of Senator Cole). Whether Senator Long's view of existing law is correct, will be discussed *infra*.

2. Robinson-Patman Price Discrimination Act of 1936. 15 U.S.C. § 13(d) (1976), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce to pay or contact [sic] for the payment of anything of value to or for the benefit of a customer of such person in course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Id. 15 U.S.C. § 13(e) (1976), further states:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Id.

3. *See, e.g.*, Chicago Spring Products Co. v. United States Steel Corp., 254 F. Supp. 83 (N.D. Ill. 1966), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966).

4. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,089 (Advisory Opinion 147). For the Advisory Opinion procedures, see Commercial Practices, 16 C.F.R. §§ 1.1-1.4 (1979). Before 1970 the Advisory Opinions were published in digest form. After 1970 the Commission has published in full both the requests for advice and the resulting opinions.

agree that the backhaul allowance is really an element of the price of the goods, and should be considered under § 2(a) of the Act.[5]

The Federal Trade Commission (FTC) has countenanced nearly every approach, except the most rational one whenever it has been confronted with the issue of backhaul allowances, leaving this area of the law in a rather confused state. Further complicating matters, one court recently completely ignored the FTC's current position and upheld a backhaul system in private litigation which clearly fell outside of the FTC's advisory views as to what is legal.[6] The time has come for review of this area to ascertain whether there is a legal and valid basis for granting backhaul allowances under current law.

After reviewing the existing law, this Article proposes a two-pronged approach to the area, based on the interplay of several Robinson-Patman concepts. That approach provides the theoretical underpinnings for the consistent, legal use of backhaul allowances.

I. EXISTING LAW

For present purposes, the current law begins with FTC Advisory Opinion No. 147.[7] There, the Commission made the initial determination that the backhaul allowance is a part of the purchase price. It advised further that it would be illegal to give such an allowance equal to the actual freight cost to a customer who picked up his goods at the seller's plant. The Commission used the concept of a zone delivered price system as its starting-point. This concept refers to a pricing structure whereby all customers within a geographic zone pay the same amount; in short, freight cost is averaged to all. Since customers all pay the same amount there is no violation of § 2(a),[8] in that there is no

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5. Robinson-Patman Price Discrimination Act of 1936, 15 U.S.C. § 13(a) (1976):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered*. . . . The underscored portion of the statute is often referred to as the 'cost justification proviso,' and that usage will be employed here. *Id.* (emphasis added).

6. Sweeney & Sons, Inc. v. Texaco, 478 F. Supp. 243, 282 (E.D. Pa. 1979).

7. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,224 (Advisory Opinion 147).

8. Delivered pricing, or pricing which incorporates freight to the buyer's location, has survived a history of antitrust attack. Such systems will violate the Sherman Act if they are used as part of a price fixing conspiracy, but are not illegal otherwise. *Compare* United States v. American

discrimination in price. Working from that base, the Commission believed that if one customer was given an allowance for the *actual* freight cost saved, he could be paying a different price than that paid by his competitors. Essentially, the Commission was concerned that individual customers might be located geographically at disparate distances from the sellers pick-up point. Thus, their actual freight costs would differ respectively and probably would also differ from the averaged cost used to determine the price to others within the zone. The Commission also doubted whether the cost justification defense would be available to a manufacturer under these circumstances.

The FTC's next pronouncement was Advisory Opinion No. 194, which, if it did not speak directly to backhauling, certainly had an impact on that area.[9] In this opinion the Commission held that it was permissible to give a freight allowance which would result in every customer paying the same net price (including the freight charges by a third party). The factual context was a manufacturer granting freight allowances to be deducted from its f.o.b. factory price in such a way that buyers would pay the same total price for goods, no matter where they were located. For example, suppose the factory price for a particular item was $99.50, and the freight charge was figured at $.50. If the actual freight cost was $.50 for a customer, he would receive no allowance and would pay a total of $100. If the actual freight cost was $1.00, the manufacturer would grant a $.50 freight allowance to be deducted from the price; the customer would pay the manufacturer $99 and the carrier $1.00 to maintain the constant total of $100.

Obviously, this scheme is somewhat startling. The Commission was saying in effect that a manufacturer could have different prices for different customers, in that its customers would have paid the same net price after taking their third party carrier costs into account. Except where justified under the cost justification proviso to § 2(a), this remarkable idea is not to be found anywhere in the statute. It should be noted, moreover, that if the price differentials are cost justified, it is immaterial whether the net price is the same to all customers. Normally,

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Linseed Oil Co., 262 U.S. 371 (1923) *with* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

Single basing-point systems, where sellers quoted prices f.o.b. one common point, regardless of where they were actually located, were struck down in Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945) and FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945) as violating the Robinson-Patman Act. In each case, buyers located near the actual plant, but not the common basing point, paid "phantom freight" where the prices to them included shipping from the basing point.

Zone delivered pricing has fared better. Under such a system, the seller divides the country into zones and determines an average freight cost for each zone. Phantom freight is minimized. In FTC v. Nat'l Lead Co., 352 U.S. 419 (1957), the FTC itself dismissed a challenge to zone delivered pricing. The Supreme Court noted that it had never condemned such a system.

9. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,224 (Advisory Opinion 194).

customer payments to third parties would hardly be a defense to differential prices by the seller. As will be seen, the Commission tacitly retreated from this view five years later.[10]

In 1968, the Commission promulgated Advisory Opinion No. 198,[11] which held that a manufacturer could not give a 5% discount for truckload shipments based upon the premise that its average freight savings on such shipments were 5% of cost. A manufacturer could charge its average freight, under a normal delivered price system, but apparently could not give a discount based upon that average. As one analyst commented:

> These three Commission advisory opinions yielded a series of apparently perplexing rules on delivered prices: Customer pick-up allowances exactly equal to the seller's actual freight cost savings on each specific shipment cannot be cost-justified because the seller's delivered price includes "an average of freight costs," yet pick-up allowances equal to the seller's average freight cost saving cannot be justified because the actual freight costs on specific shipments to particular customers are different from the average. On the other hand, the seller may grant to customer freight allowances equal to the seller's actual common carrier freight cost savings to enable such customers to pay the applicable freight directly to a common carrier performing the transportation service, yet the seller may not grant to customers pick-up allowances equal to the outbound common carrier freight cost even though such customers perform the same transportation service as a common carrier would perform.[12]

To call the rules "perplexing" is understatement; in fact, the situation created by the rules was chaotic, and in 1969 the FTC began to retreat from its original positions. In Advisory Opinion No. 393,[13] the Commission advised that the cost justification defense would be applicable to freight savings if those savings were available to all customers. This holding is so logically compelling that it is difficult to understand how the Commission arrived at the contrary position in Advisory Opinion No. 147. Note, however, that the Commission said only that the defense would apply if the manufacturer was performing the

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10. Still, the motive underlying Advisory Opinion 194 is a legitimate one. Having admitted the validity of delivered prices, whereby all customers pay the same no matter where they are located, it should be legally irrelevant who makes the actual delivery. The seller can deliver himself or he can hire a common carrier to make delivery. In either instance the price to the buyer is the same. The next logical step is to let the buyer hire the carrier, with the seller footing the bill. To escape the administrative problems of this alternative, the buyer might be allowed to hire and pay the carrier, and the seller required to reimburse the cost, either by payment or by a deduction off-invoice.

11. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,237 (Advisory Opinion 198).

12. ABA ANTITRUST LAW DEVELOPMENTS 135 n.169 (1975).

13. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,034 (Advisory Opinion 393).

delivery; the opinion did not speak to the consequences of customer pick-up.

In 1973, the first "clarification" of Opinion No. 147 was given.[14] The Commission expressed the view that it would probably not be illegal if sellers, using valid uniform zone delivered pricing systems, offered to all customers the option of purchasing at a true f.o.b. shipping point price in lieu of a delivered price. This new view did not completely overrule Opinion No. 147. It still did not authorize a manufacturer to give price *allowances* to customers who picked up their goods. A manufacturer was merely allowed to use the same f.o.b. prices for all customers. The new slant given to Opinion No. 147 by virtue of the 1973 interpretation did, however, clash rather violently with the reasoning of Opinion No. 194. Under an f.o.b. system, once customers pay freight, they will be paying different net prices. By the 1973 interpretation, it would clearly be illegal for a manufacturer to sell at different initial prices to different customers so that the customers end up paying the same net amount after they have paid common carriers for shipping. As is discussed below, this clash is the result of a policy dichotomy within the Act itself, one which the Commission does not seem to want to recognize.

In 1975 the Commission further clarified Opinion No. 147 and specifically tried to clarify its 1973 clarification.[15] The 1975 clarification defined "true" f.o.b. prices as prices which were both uniform and available to all customers. Apparently, the Commission did not intend that prices had to be computed in any certain way. In the same year, the Director of the Council on Wage and Price Stability suggested to the FTC that it allow backhaul allowances equal to the actual cost of transportation to each customer. Whereas Opinion No. 194 had attempted to reach this result by allowing manufacturers to have different prices, provided that the customer paid a third party for shipping.[16] The Commission was now being asked to allow different prices where the customer himself did the hauling.[17]

The FTC declined the Council's request,[18] holding in Opinion No. 393 that the cost justification defense could not be used to defend price differences resulting from an *absence* of delivery cost differentials that

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14. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,498 (Advisory Opinion 147).

15. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,850 (Advisory Opinion 147).

16. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,224 (Advisory Opinion 194).

17. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,224 (Advisory Opinion 194). Under this proposal, the basic price to all customers would be the zone delivered price, then a customer would get an allowance if he picked up the material. He could either perform the pickup himself (a true backhaul), or pay to have someone else do it. The Council on Wage and Price Stability's request differed from Opinion 194 in that the request would permit actual customer pick-up.

18. FTC Letter to Mr. Albert Rees, Director, Council on Wage and Price Stability, October 8, 1975. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,031.

would have been incurred had the goods in question been transported to different delivery destinations. If two customers bought goods and picked them up at the manufacturer's plant, the *seller* had no cost differences in serving the two accounts. The fact that there was a cost difference before, and that by avoiding delivery the seller had different savings for the two customers, was deemed to be irrelevant. Clearly, though, if the cost for each customer had proved to be different, a difference in price could be justified under traditional commercial law.[19]

Although the Commission's course may have been logically coherent, the premises were not. One prime reason to have a customer pick up the goods is to let the seller avoid costs. To say that a partial avoidance of costs could justify a discount, but that total avoidance could not, is neither required by the law nor sensible in fact.[20]

Although it made no more pronouncements on the topic, the Commission's subsequent actions raised questions about how seriously, if at all, it considered its prior statements. In *Martin Marietta Corp.*, [21] the FTC accepted a consent order with several companies settling a challenge to certain cement pricing practices. Under the terms of the order, each firm was required for ten years to offer an f.o.b. mill price each time a delivered price was offered. In one company's case, that mill price was defined as the delivered price less the actual freight cost which would have been incurred. For the other companies, the price was defined as the delivered price less the average freight cost included within it. Thus, while stopping short of approving a backhaul allowance, the FTC action clearly resurrected the conceptual arguments on which Advisory Opinion No. 194 had been based.[22]

In *Martin Marietta Corp.*, the Commission expressly *required* different prices to different customers. This turns normal f.o.b. pricing on its head. Usually, an f.o.b. price is the same for all buyers, the norm

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19. It should be noted that to the extent that Opinion 393 only allowed cost justification on freight savings if the seller was doing the delivery, this reading is consistent with that Opinion. *See* note 13 and accompanying text *supra*.

20. The Commission simply compared apples and oranges:

> If we start with a uniform delivered price at T_1, we have different costs for each customer (C_1 and ($C_1$1). When we move to a no-delivery system at T_2, we have new (lower) costs (C_2 and $C_2$2). The relevant inquiry is the difference between C_1 and C_2 (and $C_1$1 and $C_2$2), *not* any difference between C_2 and $C_2$2.

Id.

The analytical problem is that the FTC forgot that it started from delivered prices, where the prices are uniform but the seller's costs are not. Had it started from a base where the seller's costs for the two customers were the same ($C_1 = C_1$1), then the FTC's approach of comparing C_2 with $C_2$2 would have made sense. Any price difference would have to be based on the fact C_2 did *not* equal $C_2$2; *i.e.* there was a cost saving for the goods for one of the customers. But where C_1 did not equal $C_1$1, the question should have been whether $C_1 - C_2$ was different from $C_1$1 $- C_2$2. If so, there were different cost savings justifying different prices.

21. [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,179.

22. *See* note 9 *supra*.

relied upon in the 1973 clarification of Opinion No. 147. Similarly, delivered prices, at least within a given zone, are usually the same for all buyers. Different pricing can occur in granting backhaul allowances where a credit for pricing freight charges is given. By definitional fiat in *Martin Marietta Corp.*, the Commission twisted f.o.b. pricing into something approaching a backhaul allowance.

Amidst this confused state of the law, emerged the decision of *Sweeney & Sons, Inc. v. Texaco, Inc.* Since at least 1961, Texaco had sold gasoline at delivered prices. If a customer picked up the gas, thereby saving Texaco the cost of delivery, Texaco gave a hauling allowance computed upon the lowest common carrier rate between a designated Texaco distribution point and the customer. Sweeney shifted some of its operations, and Texaco shifted its designated pick-up point and, therefore, the freight allowance. Texaco did not change the pick-up points for Sweeney's competitors. Sweeney claimed that by changing its hauling allowance, Texaco had discriminated against it in violation of the Robinson-Patman Act. The District Court for the Eastern Pennsylvania district[23] held that Sweeney had not proved any connection between the alleged discrimination and the injury,[24] and held further that Texaco's action itself did not violate the Act.[25]

In the court's view, Texaco was doing exactly what the Act said it should do: it was treating all distributors equally. The basic price was the delivered price. If the distributor wanted to pick up the goods, he got an allowance equal to what Texaco computed its cost of delivery would have been (using common carrier rates). The cost to Texaco was the same either way.

By way of illustration, assume that the f.o.b. plant price of a truckload of goods were $900, and that delivery (based on common carrier rates) would cost $100. The manufacturer, then, would offer a delivered price of $1,000. However, he would not make any more money on the delivered price than he would on the f.o.b., since he himself would be paying the $100 for delivery.[26] The customer also would pay the same price either way. The customer could either pay the seller $1,000 and have the material delivered to his door, or pay the seller $900

23. Sweeney & Sons, Inc. v. Texaco, 478 F. Supp. 243, 282 (E.D. Pa. 1979). The discussion of the facts which follows is based on the opinions of the court. In *Sweeney,* the court dealt with two issues, the legality of the allowance was determined by the latter. *Id.*

24. *Id.*

25. *Id.* Interestingly, Texaco never argued the cost justification defense. It claimed that the allowance was a "functional discount." *Id.* at 252. That is, Texaco argued that the lower price was justified by some function which the buyer provided. *See generally* Calvani, *Functional Discounts Under the Robinson-Patman Act,* 17 B.C. INDUS. & COM. L. REV. 543. The court did not agree.

26. This statement is not completely accurate. Common carrier rates include a profit margin for the carrier. A seller using its own trucks would not incur that added increment of cost. Thus, a seller *could* make more at "delivered" prices than at "f.o.b. plant" prices. This advantage is by no means a sure thing, since one or two small volume deliveries could more than wipe out the cost savings. In any event, it is hard to see how any impact of competition could flow from this point.

and a carrier $100. In either case, he would pay $1,000. The exception would arise where the customer had his own trucks and could save money by picking up the material himself. However, whether the customer has trucks should not be a factor in determining whether the seller has violated the law. So long as he offers the same price, and the same backhaul allowance, to all customers similarly situated, the seller has fulfilled his obligations. The law does not require a manufacturer to make certain that each of his customers has the same internal costs; such a requirement would be absurd.

Note that what is irrelevant *from the seller's viewpoint* — the question of whether the customer has his own trucks — is the crucial point financially *from the customer's viewpoint.* Assuming hypothetically that the customer might have trucks which are coming back empty, he would receive, in effect, free delivery,[27] i.e., by backhauling with those trucks. While this might hurt competitors without trucks, the backhaul allowance would not be the cause of injury. Exactly the same injury would occur under f.o.b. plant pricing. The buyer without trucks would have to hire a carrier; the one with trucks could use them to backhaul. Yet f.o.b. plant prices clearly are legal, since they are the same for everyone. Any injury that may result from them is not caused by any *discrimination* in price.

The implications of this last point should not be underestimated. Where the same injury would occur with or without that challenged practice, that practice can not be called the cause of the injury. This conclusion rests upon basic logic, and has nothing to do with one's views concerning the Robinson-Patman Act. Since f.o.b. pricing is legal in spite of the fact that it may result in an advantage to buyers who own trucks, the fact that a backhaul allowance can result in the same disadvantage does not condemn the allowance.

On the other hand, such a circumstance does not, by itself, make the allowance legal. To hold that it does would be to slip into a basic logical fallacy. For example, starting with the premise "Some pots are black," it would be inaccurate to reason:

1. Some pots are black;
2. This thing is black; therefore,
3. This thing is a pot.

Similarly, it would be inaccurate to reason:

1. Some legal price structures (such as f.o.b. prices) injure buyers without trucks;
2. This structure injures buyers without trucks; therefore,
3. This price structure is legal.

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27. He is paying only for the added loading expense. Since the truck would have to be driven back in any case, the cost of the drive itself is not an added expense.

All that logic can do here is teach us that once we accept that f.o.b. prices are legal in spite of the fact that they injure some buyers, we *cannot* assert that all practices which injure these buyers (such as a backhaul allowance) are illegal. The two premises contradict each other. Still, this point is one which the FTC has apparently failed to grasp.

II. ANALYSIS

Currently, the FTC offers a seller two alternatives:

1. zone delivered prices, and/or
2. f.o.b. plant prices.

Under option number 2, the price is the same to all customers. With respect to option number 1, the Commission defers to the historical and judicial acceptance of zone delivered prices, even though such prices may not totally correspond to the manufacturers costs. The FTC stated in Opinion No. 194 that "there could be no question" of the manufacturer's right to employ a delivered pricing system, since each buyer pays the same delivered price.[28] This point is significant, since the FTC will not allow "average" pricing for the purposes of giving an "average" discount.[29]

A manufacturer may use both option 1 and option 2, as the Commission noted in its 1973 clarification,[30] since both are available to all customers. This possibility exists even though it could result in two customers paying different net prices — if one of the customers were to take f.o.b., the plant and his actual transportation cost would be less than the "average" transportation charge figured into the zone delivered price. Manufacturers are permitted to offer both options because all customers have the option of using either system.

However, the Commission has said that it will not permit a backhaul allowance based upon the individual savings to a seller resulting from customer pick-up. The Commission first opined that the cost justification defense did not apply.[31] It later admitted that the defense would apply where the manufacturer delivered the goods.[32] The Commission did not initially explain why the defense would apply in that instance, but not where the customer picked up goods. Finally, in its 1975 letter,[33] the Commission attempted to explain why the defense would apply if the manufacturer delivered but not if the customer picked up goods.

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28. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,224 (Advisory Opinion 194).
29. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,237 (Advisory Opinion 198).
30. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,850 (Advisory Opinion 147).
31. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,089 (Advisory Opinion 147).
32. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,034 (Advisory Opinion 393).
33. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,031 (FTC Letter to Mr. Albert Rees, Director, Council on Wage and Price Stability, October 8, 1975).

Compounding the confusion is the obvious fact that if, as the Commission stated in its 1975 letter, the defense will not apply where the manufacturer does not have the costs, then Opinion No. 194,[34] which allowed a discount to cover freight charged by third parties, makes no sense whatsoever.

The net result of the FTC "analysis" is to prohibit all backhaul allowances paid to customers, while permitting freight allowances to be paid to customers which would cover the cost that each customer incurs in having a third party make the delivery. Note that the Commission's position does not require the manufacturer to pay the third party directly; instead, it allows a discount on the price charged to the customer. In spite of this technical prohibition, it is a common practice among manufacturers to offer backhaul allowances to customers. According to the court in *Sweeney,* Texaco had had such a system since at least 1961, and it is difficult to believe that Texaco is the only company which followed this practice.

Evidently the FTC's interpretation has been ignored. Astute manufacturers have analyzed the statute, and have determined how to operate in such a manner (i.e., within the bounds of the law) that no civil liability would attach in a lawsuit by an allegedly wronged customer. The time has come for the FTC to recognize the reality of the situation. Although conceptually hard to reconcile with one another, there really must be three alternatives:

1. zone delivered prices and/or
2. f.o.b. plant prices, and/or
3. backhaul allowances based on actual common carrier cost, or some other neutral standard.

Affirming the legality of zone delivered prices is necessary to protect the small customer, who may need delivery by the manufacturer as part of the bargain. Of course, the manufacturer need not offer this service; he could cut out all delivery, but he should be allowed to use delivered prices if he so chooses. Such prices also can be justified on the ground that they are the same for all buyers within the zone. Similarly, f.o.b. plant prices are clearly legal. They simply set one price for all customers. Also, they have an historical sanction stemming from longstanding commercial usage.

The legal justification for backhaul allowances is a bit more complex. It builds on a combination of the "same net price to customers" view which justifies delivered prices and f.o.b. plant prices, and the cost justification defense to a price discrimination charge.

Cost justification, in essence, means that where a seller saves money by using a different method of manufacture, sale or delivery, he can

34. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,224 (Advisory Opinion 194).

pass that savings on to his customers without violating the law, even though this may result in his charging some customers lower prices than others. Although the FTC has been hostile to the defense,[35] its existence cannot be denied. It is set forth in the proviso to § 2(a) of the Act.[36]

Where a seller has lower delivery costs, it would be legitimate to pass on that savings to customers. The FTC recognizes that argument, off a delivered pricing base, where a third party handles delivery. From the seller's viewpoint, the third party is irrelevant to its cost savings, because the seller no longer has to bear the shipping expense in any event.

What has led the FTC astray is that it has failed to recognize that backhauling allowances and f.o.b. plant prices are two sides of the same coin. Both systems entail a recognition that customers will have different costs when delivery expenses are included. The FTC expressly recognizes this truism concerning f.o.b. plant pricing, but chooses to ignore it because all customers are paying the seller the same price. Because it cannot use the same argument to justify backhaul allowances, the Commission rules them out. But by focussing solely on the seller's price, the FTC has ignored the cost justification proviso and the reasons for it.

There are two distinct categories among the three pricing options:

1. Where the seller's price to all customers is the same;
2. Where the seller's cost for all customers is the same.

In the first category (same price) fall delivered prices and f.o.b. plant prices. Under this category, each customer is charged the same price by the seller for the goods. With delivered prices, that payment includes a delivery charge whereas with f.o.b. price it does not. But in either case the price charged by the seller is the same for all customers (within the given zone, in the delivered price system).

The second category (same cost) focuses on the seller's cost for that particular buyer, rather than the actual price paid to the seller. Under this category fall delivered prices, f.o.b. prices and prices with transportation allowances. To the seller, it doesn't matter whether a buyer has his own trucks, since the seller merely views the transportation allowance as compensation for what would have been his own delivery cost. As set out in Advisory Opinion No. 194,[37] where the buyer pays for delivery, he ultimately pays the same *total* cost for the goods as any other buyer. The same result obtains under delivered pricing, within the given zone. For each buyer, the seller has the same total cost.

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35. *See* Bernard, *Handling Modern Buyers: A New Look At Payment For Services Under the Robinson-Patman Act,* 44 ALB. L. REV. 89, 96 n.38 (1979). [hereinafter cited as Bernard].

36. Robinson-Patman Price Discrimination Act of 1936, 15 U.S.C. § 2(a) (1976).

37. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,224 (Advisory Opinion 194).

Obviously, one might argue, there is a hole in this argument. The whole point of backhauling is to save money. If all customers ultimately paid the same, whether they took delivery or picked up the goods themselves, the system would be pointless. This argument, although plausible on the surface, fundamentally confuses the two standards under the statute. It ignores the crucial distinction between the perspective of the seller and that of the buyer. It is only from the seller's seat that backhauling gives no net savings over delivered pricing. This is what justifies it legally. From the buyer's point of view, backhauling yields a substantial savings if he has his own trucks, as he can make use of their return trips.

Under the Act, a seller is not to concern himself with a buyer's total costs. He is simply to charge the same price to all competing buyers. A seller is not concerned with a buyer's efficiencies or general costs. But a seller is concerned with his *own* costs, and can pass his cost savings on to his customers. Where a seller is relieved of an expenditure (here, delivery) the cost justification proviso to § 2(a) specifically allows that savings to be passed on even though it may result in different buyers paying different prices.

The fact that a buyer can pick up goods more cheaply than a seller could have delivered them is totally irrelevant under the statute. The seller could not legally set prices based on each buyer's actual cost, unless those prices turned out to be the same (as in a delivered price system), since the cost justification defense to a discriminatory price only looks to the *seller's* costs and savings.[38] The details of the law of cost justification are both arcane and well beyond the scope of this article. Questions of how much cost data is necessary to support a difference in price have bedeviled antitrust lawyers for years,[39] and may continue to do so. But, distinguished from the mean run of cost justification cases, backhaul allowances are quite suited to an easy calculation. Common carrier rates do exist, and they provide a neutral means for determining the allowance. As *Sweeney* shows, for once, the easy way happens to be the correct one.

Of course, there is nothing magical about common carrier rates. Other neutral criteria might well be devised. The prime advantage to such rates, however, is that they provide an easy measure of what delivery cost would be, which makes application of the cost justification defense particularly easy. If a seller wished, it could compute its actual

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38. *See* FTC v. Morton Salt Co., 334 U.S. 37 (1948). This point cuts across functional lines. *See* Bernard, *supra* note 35, at 95-97.

39. *See generally* ABA ANTITRUST LAW DEVELOPMENTS 136-40 (1975). For an example wherein cost justification prevailed, *see* American Motors Corp. v. FTC, 384 F.2d 247 (6th Cir. 1967), *cert. denied*, 390 U.S. 1012 (1968).

internal delivery costs (using its own vehicles) and base its backhaul allowance on those. The defense would still apply.[40]

Cost justification turns the Act on its head. Normally, it is required that the seller's price to all buyers be the same and that his costs be ignored. Under the cost justification, one begins with prices that are the same, but then looks only to the seller's cost savings and ignores the fact that the resulting prices will no longer be uniform. When the prices were the same, the seller's costs varied. We should not be astounded that when the costs are the same, the prices will vary. What makes it legal is that *these* price variances, which are the direct pass-through of cost savings, are exempted by the statute from the normal rule of price uniformity.

This tension between the norm of price uniformity and the exception from it for cost justified differences is basic to the Act. As noted elsewhere,[41] the Act was designed to protect small buyers against larger ones (such as chain stores). It was not really meant to penalize sellers. Thus, if a seller has efficiencies and savings in serving a buyer, he can pass them on even if they result in different prices to different customers. However, the seller must justify those prices by proving his savings upon challenge.

The use of delivered prices within a zone, or the use of f.o.b. prices, masks this tension, since the use of such prices fits under both categories: the seller's price to all customers in the zone is the same, and its cost for those customers is the same. Until we have to deal with transportation allowances, there is no need to break down the categories. The FTC, however, has shied away from the second category (seller's cost). Yet in *Martin Marietta Corp.*,[42] the order defined f.o.b. prices in a way that makes sense only under such an analysis. There f.o.b. mill price was defined as the delivered price less the actual freight which would have been incurred. Thus, the seller would *not* be charging the same price to all customers, but *would* have the same cost for all of them. This situation fits squarely within category 2, above.

Having moved into category 2, there is no rational way for the Commission to avoid allowing backhauling allowances. Even the convoluted reasoning of its 1975 letter[43] cannot prevail. In *Martin Marietta Corp.*,[44] the Commission recognized that the absence of delivery costs *is* a

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40. *See, e.g.*, Morton v. Nat'l Dairy Products Co., 414 F.2d 403 (3d Cir. 1969).

41. *See* Bernard, *supra* note 35, at 90-92, 97.

42. [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,179.

43. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,031 (FTC Letter to Mr. Albert Rees, Director, Council on Wage and Price Stability, October 8, 1975).

44. [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,179.

savings to the seller which can be (and in that case, had to be) passed on to buyers.

CONCLUSION

The need for the option of offering backhaul allowances, and therefore the need for a legal theory which justifies such allowances, is clear. In 1975 the Council on Wage and Price Stability asked the FTC to allow the practice, but was refused. The Commission could not, or would not, articulate a theory which granted the permission. The court in *Sweeney* granted the permission, but without a theory. This Article has sought to fill that gap. The two pronged theory presented herein attempts to harmonize the divergent policies of the Act as much as is possible, and seeks to reach a reasonable result. Backhauling has taken place, and will continue to do so. It is hardly a pernicious practice. The FTC should act to remove the legal cloud which it has placed over what is both a legitimate and necessary option in today's economic and energy environment. Neither the law nor the policies behind it require that the cloud be there. It's time that the Commission cleared the sky.[45]

45. Enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 2245, 94 Stat. 793 (1980), will not by itself be sufficient. All that Senator Long's statement does is to create legislative history rejecting the implication that backhaul allowances are illegal generally based upon the specific authorization in section 8 of the Act. It certainly falls far short of a law granting blanket legal authority for such allowances. No matter what the rate of the Motor Carrier Act of 1980 may be, the FTC still should act.

NOTE

Condominium Conversion Legislation: Limitation on Use or Deprivation of Rights? — A Re-examination

In recent years, the conversion of rental apartments to condominium ownership in metropolitan areas has increased dramatically.[1] Those tenants unwilling or unable to purchase their units have been forced to vacate,[2] and the task of securing other affordable accommodations has become more difficult due to the rapid decline of existing rental stock.[3] Since 1970, an estimated 97,000 to 110,000 households have been converted from rental to condominium or cooperative units.[4] Although no serious problems occurred for the majority of those families or individuals forced to move,[5] the hardships are more severe on elderly and low income tenants.[6]

In an effort to protect tenants from the hardships resulting from condominium conversions,[7] various legislative measures have been enacted.

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1. *See* 1 HUD *Condominium/Cooperative Study,* National Evaluation IV-19 (July 1975) [hereinafter cited as HUD STUDY, reporting that in 1970 there were only 436,000 condominiums in the United States and by 1975 there were approximately 1,242,000 spread across the country, with over 50 percent built in Florida, California, Illinois, and Michigan. *See also* The Boston Globe, April 8, 1979 at 1, col. 1, reporting that in Chicago in 1976 there were 10,000 condominium units and now there are 45,000. A survey instituted by the Chicago Sun Times found 8,000 apartments converted or scheduled for conversion between January and April of 1979. *But see,* Note, *The Condominium,* 21 HAST. L.J. 243, 285 (1970) stressing the desirability of condominium ownership for low-income families. *See also* Cribbet, *Condominium-Home Ownership for Megalopis?,* 61 MICH.L. REV. 1207, 1208-09 (1963).

2. *See* CAMBRIDGE COMMUNITY DEVELOPMENT DEPT., CONDOMINIUM CONVERSION IN CAMBRIDGE: A PROFILE OF NEW OWNERS AND FORMER TENANTS § 3 (1978) (discussing the elderly tenants' hardships as a result of the sheer number of conversions in the community) [hereinafter cited as CAMBRIDGE REPORT]; Note, *Tenant Protection in Condominium Conversions: The New York Experience,* 48 ST. JOHN'S L. REV. 978, 979 (1974).

3. *Id.*

4. *See* HUD STUDY, *supra* note 1, at V-6. *See generally* ROMNEY, CONDOMINIUM DEVELOPMENT GUIDE § 19.02(4) (Supp. 1979).

5. *Id.*

6. *See* note 2 and accompanying text *supra. See also* CAMBRIDGE REPORT, *supra* note 2, at 1, revealing that the price of most condominium units, between $20,000 and $60,000, exceeds what most low and moderate income tenants can afford to pay, the obvious result being to aggravate the increasingly severe shortage of decent affordable housing.

These measures range from purely eviction control mechanisms such as temporary[8] or permanent[9] moratoria on tenant evictions stemming from conversion, to legislative plans designed to promote tenant participation in the conversion decision such as notice and first refusal plans,[10] or percentage approval plans.[11] The variety and range of this legislation has prompted renewed interest in urban housing and the complex social, economic, and legal issues surrounding it.

This Note will review the major legislative approaches already taken, examine the issues raised, and discuss the constitutional bases on which those issues have been adjudicated. Section I will introduce the concept of condominium ownership, some of the reasons for its remarkable growth in popularity, as well as the effect conversion from rental units has had on the owner-developer and tenants. Section II will discuss the range of legislation already enacted in response to condominium conversions. Section III will analyze the constitutionality of existing conversion legislation. It will be suggested that although a legislative remedy may be appropriate in some instances, individual ownership rights should only be limited if an extreme housing shortages exist in a particular community.

I. THE DEVELOPMENT OF THE CONDOMINIUM CONCEPT

Condominium is a form of ownership comprised of individually owned units within a multi-unit structure.[12] The individual condominium unit owner possesses a fee simple absolute in one unit and is a tenant-in-common with the other "co-tenants" in the building.[13] Because of this "peculiar" characteristic, the condominium concept, which originated in the Middle Ages,[14] never fully developed as a new estate in law.

In 1961, with the enactment of federal legislation granting Federal Housing Authority (FHA) mortgage insurance for condominiums,[15] the

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7. *Id.*

8. *See* note 72-74 *infra.*

9. *See* note 82 *infra.*

10. *See* note 70 *infra.*

11. *See* note 40-54 *infra.*

12. *See* 1A P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE Appendix B. (1978). *See generally* 15A AM. JUR. 2d *Condominiums* § 7 (1976).

13. *See* 2 Tiffany, *Real Property* § 626 (3rd Ed. 1939) which states:

> Not only may a building, by force of an agreement to that effect, belong to a person other than the owner of the land, but parts of a building may be owned by different persons in fee simple, as when an upper floor belongs to one person, and the lower to another, or separate rooms, or even parts of rooms belong to different persons.

See also Note, *The Air Space as Corporeal Reality,* 29 HARV. L. REV. 525 (1915).

14. *See* Leyser, *The Ownership of Flats — A Comparative Study,* 7 INT'L AND COMP. L. Q. 31, 33-37 (1958).

15. National Housing Act, Pub. L. No. 8770, Tit. I, § 104, 75 Stat. 160 (codified at 12. U.S.C. § 1715y (1976)), authorized the Federal Housing Commission to insure condominium units

availability of mortgage insurance provided financing which had been previously unavailable. As a result, condominium development grew[16] to over 1,242,000 units by 1975.[17] Although this rapid growth has not been uniform,[18] every state and the District of Columbia had enacted condominium statutes by 1970.[19] This eliminated any potential uncertainties which might have affected title or financing. While the availability of FHA mortgage insurance was an important impetus for condominiums' growth, other more substantial economic considerations have also contributed.

A. Advantages For the Condominium Owner

For the condominium unit owner, the advantages of ownership are several. When compared to rental housing, they include tax deductions for mortgage interest[20] and local property taxes,[21] equity accumulation,[22] and security of tenure.[23] A Housing and Urban Development (HUD) study indicates that a greater and greater demand will arise for condominiums, thereby offering an owner the possibility of capital appreciation as well.[24] Additionally, condominiums allow these advantages to be exercised in a metropolitan atmosphere with few

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where under the laws of the state in which the property is located, real property title and ownership are established with respect to one-family unit which is part of a multi-family structure. *See also* Berger, *Condominium: Shelter on a Statutory Foundation,* 63 COLUM. L. REV. 987, 1004 (1963); Pohoryles, *The FHA Condominium: A Basic Comparison with the FHA Cooperatives,* 31 GEO. WASH. L. REV. 1018 (1963).

The Housing Act of 1964, Pub. L. No. 88-560, Tit. I, § 119 (a), 78 Stat. 780-82 amended 12 U.S.C. § 1715y by authorizing the insurance of a mortgage which would finance the construction or rehabilitation of a new condominium, in addition to the sale of the dwelling units. Prior to this amendment, only a multi-family structure that had been financed with a FHA insured mortgage under any of the multi-family rental programs of the FHA could be sold as a condominium. *See* A. FERRER & K. STECHER, LAW OF CONDOMINIUM, § 9, p. 6 (1967). *See also* [1964] U.S. CODE CONG. & AD NEWS 3980-81.

16. *See* note 1 *supra.*

17. *Id.*

18. *See* K. ROMNEY, *supra* note 4, at § 17.02(1) (noting that in percent of total condominiums started by region in 1974: the Northeast represented 12%, North Central 15%, South 45%, and the West 28%).

19. *See* note 12 *supra.* For a complete compilation of condominium regulations and statutes throughout the United States *see* A. FERRER & K. STECHER *supra* note 15. For an exhaustive listing of current condominium literature *see* K. ROMNEY *supra* note 4, at B1-30.

20. I.R.C. § 163.

21. I.R.C. § 164. *See also* I.R.C. § 167 (uninsured casualty losses are deductible if property damaged or destroyed); I.R.C. § 182 (expenses for maintenance and repair are deductible).

There are, however, some limitations, if the unit is used partly for personal use and partly for rental to others. *See* Treas. Reg. § 1.183-1(d)(3) (1972). *See also* D. CURMAN & E. HEBARD, CONDOMINIUM AND COOPERATIVES 139 (1970), concluding that:

> the higher the tax bracket, the more attractive is the deductibility of expenditures. Initially, real property taxes and interest on the mortgage loan secured by an individual condominium home can be expected to represent 50-70% of the condominium carrying charges. The right to deduct such charges often looms large in the decision to purchase the condominium.

22. K. ROMNEY, *supra* note 4, at § 17.03(3).

23. *Id.*

24. *Id.*

of the responsibilities of detached home ownership. In many ways, condominiums represent the fulfillment of the American dream for home ownership and offers that fulfillment to buyers eliminated from the single-family housing market.[25]

B. Advantages for the Condominium-Developer.

For the developer, the profits from conversion can be substantial when compared to the 8 to 15 percent margin[26] enjoyed by those engaged in single-family house construction. The sale of a building as a condominium may bring the owner ten times the annual rental income while sale to another landlord may bring as low as six.[27] One condominium expert has noted that, "astronomical land prices, near confiscatory taxation, rocketing inflation in costs of labor, plus swollen interest rates are making the single-family detached home the dinosaur of the near future."[28] Also, high density planned communities like condominiums not only cost the developer less to build,[29] but impose fewer economic burdens on the local communities than do single-family detached dwellings.[30] Development is also enhanced by the broad acceptance of the condominium lifestyle,[31] and the continuing affluence of enough Americans enabling them to purchase condominiums as both primary and secondary housing.[32]

In addition, increasing property taxes, greater maintenance responsibilities, the stubborn persistence of rent control, and expanding tort liability[33] have encouraged landlords to re-examine their existing posi-

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25. *Id.* at § 20.02.

26. *Id.* at § 17.02(8). *See also* Note, *Cooperative Housing and the Federal Securities Laws,* 71 COLUM. L. REV. 118, 120 (1971) (finding that sale as a condominium may bring the owner ten times the annual rental income, where sale to another landlord may bring as little as six). *See generally* U.S. NEWS & WORLD REPORT, Oct. 9, 1972, at 60, col. 2, stating that at one point the minimum profit margin expected by developers of condominium conversions was 20-25%.

27. *Id.*

28. Goodkin, *The Incredible Condominium Future,* CONDOMINIUM LIVING, April-May 1975, p. 6.

29. *See Boon for Condos: U.S. Study Endorses High Density Planned Communities,* CONDOMINIUM RPTR. Jan. 1975, p. 3.

30. *Id.*

31. *See* HUD STUDY, *supra* note I, at IV-31.

32. *Id.*

33. *See* Pagelsdorf v. Safeco Insurance Company of America, 284 N.W.2d 55, 59 (Wis. 1979), (where the Wisconsin Supreme Court abolished the common law principle exculpating landlords from liability for injuries suffered as a result of defective premises. The court found the rule anachronistic and the immunity which was based on the concept of a conveyance of property should give way to the modern-day expectations of an apartment lease as a contract).

In Berman & Sons, Inc. v. Jefferson, 79 Mass. Adv. Sh. 2459, 396 N.E.2d 981 (1979), the Massachusetts Supreme Judicial Court held that a tenant's obligation to tender rent abates from the date on which the landlord had notice of a breach of the warranty of habitability. Determining that a "lease is essentially a contract between the landlord and the tenant wherein the landlord

tion vis-a-vis condominium conversion. In New York, for example, the 1978 value of rent-controlled buildings declined from six to eight times the annual rent roll to about one to one and one-half.[34] In 1975, rental housing accounted for 72.4 percent[35] of the city's dwelling units, of which only 8.4 percent of those were uncontrolled.[36] In New York, landlords found that the 7.5 percent annual rent increases allowed by the city were insufficient to keep up with rising costs brought about by spiraling inflation.[37] For these reasons, condominium conversion has emerged as a viable alternative to the low profit margins prevalent in the rental market.

C. The Tenant In Conversion

For the tenant faced with the conversion of his or her apartment, the issue becomes, simply stated, purchase the unit or vacate.[38] Because of the drastic reduction in vacancy rates brought about by rental housing shortages,[39] further aggravated by conversion activity,[40] relocation is increasingly more difficult. This difficulty is particularly keen for tenants of low and moderate income and elderly persons on fixed income, both groups often being financially ill-equipped to secure other affordable accommodations.[41]

Due to the rapid growth of condominium[42] conversion and its negative impact on those tenants least able to contend with its effects,[43] a wide range of legislative attempts to mitigate some of these hardships

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promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises", that court found the "essential objective of the warranty is to make sure that the tenant receives what she is paying for. The tenant may not excuse her obligation with mere reasonable efforts to pay rent. Nor may the landlord avoid his duty with mere reasonable efforts to provide a habitable dwelling." *Id.* at 2464, 396 N.E.2d at 985. Although the landlord was concededly without fault or guilty of any bad faith, the court found the right to abatement begins when notice is given to the landlord, and, "not at a reasonable time after notice. Time for repairs has no place in the calculus." *Id.* at 396 N.E.2d at 986.

34. *See* Utt, *Rent Control: History's Unlearned Lesson,* 8 REAL ESTATE REVIEW 88, 90 (Spring 1978) (citing statement of Frank Kristofy of the New York State Urban Development Corporation).

35. *Id.* at 89 (citing a report compiled by the New York City Housing and Development Administration).

36. *Id.*

37. *Id.* (noting also that a study of 2,351 controlled units indicated that from 1970-75, operating costs increased 56.3% while rents increased 35.6%).

38. *See* note 2 and accompanying text *supra.*

39. *See* Boston Globe, Dec. 12, 1979 at 1, col. 1, which reported that in Chicago, condominium conversion has caused a severe housing shortage resulting in only 1.6% of the rental stock being available. In Evanston, Ill., the situation is even more critical, the vacancy rate is .5%. *Id.* at 41, col. 2.

40. *Id.*

41. *See* CAMBRIDGE REPORT, *supra* note 2.

42. *See* note 1 and accompanying text *supra.*

43. *See* CAMBRIDGE REPORT, *supra* note 2.

have been enacted.[44] While the issue of whether federal legislation is appropriate in the area of condominium conversions is still in debate,[45] various states and municipalities have enacted measures in the conversion area.[46] Some measures have been designed to involve tenant participation directly in the conversion decision,[47] and others have taken the form of moratoria on tenant evictions,[48] permitting additional time for the occupying tenant faced with conversion to seek other accommodations.

II. MAJOR CONDOMINIUM CONVERSION LEGISLATION

A. The Percentage Approval Plan — The New York Approach

A percentage approval plan permits conversion only if a legislatively determined percentage of tenants agree to purchase their units.[49] In New York, previous law[50] merely forestalled eviction of a tenant who refused to purchase, but did not affect the convertability of a unit vacated voluntarily. However, under the present percentage approval plan, 35 percent of the occupying tenants must agree to purchase their units prior to any permissible conversion whether a unit is vacated voluntarily or not.[51]

The utility of a percentage approval plan stems from its establishment of tenant bargaining power. The plan, in effect, compels the owner to evaluate his or her present tenants' financial ability to purchase their units and to adjust the sale price accordingly. In New York, tenant strength is further enhanced by a requirement that the conversion plan be abandoned for eighteen months unless the requisite number of tenant agreements are secured within one year of the Attorney General's acceptance of the conversion plan.[52]

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44. *See* Hearings on Condominiums and Cooperatives, Department of Housing and Urban Development, February 10-12, 1975, Washington, D.C., 10 [hereinafter referred to as HUD Hearings] where Congressman Benjamin S. Rosenthal (D-N.Y.) in testimony given in the HUD Hearings stated:

> Problems associated with condominium purchases and conversions are potentially among the most pressing consumer problems in the Nation . . . in the case of conversions from rental units to condominium ownership, many persons, some of them elderly and some of them poor, have been dispossessed and unable to find decent substitute housing.

45. *See* K. ROMNEY, *supra* note 4, at § 19.03, indicating the Carter Administration is considering introducing condominium legislation in Congress. *But see* Davis, *Condominium Regulation: Beyond Disclosure,* 123 U. PA. L. REV. (Jan. 1975) (contending that the state and local government units are the most appropriate level by which to administer condominium controls).

46. *See* notes 8-11 *supra.*

47. *See* note 11 *supra.*

48. *See* notes 8-9 *supra.*

49. N.Y. GEN. BUS. LAWS § 352-e (2-a) (1) (i) (McKinney 1979).

50. N.Y. GEN. BUS. LAWS § 352-e (1) (b) (McKinney 1968); N.Y. REAL PROP. LAWS § 339-ee (McKinney 1968).

51. *See* note 49 *supra.*

52. N.Y. GEN. BUS. LAWS § 352-e (2-a) (1) (ii) (McKinney 1974).

Recognizing that the legislation's effectiveness could be circumvented by an owner withholding units from the rental market, thereby reducing the absolute number of tenant purchase agreements necessary, the New York approach precludes the Attorney General from accepting plans for buildings containing an "excessive" number of vacancies[53] (defined as twice the average vacancy rate for the prior two years).[54] When enacted, the New York plan contained a provision imposing a two-year ban on evictions of tenants who did not choose to purchase their units. However, the provision expired in July 1977 and was not renewed.[55]

There are disadvantages with the New York percentage approval plan. Landlords must, in all probability, sell well below the market price to achieve the number of agreements set forth by the plan's fixed percentage requirement. This would enable a tenant, who purchased a unit at an artificially depressed price, to resell after conversion at the market price, thereby profiting at the expense of the owner. This result would frustrate the objective of a percentage approval plan which contemplates tenant involvement in the conversion process, rather than the transfer of profitability from landlord to tenant.

B. A Percentage Consent Plan — The Florida Approach

Unlike the New York plan requiring an agreement to purchase before conversion is permitted,[56] Florida's percentage plan requires that an owner-developer obtain the *consent*[57] from 60 percent of the occupying tenants before conversion.[58] However, the owner-developer may avoid the rigors of the percentage provision. Florida law provides that before conversion to a residential condominium will be permitted, "each residential tenant . . . shall have the right to extend an expiring lease or tenancy upon the same terms for a period that will expire no later than 120 days after written notice to the tenant of the intended conversion."[59] The same provision allows avoidance of the notice period if: (1) either the term of the lease has less than 150 days remaining after notice is tendered;[60] (2) the lease grants the tenant a 90 day *option to purchase*[61] his or her unit at a price *equal to or less than* that offered to nontenants; or (3) if 60 percent of the occupying tenants *consent* to the conversion.[62] Therefore, failure to comply with the notice

53. N.Y. GEN. BUS. LAWS § 352-e (2-a) (1) (iv) (McKinney 1974).
54. *Id.*
55. *See* P. ROHAN and M. RESKIN, *supra* note 12, at § 3A.06.
56. *See* N.Y. GEN. BUS. LAWS § 352-e (2-a) (1) (i) (McKinney 1979).
57. FLA. STAT. ANN. § 718.402 (3) (a) (3) (West Supp. 1979).
58. *Id.*
59. *Id.* at § 718.402 (2).
60. *Id.* at § 718.402 (1).
61. *Id.* at § 718.402 (2).
62. *Id.* at § 718.402 (3).

and extension period requires the owner (with the exception of the short-term tenancy) to either obtain consent from 60 percent of the occupying tenants on the proposed conversion, or grant the tenants an exclusive 90 day option on their unit with price protection.

In terms of tenant bargaining power, comparison of the two plans is difficult. The New York plan *requires* that agreements to *purchase* be secured from a certain number of occupying tenants,[63] while the Florida plan contains *consent* and *option* provisions if a statutory notice and extension period is not complied with.[64] Further, while the New York plan contains a prohibition against "excessive" vacancies, thus preventing a landowner from diluting the absolute number of purchase agreements necessary,[65] Florida's plan contains no such provision. In fact, for voting purposes, Florida permits the owner-developer to count unoccupied apartments as he or she desires.[66]

Despite their differences, both plans achieve some measure of tenant participation in the conversion decision. Although a Florida owner-developer can avoid the consent or option provisions by complying with the statutory notice and lease extension provision, a positive relationship between the developer and the tenants may be of more importance.[67] In high rental buildings for example, it is not unusual for 35-40 percent of the tenants to purchase their units,[68] thereby substantially reducing expenditures that might otherwise be incurred by developers if extensive marketing to outside buyers were required. In addition, tenant uprisings could be costly and time consuming. Therefore, tenants' needs and input in any conversion plan are considered both necessary and appropriate.[69]

C. Notice and First Refusal — The Virginia Approach

A notice and first refusal plan requires an owner-developer to tender notice to an occupying tenant regarding an impending conversion, and a fixed period during which that tenant will have an exclusive right to purchase his or her apartment. In Virginia, where a notice and first refusal plan went into effect in 1974,[70] the owner-developer is required to give a tenant in possession 90 days notice of intent to convert. Upon

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63. *See* N.Y. GEN. BUS. LAWS § 352-e (2-a) (1) (i).
64. *See* FLA. STAT. ANN. § 718.402(2).
65. *See* N.Y. GEN. BUS. LAWS § 352-e (2-a) (1) (iv) (McKinney 1974).
66. FLA. STAT. ANN. § 718.402 (3) (a) (3) (West Supp. 1979).
67. *See generally* K. ROMNEY, *supra* note 4, at § 10.08.
68. *Id.*
69. *Id.*
70. VA. CODE ANN. § 55-79.94(b) (Supp. 1974).

receipt of that notice, the tenant automatically acquires a 60 day option period to decide whether to purchase the unit.[71]

Although the tenant is provided with an exclusive right to purchase, the ultimate conversion of the unit is substantially unaffected. Unlike the New York plan, the Virginia plan provides no provision whereby an occupying tenant can influence the price of the unit. The Virginia plan also fails to include the price protection for purchasing tenants present in the Florida statute. Additionally, the Virginia notice and first refusal plan also permits complete conversion at the end of the statutory period. Therefore, by not requiring that a percentage of tenants purchase or, at the very least, consent to the conversion, notice and first refusal plans fail to either influence unit purchase prices or retard the frequency of conversions to condominiums. The only real effect of notice and first refusal plans is to mark the point in time at which conversion will occur.

D. Moratoria on Tenant Evictions

1. A Temporary Ban — the Boston Approach

Similar in effect to the notice and first refusal plan, the temporary moratorium delays the eviction of an occupying tenant for a statutory period and allows complete conversion at the end of the statutory period. However, the temporary ban contains no provision granting a tenant an option to purchase the unit. Therefore, passage of such a measure reflects no attempt to foster tenant participation in the conversion of a unit, but simply grants a grace period to the tenant thereby lessening the impact and hardship that sudden eviction could cause.

Boston, Massachusetts approved an ordinance imposing a one year moratorium on tenant evictions stemming from conversions.[72] The legislation also provided an additional one year extension if the tenant was low income elderly.[73] Under the Boston approach, the owner-developer must provide a tenant with the required notice of intent to convert, thus initiating the moratorium period. However, the master deed[74] may be filled anytime during this period. This allows a developer considerable flexibility in deciding whether to proceed with the purchase of a building.

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71. *Id.*

72. *See* Boston Globe, December 13, 1979, at 1.

73. *Id.*

74. The master deed or condomimium declaration is the central controlling document around which all other condominium instruments revolve. It is the instrument which establishes the condominium at law. By recording the master deed, the project is thus submitted to the provisions of that particular state's condominium act which specifies in detail the various provisions which must

It should be noted that a recent study on the impact of conversions in Massachusetts[75] concluded that condominiums are the only form of home ownership suitable for most of the existing housing stock of the state's core cities.[76] Moreover, condominium ownership generally has little or nothing to do with the shortage of rental housing. According to this study, shortages in rental dwellings have resulted from the failure of rents to keep pace with rising construction, financing, and operating costs over the last 20 years.[77] On the issue of low income, elderly, or handicapped residents adversely affected by condominium conversions,[78] the study concluded that other policies, rather than moratoria, prohibitions, or other serious impediments to conversion, would be more appropriate.[79] One suggestion offered was that the increased local tax revenue realized from condominium conversion would, in most instances, provide enough resources to assist those tenants most deserving of special attention.[80]

The imposition of a temporary moratorium on tenant evictions did afford Boston the opportunity to profit from the recommendations of such an impact study.[81] Therefore, it can be concluded that by utilizing temporary moratoria, communities can evaluate the effects of conversions on specific segments of the community, and draft the appropriate legislation designed to respond to the particular needs of these segments.

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be included in the declaration. *See* K. ROMNEY, *supra* note 4, at § 13.02; N.Y. Condominium Act § 339-n; MASS. GEN. LAWS ANN. ch. 183A, § 8 (West Supp. 1979).

75. *See* Boston Globe, April 20, 1980, at 1 (Real Estate), col. 1, reporting a study on the impact of conversions conducted by John F. Kain, head of the Dept. of Urban Planning at Harvard.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id. But see* CAMBRIDGE REPORT, *supra* note 2. *See also* note 44 and accompanying text *supra.*

80. *Id.*

81. *See* proposed amendments to MASS. GEN. LAWS ANN. ch. 183a (West Supp. 1979): Hearings on S. 1118 Before the Local Affairs Committee 171 General Court, 2d Sess. (1980) requiring that in all residential rental property, a six month notice of intent to convert to condominium be tendered to a tenant and that a tenant be granted an exclusive right to purchase his or her unit. The amendment would provide a 120 day period in which a tenant could exercise the purchase option which would commence given receipt of notice to convert.

The proposed amendment would also provide safeguards for low or moderate income tenants (defined as persons whose net annual income is less than 80% of the medium income for the area) and low or moderate income elderly (defined as sixty-two or over in age and meeting the 80% requirement *supra*). If a tenant met these criteria, the amendment would completely ban eviction of that tenant and allow the owner to increase that tenant's rent only by the same proportion as increases in Social Security and Supplemental Security (SSI) payments. The amendment would also provide that if the number of rental units in a city or town was reduced by ten percent or more as a result of conversion, that city or town could by by-law require that any further conversions be permitted only by special permit with the city or town granted power to establish whatever procedures or criteria for issuance or denial of such permit as they deem necessary.

2. A Permanent Ban — The Brookline Approach

Brookline, Massachusetts is an example of a municipality which chose to move from a temporary ban[82] to a permanent ban[83] on tenant evictions stemming from condominium conversion. Rather than forbidding conversion *per se,* Brookline chose to place a permanent ban on the issuance of certificates of eviction necessary for owner recovery.[84] The net effect of this ban is the maintenance of the rental status of existing residential buildings. Condominium development is permitted only if it entails new construction or the conversion of non-residential buildings such as warehouses.

This extreme measure clearly reflects a legislative judgment that conversions in Brookline posed immediate and serious problems. Unlike Boston, where the city's 4,000 condominiums represent only 2 percent of the available dwelling units,[85] in Brookline, condominiums represent 11 percent of the available dwellings.[86] Furthermore, Brookline, a municipality possessing a large elderly population,[87] had a condominium conversion rate approaching 500 units annually from a stock of only 11,000 rent controlled units.[88]

III. STRIKING THE CONSTITUTIONAL BALANCE

Even conversion legislation stemming from carefully evaluated studies revealing the factors present in a particular geographic area sparks controversy and court challenges. These challenges set two important constitutional considerations into juxtaposition: the power of the state to regulate in the public interest versus an individual's property rights. Whether conversion legislation legitimately falls within the state's police power,[89] or whether a particular regulation constitutes a

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82. Brookline, Massachusetts By-Laws Art. XXXVIII § 9A as amended by Town meeting July 25, 1978. The effect of the amendment was to (1) require a six-to-twelve month delay in the issuance of a certificate of eviction under § 9 (a)(8) to an owner of a newly converted unit if the unit were occupied by a tenant unable or unwilling to move immediately; and (2) preclude a condominium owner-developer from obtaining a certificate of eviction in order to sell converted condominium units under the "just cause" provision of § 9 (a)(10).

83. *Id.* as amended and approved by Atty Gen. Aug. 14, 1979.

84. *See* note 81 and accompanying text *supra.*

85. *See* Boston Globe, April 18, 1980 at 1, col. 1.

86. *Id.*

87. More persons over 65 reside in Brookline than any other metropolitan Massachusetts community. *See* 1970 Census of Population, General Population Characteristics: Massachusetts (U.S. Department of Commerce, Census Bureau) at pp. 23-46 (Table 16: Summary of General Characteristics) (August 1971). Brookline's percentage (20.1) is well above the state average (11.2%), the state's urban average is (11.6%) and the Boston average is (11.3).

88. Brief of Defendant-Intervenor at 16, Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 399 N.E.2d 1038 (1979) *citing* Report of Brookline Town Meeting Advisory Committee.

89. *See* United States v. Sprague, 282 U.S. 716, 733 (1931), where the court stated: "The Tenth Amendment was intended to confirm the understanding of the people at the time the Con-

deprivation of property in violation of the due process clause of the fifth[90] and fourteenth amendments[91] has turned on the courts' characterization of the regulation. Conversion regulations have been generally found to be proper exercises within the state's police power. Courts have characterized those regulations as permissible under either zoning or rent control statutes.

A. Zoning vs "Taking" — The Constitutional Test

Zoning is a legal tool used by municipalities to implement community planning by restricting land use. One court has defined zoning as the "separation of the municipality into districts, and the regulation of buildings and structures in the districts so created, in accordance with their construction and the nature and extent of their use."

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stitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified." *See also* Michelman, *States' Rights and States' Roles: The Permutations of 'Sovereignty' in National League of Cities v. Usery,* 89 YALE L.J. 1165 (1977).

In Loan Association v. City of Topeka, 87 U.S. (20 Wall) 655 (1874), Justice Miller enunciated the then prevailing doctrine, "[t]here are rights in every free government beyond the control of the state . . . limitations on such [governmental] power which grows out of the essential nature of all free governments." Justice Miller narrowly construed the applicability of the fourteenth amendment in order to uphold state legislation and restrict the ability of the federal government to review the states' power to impact on the rights of its own citizens. However, state legislation increasingly underwent substantive review under the due process clause of the fourteenth amendment and the Supreme Court became more demanding in its requirement that the state show a real or substantial relation between the legislation under review and the health, safety, or morals of its citizenry.

In Allyeger v. Louisiana, 165 U.S. 578 (1897) a Louisiana statute was invalidated as exceeding the state police power and violating the due process clause of the fourteenth amendment. This case initiated a period known as the "Lochner Era" after Lochner v. New York, 198 U.S. 45 (1905); an era in which the Supreme Court scrutinized legislative ends and invalidated government action which sought to enhance the public good at the expense of individual rights and private interests. Much of the philosophy of the Court reflected the economic and social theories of Herbert Spencer. The period ended under the political and economic pressures of the depression of the 1930's, marked by the landmark case of West Coast Hotel v. Parrish, 300 U.S. 379 (1937), upholding minimum wage legislation as consistent with constitutional guarantees.

See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 434-55 (1978); Gompers, *"Usurped Power",* 50 SURVEY 221 (May 15, 1923); Smith, *The Supreme Court and Minimum Wage Legislation,* 33 *American Federationist* 197 (Feb. 1926).

Following the demise of the Lochner Era and its laissez-faire ideology, the Court declared that in socio-economic areas, it would sustain legislation, "if any state of facts either known or reasonably inferrable afforded support for the legislative judgment." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n. 4 (1938). This expansive judicial definition of the permissible bounds of the legislative prerogative provides the perspective by which the judiciary views the exercise of the police power.

90. U.S. CONST. amend. V provides: "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

91. U.S. CONST. amend. XIV provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Since zoning regulations necessarily involve the rights of individuals to freely use their property, constitutional challenges to municipal zoning regulations were mounted and early judicial reaction to those challenges was mixed.[92] A number of state courts found zoning ordinances not to be in violation of constitutional protections, and therefore, valid exercises of the state's police power.[93] Other states held that zoning ordinances constituted a taking of property without just compensation in violation of the fifth and fourteenth amendments.[94] The issue remained unresolved until the landmark decision of *Euclid v. Amber Realty Co.*,[95] where the United States Supreme Court upheld the constitutionality of a comprehensive zoning program as a valid exercise of the state's police power.

Euclid provided the test by which government imposed restrictions would be measured. The Court spoke of the need for a rational relationship between the general *goals* of the police power: the health, safety, and welfare of the community; and the *means* chosen to accomplish those goals.[96]

Following *Euclid,* zoning ordinances were rarely challenged as generally constituting a taking, but rather challenges focused on whether a *specific* ordinance[97] or regulation was "reasonably related to the police power,"[98] or "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[99] The states generally took the position that private property was retained by its owner subject to the power of the state to limit its use through regulation in the interest of the public welfare without compensation, so long as the regulation was reasonable.[100] In its holding, the *Euclid* Court expressly stated that:

> It is true that when . . . the provisions set forth in the ordinance . . . come to be concretely applied to a particular premises, including

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92. Mansfield & Swett, Inc. v. West Orange, 120 N.J.L. 145, 198 A. 225 (1938).

93. *See* R. Anderson, AMERICAN LAW OF ZONING § 2.07-08 (1968). *See also* Euclid v. Amber Realty Co., 272 U.S. 365 (1926), where a number of the early state cases are collected and classified.

94. *See, e.g.,* State *ex rel.* Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923) re-examining and overruling a line of decisions which had invalidated zoning laws.

95. *See, e.g.,* State *ex rel.* Better-Built Home & Mortg. Co. v. Davis, 302 Mo. 307, 259 S.W. 80 (1924).

96. 272 U.S. 365 (1926).

97. In Euclid v. Amber Realty, 272 U.S. 365 (1926), the Court stated: "It must be said [that] before the ordinance can be declared unconstitutional . . . [the] provisions [must be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See also* Comment, *Regional Development and the Courts,* 16 SYRACUSE L. REV. 600 (1965).

98. *See generally* Comment, *Zoning Progress in the United States,* 13 ABA J. 547 (1927).

99. *See* note 96 *supra.*

100. *Id.*

> those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.[101]

This warning foreshadowed the case *Nectow v. Cambridge,*[102] decided two years later.

In *Nectow,* plaintiff challenged an ordinance, not as unconstitutional *per se,* but as unconstitutional as it applied to him individually. The regulation under review divided plaintiff's property between differently zoned areas leaving one section in a residentially zoned area where that type of development was wholly impractical. As forewarned in *Euclid,* the Court did not find the regulation to be *per se* unreasonable, but instead found that on the particular facts of plaintiff's case, the ordinance rendered the property nearly valueless. Therefore, the Court held the ordinance to be unconstitutional as it applied to *Nectow* specifically. The balancing test employed in *Nectow* and *Euclid,* has been consistently followed by the states on a case by case basis.[103]

Zoning regulations, as legislative acts, are accorded presumptive constitutionality unless shown to be beyond the tenth amendment police powers. The issue is always one of reasonableness.[104] The courts have attempted, in reviewing a constitutional challenge to a particular ordinance, to balance the public *benefit* sought by enactment of the ordinance against the economic *burden* that the ordinance will impose on the individual.[105] If the court finds the objective of the ordinance to be outside the proper purview of the police power,[106] then no matter how slight the impact on the property, the ordinance will not be upheld. Moreover, if the court finds the purpose of the ordinance to be within the police power, but unduly restrictive, the ordinance will not be

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101. *See* R. ANDERSON, *supra* note 92, at § 2.10 n.10.

102. 272 U.S. 365 (1926).

103. 277 U.S. 183 (1928).

104. *See, e.g.,* Krom v. Elmhurst, 8 Ill.2d 104, 133 N.E.2d 1 (1956); Huttig v. Richmond Heights, 372 S.W.2d 833 (Mo. 1963); Deacon v. Ladue, 294 S.W.2d 616 (Mo. App. 1956); Curtiss v. Cleveland, 170 Ohio St. 127, 163 N.E.2d 682 (1959).

105. *See* Willott v. Village of Beachwood, 175 Ohio St. 557, 197 N.E.2d 201, 204 (1964) where the state supreme court stated: "The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted ... in any case in which the issue ... is fairly debatable."

106. *See* Langgruth v. Village of Mt. Prospect, 5 Ill.2d 49, 124 N.E.2d 879, 881 (1955) where the court stated: "If the gain to the public is slight and the loss to the individual property owner is substantial, the regulation is not a proper exercise of the police power and is ... invalid."

Compare Langgruth with Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) holding that emergency housing statutes passed in response to serious housing shortages were valid exercises of the state's police power to promote the health, safety, and morals of the public. *See also* Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973) where the court held the police power could be validly exercised by a municipality of the requisite emergency existed.

upheld.[107] As enunciated in *Euclid,* the ultimate determination as to whether an ordinance is constitutional, will involve a judicial balancing of the competing interests — those of the state, and those of the individual.[108]

Under this test, a zoning ordinance will not be invalidated simply because it prevents the *most profitable* use of the property.[109] Realistically, any other position would effectively negate a court's ability to strike a proper balance between the competing interests. Nevertheless, evidence of the value of the property at its most profitable use, is still a factor in influencing a court's ultimate determination of a zoning ordinance's validity.[110] Not only may an owner be precluded from the most profitable use of his property, but, coversely, the fact that a particular ordinance reduces the value of the property will not, of itself, invalidate the ordinance.[111] Courts have consistently found that pecuniary interests of owners are subordinate to the interests of the public.[112] However, as with profitability, a severe reduction in value will also be a factor in the court's determination of a zoning ordinance's validity.[113]

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107. *See* R. ANDERSON, *supra* note 92, at § 2.19; note 96 and accompanying text *supra.*

108. *Id.*

109. Euclid v. Amber Realty, 272 U.S. 365 (1926). For an application of this standard, *see* Stevens v. Huntington, 46 Misc.2d 604, 260 N.Y.S.2d 96 (1965) ("the implicit idea of zoning is a rational balancing of individual and communal interests"); Udell v. McFadyen, 40 Misc.2d 265, 243 N.Y.S.2d 156 (1963) (noting that the public welfare must be balanced against the loss to the property owner).

110. *See* Gedney Estates v. White Plains, 99 N.Y.S.2d 111, 118 (1950) where that court stated: "if the injury is not too great, they (the property owners) must suffer it in silence and bow to the greater wisdom of the city fathers, who have taken from them the gift to others for the general good."

111. *See, e.g.,* First National Bank v. County of Lake, 7 Ill.2d 213, 130 N.E.2d 267 (1955).

112. *See* Penn. Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) holding that a local landmarks preservation law preventing Penn Central from adding a building on top of the existing terminal did not violate either the taking clause or the due process clause, because although substantial losses might occur, Penn Central could still obtain a "reasonable return" on its investment; South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 678-80 (1st Cir. 1974) upholding an EPA regional air quality control plan which required a 40% reduction in the available off-street parking spaces at Logan Airport; Turnpike Realty Co. v. Dedham, 362 Mass. 221, (1972), *cert. denied,* 409 U.S. 1108 (1973) where land acquired for development subsequently was restricted by local ordinance to undeveloped, recreational use was upheld.

See also The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 222-32 (1978) noting that regulation must deprive owner of a reasonable return on investment; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law,* 80 HARV. L. REV. 1165, 1189 (1967).

113. *See* Little v. Young, 82 N.Y.S.2d 909, 916 (1948), *affirmed* 274 App. Div. 1005, 85 N.Y.S.2d 41 (1948), *affirmed* 299 N.Y. 699, 87 N.E.2d 74 (1949), where the court stated: "Properly administrated zoning power by local authorities may legally leave in its wake scars of lost profits to landowners as well as restricted uses causing inconvenience and disappointments but that is the exact meaning of zoning." *See also* L. TRIBE, *supra* note 88, at 460 n.3 (1978) noting that courts have consistently sustained diminutions in value amounting to more than 75%.

In *Goldblatt v. Hempstead,*[114] the Court reiterated that, "a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to health, morals, or safety of the community, cannot, in any sense be deemed a taking or an appropriation of property for the public benefit."[115] However, the Court qualified its position by cautioning that "government action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.[116] In determining when a taking has occurred, the basic criteria enunciated in *Lawton* v. *Steele*[117] has been generally followed in the modern context:

> To justify the State in ... interposing its authority in behalf of the public, it must appear, first, that the interests of the public ... require such interference and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[118]

Restated, *Lawton* imposes the standards of necessity, reasonableness, and balance, before restrictions will be tolerated.

The landmark case of *Arverne Bay Construction Co. v. Thatcher,*[119] typifies the modern approach. In *Arverne,* a property owner challenged a zoning law which classified a previously unrestricted district, in which he owned a lot of unimproved land, as residential. Although the land was unsuitable for any permitted purposes, plaintiff paid taxes in excess of $4,000 per year from 1928 to 1936. Having applied for and been denied a zoning variance, plaintiff brought suit contending that the restriction as it applied to his land was arbitrary and unreasonable, amounting to a taking without due process in violation of the fifth and fourteenth amendments of the United States Constitution and Article 1 of the New York Constitution. The court noted that the appellate division had stated that: "It must be conceded, upon the undisputed facts of this case, that this property cannot, presently or in the immediate future, be profitably used for residential purposes."[120] The New York Court of Appeals found that the situation would be different if the property could be put to a profitable use in a reasonable time. However, the court found that on the facts of the case at hand, "an ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purposes goes ... beyond regulation, and must be

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114. 369 U.S. 590 (1961).
115. *Id.* at 593.
116. *Id.* at 594.
117. 152 U.S. 133 (1894).
118. *Id.* at 137.
119. 278 N.Y. 222, 15 N.E.2d 587 (1938).
120. 253 App. Div. 285, 286, 2 N.Y.S.2d 112, 114 (1938).

recognized as a taking of property."[121] The court also noted that the only substantial difference between such a restriction and an actual taking, "is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."[122] The modern approach by which the courts will determine whether a compensable taking has occurred, has followed the *Arverne* standard: when the purpose of the statute is to protect the public welfare, regulation will be deemed constitutional under the state's tenth amendment police power so long as it does not deprive the owner of *all* beneficial uses, or require an *actual* transfer of property rights. If the latter is the case, the state must proceed with "taking" the property pursuant to the eminent domain power implied from the tenth amendment and render "just compensation" as required by the fifth and fourteenth amendments.[123]

B. Rent and Eviction Control — The Constitutional Basis

Rent and eviction control has long been recognized as a legitimate exercise of the police power.[124] It can be seen as the power of a legislative body to regulate property rental and determine under what conditions eviction of tenants will be permitted.[125] This regulatory power is, like zoning, subject to constitutional limitations. In *Block v. Hirsh,*[126] where the United States Supreme Court upheld a District of Columbia rent control law as consistent with the police power, Mr. Justice Holmes, writing for the Court, stated:

> A public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. . . . Housing is a necessity of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For

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121. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

122. *Id.* at 592.

123. *See* Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972) where the court made the following distinction:

> It may be said that the State takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter does not."

Id. at 16, 201 N.W.2d at 767, *quoting* P. FREUND, THE POLICE POWER, at 546-47.

124. *See* Mayo v. Boston Rent Control Administrator, 365 Mass. 575, 582, 314 N.E.2d 118, (1974) discussing and citing the major cases standing for the legitimacy of the rent control power.

125. *See, e.g.,* 1970 MASS. ACTS ch. 843, sec. 1 which provides:

> The general court finds and declares that a serious public emergency exists in the Town of Brookline with respect to the housing of a substantial number of citizens of said town. . . .
> Section 1. General Powers: The Town of Brookline may, by by-law, regulate rents . . . establish a rent board for the purpose of regulating rents . . . and eviction of tenants.

126. 256 U.S. 135 (1921).

> just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.[127]

As indicated by the *Hirsh* decision, the existence of a public emergency is required before government interference with rent and evictions would be justified. As in zoning, the Court has not enunciated any specific criteria by which to guide courts in making a constitutional determination. Rather, the Court has chosen to express the general rule that if a regulation goes "too far"[128] it will be recognized as a taking, and a court, in determining "too far," will make its determination on the particular facts of each case.

C. *Recent Conversion Decisions*

1. Zoning — *Goldman v. Town of Dennis*[129]

In *Goldman,* the Massachusetts Supreme Judicial Court upheld an amendment to a municipal zoning by-law which forbade the conversion of any nonconforming cottage colony to single family use under condominium ownership, unless certain dimensional requirements were met. One of plaintiff's attacks on the by-law argued that a municipality could control only the use of land under zoning by-laws but not legal forms of ownership.[130] Contrary to the prevailing majority view among the states, the Supreme Judicial Court concluded that a change to condominium ownership was a change of use, and that the legislative body of the town, "could reasonably believe that conversion of a cottage colony to single family use under condominium type ownership would encourage expansion of use beyond the short summer season."[131]The *Goldman* decision, however, leaves many questions unanswered. For example, the *Goldman* court failed to delineate what objective criteria is necessary for a court to decide that a change in ownership results in a change of use. In the conversion of an apartment

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127. *Id.* at 156.

128. *Id.*

129. 1978 Mass. Adv. Sh. 1236, 375 N.E.2d 1212 (1978). *But see* City of Miami Beach v. Arlen Cole Condominium Assoc. Inc., 302 So.2d 777, (Fla. Dist. Ct. App. 1974) (holding that a conversion to condominium ownership is just a change in ownership and not of land use, thereby unaffected by zoning regulation); Maplewood Village Tenants' Assoc. v. Maplewood Village, 116 N.J. Super. 372, 282 A.2d 428 (1971) (holding that planning controls, including subdivision approval could not be employed by a municipality, "to exclude condominiums or discriminate against the condominium form of ownership, for its use rather than the form of ownership . . . is the proper concern and focus of zoning and planning regulation").

130. Goldman v. Town of Dennis, 1978 Mass. Adv. Sh. 1236, 1237, 375 N.E.2d 1212, 1213 (1978).

131. *Id.* at 1238, 375 N.E.2d at 1214.

complex into condominium, the sizes of the buildings do not change and substantially the same number of people occupy the dwellings. Would a court determine this to be a change of use if the town speculated that such a change might affect the ultimate use of the land? If, as one might suspect, the actual concern of the *Goldman* court was for the probable diminishing effect on rental stock that conversions might have, then the means chosen by the Town of Dennis could likewise be employed to prohibit the conversion of other than seasonal property from rental to condominium by implying a zoning purpose.

2. Rent and Eviction Control — *Grace v. Town of Brookline*[132]

In *Grace,* the Massachusetts Supreme Judicial Court addressed the question of whether amendments to a municipal by-law which controlled rent and evictions were consistent with both statutory authorization[133] and constitutional guarantees.[134] The amendments, imposing a six month moratorium on the issuance of tenant eviction certificates involving units slated for conversion, were upheld as constitutionally permissible regulations of property rights. By rationally furthering a legitimate local concern,[135] they were within the purview of the police power in public emergency situations.[136] The court, conceding that "in a strict sense"[137] the amendments effected a transfer of rights incident to ownership from the landlord to the tenant, found the "redistribution" to be similar in nature to the effect of rent control regulations generally.[138] Focusing on the amendments' practical effect, the issue as to whether a taking had occurred was resolved when the court found that the property in question had not been rendered worthless by the amendments' operation. Citing statutory language providing that a controlled unit must yield a "fair net operating income,"[139] the *Grace* court found the temporary delay to "merely limit the property owners' right to remove units from the rental market by delaying recovery for personal occupancy ... (and did) not render the provisions confiscatory."[140] After upholding the constitutionality of the Brookline by-law amendments establishing a temporary ban on tenant evictions,

132. 1979 Mass. Adv. Sh. 2257, 399 N.E.2d 1038 (1979).

133. *Id.* at 2264, 399 N.E.2d at 1042 (1979). *See also* note 115 *supra.*

134. *Id.* at 2271, 399 N.E.2d at 1045 (1979).

135. *Id.* at 2275, 399 N.E.2d at 1046 (1979). The court stated that: "We perceive no reason why Brookline may not draw up regulations based on the form of ownership so long as such a classification is rationally related to the purposes of rent and eviction control." *Id.*

136. *Id.* at 2266, 399 N.E.2d at 1042 (1979).

137. *Id.* at 2272, 399 N.E.2d at 1045 (1979).

138. *Id.* at 2273, 399 N.E.2d at 1045 (1979).

139. 1971 MASS. ACTS ch. 673 § 1.

140. Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 2273, 399 N.E.2d 1038, 1046 (1979).

Brookline further amended their by-laws and established a permanent ban.[141] The validity of the permanent ban has not, as yet, been tested constitutionally in the courts.

Both *Goldman* and *Grace* are indicative of the modern approach courts take when reviewing legislative restriction on private property. These cases evidence the fact that one standard of review will be applied to both zoning and rent and eviction control challenges. The court will determine whether the objectives sought by the amendments are within the scope of the police power, and the means chosen are reasonably calculated to achieve those objectives. If both tenets are resolved affirmatively, then a court will sustain the regulation.

CONCLUSION

Legislatures have enacted a wide range of conversion control measures. Some, like percentage approval and notice and first refusal plans reflect an attempt to fairly involve the occupying tenant in the conversion process. Others, such as the temporary or permanent bans, have focused on eviction control as a means of mitigating or eliminating the attendant hardships to tenants subjected to conversion.

If it is determined that within a particular geographic area conversion regulations are necessary, then those regulations should be fashioned so as to protect both the tenant, whose needs provide the justification for the legislation, and the owners, whose individual rights must be recognized. These rights should be limited only after careful consideration of the competing constitutional interests at stake — the public welfare and individual property rights.

Recent studies indicate that for 1980, single family housing starts will decline to less than 600,000 units, a decline of 67 percent from the 1.5 million single family starts in 1977 and 1978.[142] Assuming, as some studies indicate, that conversions have minimal impact on the number of available rental units since conversion usually reduces both the number of rental units and the number of renting households,[143] then regulations that severely impede condominium conversion would deprive many buyers of the only viable housing alternative open to them. One can hardly dispute the need for adequate notice provisions, or measures designed to alleviate the housing issues peculiar to low-income elderly. However, before legislation imposes restrictions on one of the few viable forms of housing, careful consideration of the par-

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141. *See* note 82 *supra.*

142. *See* Boston Globe, April 20, 1980, col. 2, at § 1, *quoting* Michael Sumichrast, vice president and chief economist of the National Ass'n of Home Builders.

143. *See* note 75 and accompanying text *supra.*

ticular needs of the community and exploration of alternative measures, other than conversion restrictions, should be thoroughly examined.

In rent controlled areas, legislatures must satisfy themselves that existing rental incomes are adequate so that absent conversion, landlords will profit by remaining in the urban rental business. Not only must the necessity for a fair income from those properties be acknowledged, but the advantages of condominium ownership in those areas must also be considered. Opponents of condominium conversion regulation point out that converted units tend to stabilize neighborhoods, and provide an influx of greatly needed capital into city neighborhoods. This influx would broaden the tax base[144] and bring about economic revitalization. Both the benefits possible from conversion and the preservation of an affordable rental market require careful evaluation of the complex economic and demographic forces in the community. Legislative action should be directed at the sources of the housing problem, rather than at the symptoms in a reasonable effort to achieve proper balancing of legitimate social and economic interests within a proper constitutional framework.

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144. *See* Boston Globe, December 11, 1979, at 1, col. 1, noting that an apartment assessed at $35,000 pays $8800 in yearly taxes, whereas as a condominium building would pay three to five times that amount in yearly taxes.

CASE COMMENTS

Commonwealth v. Vitello: The Role of the Polygraph in Criminal Trials Under Massachusetts Law and the Federal Rules of Evidence

The term "polygraphic evidence" refers to the results of a test administered by an examiner to a subject using a polygraph (or lie-detector) machine.[1] In *Commonwealth v. Vitello,*[2] the Supreme Judicial Court of Massachusetts dealt with the issue of whether polygraphic evidence should be admissible in criminal trials. The court ruled that polygraphic evidence will be allowed in a criminal trial to impeach or corroborate the testimony of a defendant, provided the examiner is qualified and the jury is given a proper limiting instruction.[3] This doctrine of admissibility allows polygraphic evidence to enter the criminal process at the risk of endangering a defendant's fundamental right to a fair trial.

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1. These results consist of the interpretation by the examiner of the raw data gathered by the polygraph to determine truth or deception of the subject. J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ('LIE-DETECTOR') TECHNIQUE (2d ed. 1977). The authors describe the polygraph as "essentially a pneumatically operated mechanical recorder of changes in blood pressure, pulse, and respiration," along with additional units measuring galvanic skin response and muscular activity. *Id.* at 5. The theory behind polygraphy is that a subject's attempt to deceive the operator will result in measurable physiological changes recorded by the polygraph and interpreted by the examiner. *Id.* at 61.

The actual steps involved in the polygraph examination can be separated into distinct phases. (1) Data Collection — the examiner gathers background information on the subject relating to the health, educational, and emotional aspects of the subject; (2) Pretest Interview — the subject is told what will happen and the infallibility of the polygraph is impressed on the subject and control questions are also asked; (3) Testing — test questions are asked permitting the examiner to study both objective and subjective aspects of the subject; (4) Post-Test Interview — the results are discussed with the subject. If a subject has shown deception, or if the results are inconclusive, the examiner will accuse the subject with a view towards eliciting a confession.

A more extensive discussion of the polygraph is beyond the scope of this comment, and would only reiterate the information published elsewhere. *See generally* REID & INBAU, *supra;* A. MOENSSENS & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES (2d ed. 1978); Axelrod, *The Use of Lie Detectors by Criminal Defense Attorneys,* 3 NAT'L J. CRIM. DEF. 107 (1977); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection,* 70 YALE L.J. 694 (1961); Note, *Polygraphy: Short Circuit to Truth?* 29 U. FLA. L. REV. 286 (1977).

2. 78 Mass. Adv. Sh. 2603, 381 N.E.2d 582 (1978).

3. *See* notes 17-23 and accompanying text *infra.*

Within the past few years there has been a marked change in the attitude of many courts regarding the admissibility of polygraphic evidence in criminal trials.[4] This change reflects a growing judicial inclination to allow the use of polygraphic evidence at trial despite its less than perfect accuracy.[5] The use of polygraphy (or lie-detection) is expanding within a system which has until recently characterized polygraphic evidence as inaccurate, undignified and inadmissible.[6] Wigmore stated that "[i]f there ever is devised a psychological test for the valuation of witnesses, the court will run to meet it."[7] It appears from several cases that the courts have started to run, albeit cautiously, towards polygraphic evidence.

Part I of this Comment will outline the facts and holding of the *Vitello* case.[8] Part II discusses prior case law of Massachusetts and other jurisdictions.[9] This will be followed by a discussion of the nature of polygraphic evidence.[10] Finally, an analysis of whether polygraphic evidence should be admitted in criminal trials will be presented.[11] The Comment will conclude by suggesting that due to the inherent limitations of the polygraphic process and the serious policy considerations involved, this evidence should not presently be admitted into the criminal process for any testimonial purpose.

I. THE VITELLO CASE

A. Facts and Procedure

In *Commonwealth v. Vitello,*[12] the defendant was indicted for armed robbery. In an attempt to corroborate his innocence, the defendant was granted leave to undergo a polygraph examination prior to trial. This examination was conducted by an agency selected by the defendant and approved by the district court.[13] The test results were unfavorable to the defendant. At a bench conference defense counsel asked the judge for what, if any, purposes the test results might be admitted. The judge replied that if the examiner were held to be qualified, the evidence would be allowed during the prosecutor's case in chief. He further ruled

4. *See* notes 36, 37 and 48 *infra.*
5. *See* notes 100-07 and accompanying text *infra.*
6. *See* note 49 *infra.*
7. J. WIGMORE, EVIDENCE § 875 (2d ed. 1923).
8. *See* notes 12-23 and accompanying text *infra.*
9. *See* notes 24-46 and accompanying text *infra.*
10. *See* notes 47-77 and accompanying text *infra.*
11. *See* notes 78-123 and accompanying text *infra.*
12. 78 Mass. Adv. Sh. 2603, 381 N.E.2d 582 (1978).
13. *Id.* at 2603, 381 N.E.2d at 584.

that the prosecutor could advise the jury during opening statements of this evidence.[14] During his opening statement, the prosecutor told the jury that evidence would be introduced by a polygraph examiner tending to show that the defendant lied when he denied having committed the robbery.[15] The defense objected to the bench conference decision, and moved for a mistrial after the prosecutor's opening statement. Both motions were denied by the trial judge. Based on a voir dire determination that the examiner was qualified, he took the stand during the Commonwealth's case in chief.[16] The defendant was subsequently found guilty of armed robbery, and his appeal was filed assigning as error the admission of the examiner's testimony during the Commonwealth's case in chief.

B. Issues and Holding

In defining the issue, the Supreme Judicial Court of Massachusetts stated that it was seeking only to show when and for what purposes polygraphic evidence would be admissible in a criminal trial under the guidelines previously established in *Commonwealth v. A Juvenile (No. 1)*.[17] The court held that polygraphic evidence was inadmissible during the case in chief of either party to prove guilt or innocence.[18] However, polygraphic evidence could be admitted for the limited purpose of impeaching or corroborating the testimony of the defendant.[19] Furthermore, if the evidence is found to be unfavorable to the defendant, he may attack: (1) the examiner's qualifications; (2) the propriety of the test procedure; and (3) the questions asked.[20] Lastly, if the polygraphic evidence is admitted, the defendant would be entitled to an instruction specifying the limited purposes for which the evidence may be used.[21]

The Supreme Judicial Court felt that while policy considerations weighed heavily against admissibility during the case in chief of either party,[22] different considerations should apply when polygraphic evidence is used for the limited purposes of impeachment or corroboration.[23]

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14. *Id.*
15. *Id.*
16. *Id.* at 2604, 381 N.E.2d at 584.
17. *Id.* at 2608, 381 N.E.2d at 586. For a discussion of Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974), *see* notes 38-46 and accompanying text *infra*.
18. Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2633-34, 381 N.E.2d 582, 596-97 (1978).
19. *Id.* at 2636, 381 N.E.2d at 597.
20. *Id.* at 2639, 381 N.E.2d at 599.
21. *Id.*
22. *Id.* at 2632, 2633-35, 381 N.E.2d at 596, 597.
23. *Id.* at 2636, 381 N.E.2d at 597.

II. DEVELOPMENT OF CASE LAW

The accepted standard for admissibility of scientific evidence was stated by the District of Columbia Court of Appeals in *Frye v. United States,*[24] which involved a systolic blood pressure deception test, the early predecessor of the polygraph. In rejecting the admissibility of the test results the court stated that before a new scientific principle or discovery will be held admissible, that principle or discovery must have gained a "general acceptance in the particular field in which it belongs."[25]

The requirement of general acceptance within the scientific community has historically been recognized as indispensable to the admissibility of scientific evidence. Any discovery which has not met this standard of general acceptance will be held to be inadmissible in a court of law.[26]

The *Frye* standard was adopted by the Massachusetts Supreme Judicial Court in *Commonwealth v. Fatalo,*[27] stating that there was much disagreement among authorities as to the reliability and accuracy of the polygraph.[28] While the court in *Fatalo* was not demanding infallibility as a prelude to admission, it was demanding that the "substantial doubts" about the polygraph be resolved.[29]

In the *Fatalo* case,[30] Justice Spiegal pointed to a recent Arizona Supreme Court case, *State v. Valdez,*[31] which contained an excellent discussion of the issues involved. The *Valdez* court felt that the accuracy of the polygraph was insufficient to be admitted in all cases, but "[w]ith improvement in and standardization of instrumentation, technique and examiner qualifications the margin of proven error is certain to shrink."[32] The *Valdez* court felt that at the present time polygraphic evidence had sufficient probative value to be admitted only if certain conditions were first met.[33]

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24. 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

25. *Id.* at 1014.

26. Axelrod, *supra* note 1, at 138-39; Note, *supra* note 1, at 288.

27. "Judicial acceptance of a scientific theory or instrument can occur only when it follows a general acceptance by the community of scientists involved." 346 Mass. 266, 269, 191 N.E.2d 479, 481 (1963).

28. *Id.* at 268, 269 n.4, 191 N.E.2d at 480 (1963).

29. *Id.* at 270, 191 N.E.2d at 481.

30. *Id.* at 267, 191 N.E.2d at 480.

31. 91 Ariz. 274, 371 P.2d 894 (1962).

32. *Id.* at 282, 371 P.2d at 900.

33. The conditions stated were:

(1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state. (2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is

The theory usually set forth by jurisdictions admitting polygraphic evidence with a stipulation is one based on estoppel. The theory states that simply because the test results were adverse, the defendant should not be allowed to suddenly contest the results of a test which he himself requested.[34] This view, that otherwise inadmissible evidence may be rendered admissible by a stipulation, has been attacked as logically unsound.[35] The critics of this position contend that if the rationale for exclusion is the inaccuracy of the test, then it would not gain any more reliability by a stipulation of the parties. Notwithstanding this criticism, the estoppel theory has been adopted by a number of jurisdictions, with[36] or without[37] the *Valdez* conditions.

Massachusetts had another opportunity to reevaluate the *Fatalo* decision in *Commonwealth v. A Juvenile (No. 1)*.[38] The defendant there argued[39] that developments in the field of polygraphy merited a finding of general acceptance in the scientific community.[40] The court, holding that the "general acceptance" standard of *Frye* and *Fatalo* was not met, nonetheless suggested that polygraphy "could prove to be of significant value to the criminal trial process if its admissibility is limited to careful-

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qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting: a. the examiner's qualifications and training; b. the conditions under which the test was administered; c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.

Id. at 283-4, 371 P.2d at 900-01.

34. *Id.* at 281, 371 P.2d at 899, *quoting* People v. Houser, 85 Cal. App.2d 686, 695, 193 P.2d 937, 942 (1948).

35. *See, e.g.*, People v. Zazetta, 27 Ill. 2d 302, 308, 189 N.E.2d 260, 264 (1963); Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2634 n.24, 381 N.E.2d 582, 597 n.24 (1978).

36. *See, e.g.*, People v. Oswalt, 26 Ill. App. 3d 224, 324 N.E.2d 666 (1975); State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

37. *See, e.g.*, Codie v. State, 313 S.2d 754 (Fla. 1975); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960); State v. Fields, 434 S.W.2d 507 (Mo. 1968); Powers v. Carvalho, 281 A.2d 298 (R.I. 1971).

38. Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974); *See also* Significant Developments, *Polygraph Test Results Admissible Under Certain Conditions*, 55 B.U.L. REV. 302 (1975); Comment, *Polygraph Test Results Admissible Under Limited Circumstances Absent a Stipulation by the Parties*, 9 SUFFOLK U.L. REV. 886 (1975).

39. The defendant offered testimony of qualified polygraph experts to demonstrate: (1) scientific reliability of the polygraph; (2) scientific acceptability; (3) manner of administration of the test; (4) physiological, psychological and technological manner in which test is effective; and (5) opinions of experts and basis for opinion regarding defendant's veracity. Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 423, 313 N.E.2d 120, 122 (1974).

40. *Id.* at 423, 313 N.E.2d at 122 (1974).

ly defined circumstances designed to protect the proper and effective administration of criminal justice."[41] The Massachusetts Supreme Judicial Court went on to hold that polygraphic evidence may be admitted, but only after the trial judge has made a "close and searching inquiry" into (1) the qualifications of the examiner; (2) the fitness of the defendant for an examination; and (3) the methods used in conducting the test. This evidence is not to be binding, but is to "be considered with all other evidence as to innocence or guilt."[42]

The court in *A Juvenile* did not overrule *Commonwealth v. Fatalo,*[43] and stated that the general acceptance theory of admissibility was still a barrier to the general admission of polygraphic evidence, but that a "cautious first step" towards admissibility was warranted.[44] The Supreme Judicial Court went on to discuss the relationship of its holding and a defendant's fifth amendment rights against self-incrimination.[45] The court emphasized that due to the testimonial nature of the polygraph, the defendant must take the test on his own incentive, thus waiving his right against self-incrimination "voluntarily, knowingly and intelligently."[46]

IV. The Evidentiary Nature of Polygraphic Evidence

As previously stated, the standard set forth for the admissibility of a new scientific discipline is the "general acceptance" standard of *Frye v. United States.*[47] While this rule has recently come under criticism,[48] it is still widely cited and followed.[49] This general acceptance standard was adopted in Massachusetts in *Commonwealth v. Fatalo,*[50] and expressly affirmed in *Vitello.*[51]

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41. *Id.* at 425, 313 N.E.2d at 123, 124 (1974).

42. *Id.* at 426, 313 N.E.2d at 124 (1974).

43. 346 Mass. 266, 191 N.E.2d at 479 (1963).

44. Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 432, 313 N.E.2d at 120, 127 (1974).

45. *Id.* at 431-32, 313 N.E.2d at 127 (1974). U.S. Const. amend. V states: "No person ... shall be compelled in any criminal case to be a witness against himself. ..."

46. Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 432, 313 N.E.2d 120, 127 (1974), *quoting* Miranda v. Arizona, 384 U.S. 444 (1966). The problem of a defendant taking a polygraph test involuntarily cannot realistically occur, since without a willing subject, conclusive results cannot occur. This is so because an unwilling subject may present anger, nervousness, and muscular movement. *See* notes 93-99 and accompanying text *supra.*

47. 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

48. *See, e.g.,* U.S. v. DeBetham, 348 F. Supp. 1377 (S.D. Cal. 1972); U.S. v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972); U.S. v. Zeiger, 350 F. Supp. 685 (D. D.C. 1972).

49. *See, e.g.,* Pulakis v. State, 476 P.2d 474 (Alaska 1970); Stack v. State, 234 Ga. App. 227, 214 S.E.2d 514, 88 A.L.R.3d 216 (1975); State v. Gagne, 343 A.2d 186 (Me. 1975); Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976). *See also* Hughes, *Comparison of the New Federal Rules of Evidence and Rules of Evidence Applied in Massachusetts Courts,* 60 Mass. L.Q. 125, 133 (1975) [hereinafter cited as Hughes]; Comment, *supra* note 38, at 889 n.17; Note, *Evolving Methods of Scientific Proof,* 13 N.Y. L.F. 679, 688 n.7, 682 n.15 (1967).

50. 346 Mass. 266, 191 N.E.2d 479 (1963).

51. 78 Mass. Adv. Sh. 2603, 2608, 381 N.E.2d 582, 586 (1978).

In spite of the *Vitello* court's language supporting the *Fatalo* and *Frye* holdings, the court's decision to admit polygraphic evidence runs counter to the traditional ban on the polygraph.[52] It appears that admissibility based on the "general acceptance" standard has been replaced by some other more easily accessible standard of admissibility. Under the Federal Rules of Evidence,[53] there is no specifically articulated standard which must be met in order for scientific evidence to be admitted,[54] so that in the absence of any other factors, normal concepts of relevancy would presumably apply. However, it has been suggested that the question of relevancy of polygraphic evidence should differ from that regarding other types of scientific evidence.[55] A higher level of reliability is clearly justified since "an almost impenetrable aura of scientific infallibility may well surround the polygraph machine itself in the minds of the jurors."[56]

In trying to determine the nature of polygraphic evidence one must commence with the concept of relevance. Federal Rule of Evidence 402[57] states the general rule that all relevant evidence is admissible and nonrelevant evidence is inadmissible. Rule 401[58] sets forth the definition of relevant evidence, which states that evidence must make the existence of any fact more probable or less probable than it would be without the evidence in order to be considered relevant.

In order to make the existence of any fact more or less probable, the polygraph must have some indicia of reliability. Many types of evidence

52. *See* note 27 and accompanying text *supra.*

53. The Rules cited in notes 54, 58, 65 & 75 *infra* are generally in accord with comparable Massachusetts rules. For ease of discussion and comparison, the Federal Rules will be used along with the Massachusetts Rules during this section. *See* Commonwealth v. Rodriguez, 364 Mass. 87, 300 N.E.2d 192 (1973); Commonwealth v. Boyd, 1 Mass. App. 803, 294 N.E.2d 454 (1973); Commonwealth v. Binkiewicz, 342 Mass. 740, 175 N.E.2d 473 (1961); W. LEACH & P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE (4th ed. 1967); Hughes, *supra* note 49 at 132-43.

It should be noted that Massachusetts is currently considering a preliminary draft of Proposed Massachusetts Rules of Evidence. The rules, if adopted, would be parallel to the Federal Rules.

54. Federal Rules of Evidence 702 and 703 deal with testimony of expert witnesses, but do not set forth any theory of admissibility for that scientific evidence. Therefore admissibility must be determined according to normal concepts of relevance. *See* Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence,* 6 N.M. L. REV. 187, 199-200 (1976).

55. Romero, *supra* note 54, at 201, 207; Wilner, *supra* note 1, at 295; Note, *supra* note 49, at 681. *But see* Kaplan, *The Lie Detector: An Analysis of its Place in the Law of Evidence,* 10 WAYNE L. REV. 381, 407-09 (1963-64).

56. Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 446-47, 313 N.E.2d 120, 135 (1974) (Quirico, J. dissenting).

57. "All relevant evidence is admissible, except as otherwise provided .... Evidence which is not relevant is not admissible." *See* FED. R. EVID. 402. *See also* Hughes, *supra* note 49, at 132. *See also* Proposed Massachusetts Rule of Evidence 402 and note 53 *supra.*

58. FED. R. EVID. 401 states: " 'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." *See also* Proposed Massachusetts Rule of Evidence 401 and note 53 *supra.*

can be evaluated through common human experience to determine whether it makes a fact more or less probable. However, by definition, scientific evidence is beyond normal human experience. Its reliability must be shown through some type of external evidence. The Rules call for foundation evidence which would show some minimal amount of reliability as a prerequisite to a judicial finding of relevance.

Admissibility based on relevance is an easier standard to meet than that of general acceptance in the scientific community.[59] To be relevant, there must only be *some* acceptance in the scientific community, not necessarily a "general acceptance." Thus, the Supreme Judicial Court has allowed polygraphic evidence into the trial process based on concepts of mere relevancy, while also clinging to the *Frye* and *Fatalo* standards. The court attempted to reconcile both of these concepts by differentiating the uses of the evidence. The court was of the opinion that since the general acceptance standard had not been met but a standard for relevance had, then the evidence may come in, but only for the limited purposes of impeachment or corroboration and not during the case-in-chief of either side.

A question which must be raised is whether the concept of relevance is compatible with that of general acceptance in the scientific community. One way to merge these concepts is by using the preliminary question of competency. The *Vitello* court stated that although the question of competency is usually reserved for witnesses, it may also arise when the body of knowledge being applied is relatively new.[60] To determine whether a new scientific field is competent, the test is "whether there is a consensus of expert opinion which the court can accept as creating a valid basis for expert testimony."[61] This concept of a "consensus" appears very similar to that of "general acceptance." Therefore, the polygraph's competency must still be proven by general agreement in the scientific community, even though it might later be found to be relevant.[62]

If the testimony of a polygraph examiner is to be accepted in criminal trials, then an attempt to define polygraphic evidence within the normal framework of evidence should be made. The closest description, although not totally accurate,[63] is that polygraphic evidence would

59. *See* Romero, *supra* note 54, at 210; Strong, *Questions Affecting The Admissibility of Scientific Evidence,* 1970 U. ILL. L.F. 1, 10-15; Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury Plagued System,* 26 HASTINGS L.J. 917 (1975).

60. 78 Mass. Adv. Sh. 2603, 2621, 381 N.E.2d 582, 591 (1978). *See also* W. LEACH & P. LIACOS, *supra* note 53.

61. W. LEACH & P. LIACOS, *supra* note 53, at 94.

62. *See* A. MOENSSENS & F. INBAU, *supra* note 1, at 58; Radek, *The Admissibility of Polygraph Results in Criminal Trials: A Case For the Status Quo,* 3 LOY. U. L. REV. 289, 300-02 (1972); Note, *supra* note 49, at 683.

63. *See* notes 67-74 and accompanying text *infra.*

come under the category of character evidence for determining truth and veracity. The court in *Vitello* even referred to the polygraph examiner as a "potential expert character witness."[64] Federal Rule of Evidence 608,[65] the rule for the admissibility of character evidence, discusses three broad categories of character testimony: opinion, reputation, and specific instances of conduct. Since polygraphic evidence indicates no more than truth or deception at the time of the test,[66] this type of evidence would clearly fall under the heading of specific instances of conduct. However, under both Federal Rule of Evidence 608(b)[67] and the traditional Massachusetts rule,[68] there is a strong inclination against the use of specific instances of conduct to show character.

The testimony of the examiner also does not fit neatly into opinion evidence under Federal Rule of Evidence 608(a).[69] The examiner may be giving an opinion, but the fact remains that it is still based on a specific instance of conduct — the polygraph examination. It should be noted that the Massachusetts rule is different than Federal Rule of Evidence

64. 78 Mass. Adv. Sh. 2603, 2636, 381 N.E.2d 582, 598 (1978).

65. FED. R. EVID. 608 provides:

> Evidence of Character and Conduct of Witnesses
> (a) Opinion and reputation evidence of character — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
> (b) Specific instances of conduct — Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified....

See also Proposed Massachusetts Rule of Evidence 608 and note 53 *supra.*

66. *See* Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2636-37, 381 N.E.2d 582, 598 (1978). During the actual testimony of a polygraph examiner, the key question to be asked involves the polygrapher's opinion as to whether the subject was practicing deception when asked a *specific* question. This is, of course, after the examiner's qualifications, the description of the polygraph, and the reliability of the technique have all been discussed. Sevilla, *Reliability in Polygraph Examinations,* 14 AM. JUR. Proof of Facts 2d 1, 32-9.

67. "[T]he present rule [Fed. R. Evid. 608] generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility .... Effective cross-examination demands that some allowance be made for going into matters of this kind, but the *possibilities of abuse are substantial." Advisory Committee Note to Federal Rule of Evidence* 608 (emphasis added).

68. Under the present Massachusetts Rules, character evidence is limited only to reputation evidence. Specific acts of misconduct and opinion evidence are inadmissible to prove character for truth and veracity. *See* Commonwealth v. Binkiewicz, 342 Mass. 740, 175 N.E.2d 473 (1961); W. LEACH & P. LIACOS, *supra* note 53, at 121-22; Hughes, *supra* note 49, at 142-43. However, *see* Proposed Massachusetts Rule of Evidence 608, which parallels the Federal Rule. If the Massachusetts Rules are passed as proposed, both opinion and reputation evidence would be allowed to prove character. *See also* note 53 *supra.*

69. *See* note 65 *supra.*

608(a).[70] The witness may testify only as to the subject witness' reputation for veracity, and the witness' opinion is totally inadmissible to prove character.[71] A further problem with Federal Rule of Evidence 608 character evidence is that corroborative evidence is normally inadmissible until an attack has been made on the defendant's credibility.[72] The court in *Vitello* specifically refused to accept this view as it related to the polygraph.[73]

The preceding discussion demonstrates that the polygraph cannot fit neatly into any one existing evidentiary category; and, as more courts turn to the polygraph, some new category may out of necessity be created.[74] Assuming arguendo that competency, relevancy, and character evidence problems are overcome, a trial judge would have to allow the examiner's testimony into evidence unless given the authority to exclude the evidence elsewhere. This authority has been codified under Federal Rule of Evidence 403[75] and accepted by Massachusetts case law.[76] Under this Rule, otherwise admissible evidence is to be held inadmissible if certain considerations against admissibility outweigh the benefits to be gained.[77] With regard to polygraphic evidence, there are two major areas which provide a sufficient basis for exclusion: faults inherent in the polygraph process itself, and overriding policy considerations.

V. PROBLEMS WITH THE USE OF POLYGRAPHIC EVIDENCE

As previously stated, there are two major areas which provide most of the problems critics have with the polygraph. The first is the

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70. *See* notes 53 and 68 *supra*.

71. *See* W. LEACH & P. LIACOS, *supra* note 53, at 121-22; Hughes, *supra* note 49, at 142-43.

72. W. LEACH & P. LIACOS, *supra* note 53, at 130.

73. "Another point of departure is the general rule that evidence to corroborate or sustain the credibility of a witness is not admissible until a direct attack has been made on that witness's credibility (citations omitted). We do not think that this rule should be applied to the admission of polygraph evidence to corroborate the defendant's testimony." Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2636 n.25, 381 N.E.2d 582, 598 n.25 (1978), *referring to* K. HUGHES, EVIDENCE § 244 (1961).

74. A sample rule proposed by one author states: "Scientific evidence is relevant according to Rule 401 if there is foundation evidence having any tendency to make more probable that the scientific evidence is in some degree reliable in showing what it purports to show." Romero, *supra* note 54, at 206.

75. FED. R. EVID. 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentations of cumulative evidence."

76. Commonwealth v. Boyd, 1 Mass. App. 803, 294 N.E.2d 454 (1973); Hughes, *supra* note 49 at 133. Proposed Massachusetts Rule of Evidence 403 is the same as the Federal Rule. *See* note 53 *supra*.

77. *See generally,* HUGHES, EVIDENCE § 238 (1961); MCCORMICK, EVIDENCE § 185 (2d ed. 1972); 3A WIGMORE, EVIDENCE § 877 (Chadbourn rev. 1970).

polygraphic process itself.[78] The unique roles of both the examiner and the subject, and the reliability of the data analysis form the basis for these criticisms. The second major problem area consists of those considerations based on policy matters: the risk of misleading the jury, the intrusion into the traditional jury function, and the consumption of court time.[79] These are the elements which a judge must consider, and which, when taken in aggregate, should be adequate to bar the polygraph from the realm of the courtroom.

A. Faults of the Polygraph Process

1. The Role of the Examiner

It is stated by all authorities that the reliability of polygraph evidence is highly dependent upon the skill of the examiner.[80] While many states have enacted legislation setting minimum standards for examiner competency,[81] Massachusetts has left the determination of examiner competency to the trial judge.[82]

Leaving this determination to the trial judge raises many problems, not the least of which is the fact that different authorities cite different minimum qualifications,[83] which most examiners do not even possess.[84] Although the level of expertise would usually affect only evidentiary weight, the very question of admissibility is raised in the case of the polygraph. This situation would arise if the examiner administering the test is inadequately trained; the concepts of relevance and competence are then brought into issue and must be considered.[85]

Another problem is that reliability will often suffer due to the examiner's inexperience, even if the minimum competency standards are met. One study[86] showed that if polygraph records are shown to both

78. *See* notes 80-107 and accompanying text *infra.*

79. *See* notes 108-23 and accompanying text *infra.*

80. *See, e.g.,* Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2617-18, 381 N.E.2d 582, 590 (1978); Commonwealth v. A Juvenile, 365 Mass. 421, 427, 313 N.E.2d 120, 124 (1974); J. REID & F. INBAU, *supra* note 1 at 304; Abrams, *Polygraphy Today,* 3 NAT'L J. CRIM. DEF. 85, 89-90 (1977).

81. Minimum standards usually cited are: (1) six months formal training; (2) period of internship with a trained polygrapher; (3) possession of a college degree. *See, e.g.,* FLA. STAT. § 493 (1975); ILL. ANN. STAT. ch. 38 § 202-1 to 202-30 (1973); VA. CODE ANN. art. 4413 (29cc) § 7 (1974). For a more complete list *see* J. REID & F. INBAU, *supra* note 1, at 349 n.178; Commonwealth v. A Juvenile, 365 Mass. 421, 446 n.10, 313 N.E.2d 120, 135 (Quirico, J., dissenting).

82. *See* notes 119-23 and accompanying text *infra.*

83. *See, e.g.,* United States v. Wilson, 361 F. Supp. 510, 513 (D.C. Md. 1973); Kaplan, *supra* note 55, at 397-400.

84. Most of the works on the subject cite to the inadequate training of many examiners, especially in serving an internship period. *See* A. MOENSSENS & F. INBAU, *supra* note 1, at 624; Radek, *supra* note 62, at 294-96; Note, *supra* note 1, at 303.

85. *See* notes 57-62 and accompanying text *supra.*

86. Horvath & Reid, *The Reliability of Polygraph Examiner's Diagnosis of Truth & Deception,* 62 J. CRIM. L. C. & P.S. 276 (1971).

experienced and inexperienced examiners, the experienced examiners attain over eleven percent better accuracy.[87]

The second facet of the examiner problem is that of possible examiner bias. Since polygraphy places such an unusual responsibility on the examiner,[88] his objectivity is of utmost importance. If the examiner has an accusatory tone of voice, the results can be significantly influenced.[89] Any preconceptions about the factual elements of a case can also affect the results.[90] Moreover, the way in which the subject acts during the course of the examination can also play on the examiner's subconscious bias.[91] This subject-examiner interaction gives polygraphic evidence a character significantly different from other types of scientific evidence[92] and, therefore, such evidence demands a different treatment.

2. The Role of the Subject

The subject in a polygraphic examination plays a much greater role than in fingerprinting, blood tests or other scientific areas of evidence.[93] Since the subject plays an important role in the examination, otherwise absent variables are introduced. "The experts are in accord that the examiner must carefully watch for signs of psychosis, extreme neurosis, psychopathology, drunkenness and drugs, any of which might preclude a successful examination."[94] Extreme nervousness in a subject may also preclude a successful examination.[95] A subject who is angry,[96] or causes

87. It seems that the fine points of polygraphic theory can be best utilized by those with the most experience. *Id.* at 281.

88. *See, e.g.,* United States v. Wilson, 361 F. Supp. 510, 512 (D.C. Md. 1973); Axelrod, *supra* note 1, at 150-52; Forkosch, *The Lie Detector and Mechanical Jurisprudence,* 28 OKLA. L. REV. 288, 302 (1975).

89. *See* Axelrod, *supra* note 1, at 116; Wilner, *supra* note 1, at 300.

90. *See, e.g.,* Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials,* 15 AMER. CRIM. L. REV. 29, 40 (1977); Axelrod, *supra* note 1, at 126; Note, *supra* note 1, at 302.

91. The examiner is supposed to observe the behavior of the subject, including whether the subject is coughing, delaying in answering, making gurgling stomach sounds or has tired eyes. Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2614, 381 N.E.2d 582, 588 (1978). Observations are not limited to the testing phase alone. The examiner's associates are to observe all behavior of the subject, even what reading material the subject looks at while waiting to take the test. *Id.* at 2614, 381 N.E.2d at 588 n.8; *See also* Abbell, *supra* note 90, at 39; Highleyman, *The Deceptive Certainty of the 'Lie Detector',* 10 HASTINGS L.J. 47, 61 (1958); Skolnick, *supra* note 1, at 705.

92. *See, e.g.,* Abbell, *supra* note 90, at 36; Note, *The Emergence of the Polygraph at Trial,* 73 COLUM. L. REV. 1120, 1141 (1973).

93. *See* note 88 *supra. See also,* Abbell, *supra* note 90, at 36, 46; Strong, *supra* note 59, at 17; Comment, *supra* note 38, at 896 n.24.

94. United States v. Wilson, 361 F. Supp. 510, 512 (D.C. Md. 1973). *See also* Highleyman, *supra* note 91, at 58; Levitt, *Scientific Evaluation of the 'Lie Detector',* 40 IOWA L. REV. 440, 451 (1954-5).

95. *See, e.g.,* J. REID & F. INBAU, *supra* note 1, at 216-17; Levitt, *supra* note 94, at 452; Wilner, *supra* note 1, at 297 n.63.

96. *See, e.g.,* J. REID & F. INBAU, *supra* note 1, at 220; Highleyman, *supra* note 91, at 60.

muscular movement,[97] or has taken the test previously[98] can distort the testing sufficiently to void any adverse result. Finally, since the polygraph depends on the subject's belief in the accuracy of the machine, the lack of such belief can either fail to yield definitive answers or produce an incorrect result.[99]

3. Reliability

The technical data recorded by the polygraph is physiologically accurate; it is the analysis of that data which is the key to reliability. The proponents of polygraphy state that a polygraph examiner can diagnose truth and deception correctly at high levels.[100] One major work[101] quotes from different studies yielding average examiner accuracy from 86%[102] to 87.75%.[103] While it is argued that this level of accuracy is higher than other types of scientific evidence,[104] those other types do not raise the serious presumption of guilt that polygraphic evidence carries. The accuracy statistics have themselves come under attack from various sources which cite serious methodological errors,[105] including the fact that accuracy tests tend to test the abilities of individual examiners rather than the polygraphic process itself.[106] It is not known how the examiner's subjective ideas enter into the examination process, but it is thought that the reliability figures mask this reliance on nonscientific factors.[107]

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97. *See, e.g.*, J. REID & F. INBAU, *supra* note 1, at 258-62; Abbell, *supra* note 90, at 37; Levitt, *supra* note 94, at 453.

98. *See, e.g.*, J. REID & F. INBAU, *supra* note 1, at 226; Abbell, *supra* note 90, at 47.

99. *See, e.g.*, J. REID & F. INBAU, *supra* note 1, at 215; Wilner, *supra* note 1, at 296 n.60.

100. *See, e.g.*, J. REID & F. INBAU, *supra* note 1, at 303-04, 389-403; Abrams, *supra* note 80, at 89, 93.

101. J. REID & F. INBAU, *supra* note 1.

102. *Id.* at 395-98.

103. *Id.* at 389-94.

104. *See, e.g.*, A. MOENSSENS & F. INBAU, *supra* note 1, at 8; Kaplan, *supra* note 55, at 402-07.

105. *See, e.g.*, Radek, *supra* note 62, at 297, where the author states: "To demonstrate this the following example is given: If 1,000 subjects were given the exam, and if 25 of those attempted to lie, and if the machine were 95% accurate, then the results would show (.95 x 25 =) 24 liars, with one 'beating the machine'; and (.05 x 975 =) 49 truth tellers erroneously called liars." *Id.* *See also* Commonwealth v. Fatalo, 346 Mass. 266, 269 n.5, 191 N.E.2d 479, 480 (1963); Levitt, *supra* note 94, at 441-49; Skolnick, *supra* note 1, at 715-19.

106. *See* Axelrod, *supra* note 1, at 135.

107. *See* United States v. Wilson, 361 F. Supp. 510, 514 (D.C. Md. 1973) (emphasis in original), where the court states: "The fundamentally psychological component of the examination, the subjectivity of interpretation, and the incipient stage of experimental research, preclude the finding of a *particular* degree of probability of accuracy of a polygraph examination."

B. Policy Considerations

1. Misleading the Jury

Perhaps the single most important consideration against the admissibility of polygraphic evidence is its potential for confusing and misleading the jury.[108] One commentator has stated that "since the average juror would probably fail to distinguish the physiological facts from the examiner's inferences, polygraph evidence might become virtually decisive of ultimate fact issues."[109]

A counterargument is that limiting instructions can be used to inform the jury of the polygraph's proper role.[110] While limiting instructions may be helpful in some areas, it is doubtful that they are adequate in a situation where the evidence "directly addresses the guilt or innocence of the defendant."[111] Due to the special nature of polygraphic evidence "instructions to the jury are likely to be erroneous, or inadequate, or at the very best quite confusing."[112]

This ineffectiveness of limiting instructions is due to the special nature of the polygraph evidence. Once admitted into trial, the issue of the machine's credibility will fade away, and the "polygraph may assume a posture of 'mystic infallibility' in the eyes of the jury."[113] The *Vitello* court, recognizing the seriousness of this phenomenon, nonetheless felt that the "mystic infallibility" could be overcome by proper jury instructions.[114] When so important an issue is in such doubt, the court should take great care to protect the rights of a defendant. Due to the strong possibility of prejudicial matter being presented to the jury, the courts should maintain their stance of nonadmissibility.

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108. *See, e.g,* Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2624, 381 N.E.2d 582, 592 (1978); Abbell, *supra* note 90, at 50-54; Radek, *supra* note 62, at 295-96.

109. Highleyman, *supra* note 91, at 63.

110. *See, e.g.,* United States v. Zieger, 350 F. Supp. 685, 691 (D.D.C. 1972); Forkosch, *supra* note 88, at 308; Note, *The Polygraph: Scientific or Judicial Acceptance,* 27 U. MIAMI L. REV. 254, 258 (1972).

111. Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2624, 381 N.E.2d 582, 593 (1978). *See also* Comment, *Post Conspiracy Admission in Joint Prosecutions — Effectiveness of Instructions Limiting the Use of Evidence to One Co-defendant,* 24 U. CHI. L. REV. 710, 713 (1957), where the author states: "It seems reasonable that a jury will follow many instructions, but it does not follow that it is reasonable to expect a jury to obey instructions to disregard relevant evidence." *Id.* at 713 n.21.

112. Comment, *Confessions, Habeas Corpus and the Stein Case,* 8 STAN. L. REV. 451, 456 (1956). *See also* Krulewitch v. United States, 336 U.S. 440 (1948), where stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (Jackson, J., concurring) (citation omitted) at 453.

113. Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2624, 381 N.E.2d 582, 592-93 (1978), *quoting* Commonwealth v. Lykus, 367 Mass. 191, 197, 327 N.E.2d 671, 675 (1975).

114. *Id.* at 2639, 381 N.E.2d, at 599.

2. Intrusion into the Jury Function

Polygraphic evidence creates unique problems of intrusion into the jury's role as the ultimate finder of fact. When the credibility of a witness is determined by a polygraph (through an examiner), the defendant's right to trial by jury[115] may become a mere fiction. "The spector of 'trial by polygraph' replacing trial by jury is more than a felicitous slogan."[116] The polygraph, through the examiner, determines for itself the credibility of the evidence; this is the traditional and constitutional province of the jury.[117] A moral statement of the problem is that "[t]he issue before us is whether we are to abandon our traditional system of adversary litigation with emphasis upon dignity for 'scientific' trial with emphasis upon truth."[118] In this sense, the use of the polygraph could seriously compromise the constitutional right to trial by one's peers and the dignity inherent in our system of justice.

3. Consumption of Time

The Supreme Judicial Court in *Vitello* stated that "we have charged judges with the important task of satisfying themselves that a prospective expert polygraph witness is fully qualified."[119] This task will necessarily absorb a great amount of time in criminal proceedings where the polygraph is used. The trial court must make a determination that: (1) the subject was testable; (2) the conditions were proper; and (3) the questions used were properly administered.[120] Making these determinations will undoubtedly further burden the trial process.

Aside from these questions, both parties can be expected to introduce their respective authorities and experts to debate the reliability of the polygraphic technique.[121] It has been estimated that in more than two thirds of federal criminal trials where polygraph evidence is introduced, "at least as much time would be spent hearing evidence related to the

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115. U.S. CONST. amend VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

116. United States v. Wilson, 361 F. Supp. 510, 513 (D.C. Md. 1973).

117. *See, e.g.*, Note, *supra* note 1, at 304; Note, *Problems Remaining for the 'Generally Accepted' Polygraph*, 53 B.U. L. REV. 375, 387 (1973).

118. Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683, 702 (1955-1956).

119. 78 Mass. Adv. Sh. 2603, 2627, 381 N.E.2d 582, 594 (1978), *quoting* Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 429, 313 N.E.2d 120, 126 (1974).

120. Commonwealth v. Vitello, 78 Mass. Adv. Sh. 2603, 2627-28, 381 N.E.2d 582, 594 (1978).

121. There is a fear that the trial will descend into a type of "battle of experts" which would, in the long run, confuse rather than enlighten the jury. Commonwealth v. Fatalo, 346 Mass. 266, 269, 191 N.E.2d 479, 480-81 (1963). *See also* United States v. Irquidez, 356 F. Supp. 1363, 1367 (C.D. Cal. 1973).

polygraph findings as on the actual issues of the cases."[122] This trial within a trial on the merits of the polygraph would cause a monumental consumption of time in our already overcrowded judicial system, not to mention the possibility of confusion to the jury by the airing of such superfluous collateral issues.[123] Polygraphic evidence should therefore be kept out of the criminal process until increased reliability and standardization occurs.

Conclusion

The argument for the admissibility of polygraph evidence may be a strong one, and courts may be coming under increasing pressure to utilize this "shortcut" evidence. If perfected, the polygraph could be a great help to the orderly administration of justice in America. However, so long as it is unperfected, its use in the courtroom should be severely limited.

The Massachusetts Supreme Judicial Court in *Vitello*[124] has recognized an increased use of polygraph evidence. This poses a grave danger to our traditional adversary system of justice. The problems with the polygraph are many, and it is submitted that the risks clearly outweigh the benefits to be gained. Dubious reliability, prejudice, confusion, intrusion into the jury's role, and waste of valuable court time all weigh heavily against admissibility. The questionable advantages which are to be gained by the use of the polygraph cannot outweigh these existing dangers. The court in *Vitello* recognized these pitfalls, but nevertheless decided to extend the "cautious first step" taken in *Commonwealth v. A Juvenile (No. 1)*.[125] While it is commendable that the court work for an increase in the orderly administration of justice, it would be equally laudable for a reevaluation of this recent position. The court can therefore maintain its traditional role as the protector of the rights of the defendant. Polygraphic evidence may one day indeed be an answer to many of the problems of criminal trials, but until such time, it is unjust to allow such a potentially harmful process into our tribunals of justice.

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122. Abbell, *supra* note 90, at 52.
123. *See* notes 108-114 and accompanying text *supra*.
124. 78 Mass. Adv. Sh. 2603, 381 N.E.2d 582 (1978).
125. 365 Mass. 421, 313 N.E.2d 120 (1974).

King Solomon's Court: Reconciling the Interests of Parent, Child and State Under Mass. Gen. Laws ch. 119

"A child is a man in a small letter . . . his soul is yet a white paper unscribbled with observation of the world . . . he knows no evil."[1]

Our society functions under the general assumption that children should be cared for by their own parents. Yet, family life is not always harmonious. It is therefore incumbent upon the state as sovereign to intrude, when necessary, to protect innocent individuals from undue harm caused by those who should be their natural protectors.

Illustrative of the inherent problem of state involvement in the family unit is the case of *Roe v. Conn.*[2] In that case a twenty-five year old white woman, living in a black neighborhood in Montgomery, Alabama with her four year old son, was forced to turn her son over to the local welfare department based on a court order requiring immediate compliance pending an adjudication that he was a "neglected child." This order was issued by a judge based on the meager facts that this woman was single, unemployed, and living with a black man in a black neighborhood. No evidence of any physical neglect or abuse was presented.[3] Later, it was revealed that this mother was providing adequate care for this child.[4] This case represents an example of the state as sovereign intervening prematurely and consequently violating the woman's rights as well as those of the child.[5]

The other extreme is illustrated by *Commonwealth v. Gallison.*[6] Jennifer and her brother, infants not yet one and three years old respec-

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1. Illick, *Child Rearing in Seventeenth Century England and America,* in THE HISTORY OF CHILDHOOD 317 (L. de Mausse, ed. 1975).

2. 417 F. Supp. 769 (M.D. Ala. 1976).

3. *Id.*

4. *Id.* at 774, 778.

5. *Id.* at 778. The court indicated that the Alabama statute violated the due process clause of the fourteenth amendment since it did not provide for notice and a hearing where the mother might defend herself. *Id.*

6. Boston Globe, May 17, 1978, at 1, col. 1. For more coverage of this case *see also,* Boston Globe, May 16, 1978, at 3, col. 1; May 18, 1978, at 3, col. 5; May 22, 1978, at 5, col. 1; May 24, 1978, at 1, col. 5; May 25, 1978, at 1, col. 1; May 26, 1978, at 1, col. 1; May 27, 1978, at 4, col. 1; May 30, 1978, at 4, col. 1; May 31, 1978, at 3, col. 2.

tively, were removed from their home after having endured physical abuse, administered in the form of a severe spanking. Almost two years later these children were returned to their natural parents. Several months later Jennifer was dead. Her older brother was hospitalized for injuries resulting from a severe beating. In this case, the state did not exercise the full extent of its power to protect Jennifer from an abusive parent. Intervention should have been swift and permanent since serious physical harm had occurred.[7]

A Massachusetts statute[8] outlining the state's power in this area provides for a "care and protection" petition[9] which can be filed by anyone[10] who has reason to believe that a child is being abused or

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7. The contrast in the problems presented by state interference in the familial sphere is discussed in J. GOLDSTEIN, A. FREUD & A. J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD, 79-82, 142-143 (1979).

8. MASS. GEN. LAWS ANN. ch. 119 (West Supp. 1980).

9. *Id.* §§ 24, 26, which provide in pertinent part:

§ 24. The Boston juvenile court, the Worcester juvenile court, the Bristol county juvenile court, and the Springfield juvenile court or the juvenile sessions of any district court of the commonwealth, except the municipal and district courts located within Suffolk county and except the municipal and district courts located within the territorial limits of the Worcester, Bristol county, and Springfield juvenile courts, upon the petition of any person alleging on behalf of a child under the age of eighteen years within the jurisdiction of said court that said child is without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent or unavailable to provide such care, may issue a precept to bring such child before said court, shall issue a notice to the department, and shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made.

. . . .

§ 26. If the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that said child is in need of care and protection and may commit the child to the custody of the department until he becomes eighteen years of age or until in the opinion of the department the object of his commitment has been accomplished, whichever occurs first; or make any other appropriate order with reference to the care and custody of the child as may conduce to his best interests, including but not limited to any one or more of the following: —

(1) It may permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations which the court may prescribe including supervision as directed by the court for the care and protection of the child.

(2) It may, subject to such conditions and limitations as it may prescribe, transfer temporary legal custody to any of the following: —

(i) any individual who, after study by a probation officer or other person or agency designated by the court, is found by the court to be qualified to give care to the child;

(ii) any agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child;

(iii) the department of social services.

(3) It may order appropriate physical care including medical or dental care.

In appropriate cases the court shall order the parents or parent of said child to reimburse the commonwealth or other agency for care.

10. *Id.* § 51A, which provides in pertinent part:

Any physician, medical intern, medical examiner, dentist, nurse, public or private school teacher, educational administrator, guidance or family counselor, probation officer, social worker, foster parent or policeman, who, in his professional capacity shall have reasonable cause to believe that a child under the age of eighteen years is suffering

neglected or is without proper care. By its terms,[11] the statute is very broad and general and grants correspondingly broad and general power to the trial judge[12] who hears the petitions. Since the enactment of this statute,[13] the courts of this state have struggled to implement its intended policy[14] and have devised various standards for review of cases brought under its purview.[15]

In interpreting the Massachusetts "care and protection" statute the Massachusetts Supreme Judicial Court in the recent case of *Custody of a Minor,*[16] set out new standards which trial judges are required to follow in determining whether a parent is to be deprived of the custody of his or her child.[17] The court stated: "we are persuaded that it is constitutionally demanded that a judge exercise the utmost care, as demonstrated through specific and detailed findings of fact, in rendering a judgment which deprives parents of child custody."[18]

It is the purpose of this comment to evaluate the soundness of the standards for removing a child from its parents' custody. Section I of this Comment presents an historical discussion of the Commonwealth's efforts to care for neglected and abused children. The facts and circumstances of *Custody of a Minor* are outlined in Section II. Section III focuses on the two traditional tests used in such proceedings. Finally, the required weight of evidence set forth in *Custody of a Minor,* as compared to the standard of clear and convincing evidence requested by the appellant mother in this case, is discussed and analyzed in Section IV.

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serious physical or emotional injury resulting from abuse inflicted upon him including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth, shall immediately report such condition to the department by oral communication and by making a written report within forty-eight hours after such oral communication.

11. MASS. GEN. LAWS ANN. ch. 119, § 1 (West Supp. 1979), which provides in pertinent part:

It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.

12. MASS. GEN. LAWS ANN. ch. 119, § 26 (West Supp. 1980). For the text of Section 26, *see* note 9, *supra.*

13. The first statute clearly setting out terms similar to the present Chapter 119 was Chapter 283, enacted in 1866. *See* note 27 and accompanying text *infra.*

14. For discussion of this policy *see* notes 19-29 and accompanying text *infra.*

15. For discussion of standards used *see* notes 68-88 and accompanying text *infra.*

16. 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979).

17. *Id.* at 1118, 389 N.E.2d 68, 69 (1979).

18. *Id.*

I. STATE INTERVENTION IN CUSTODY CASES — HISTORICAL BACKGROUND

A. *The State as Parens Patriae*

The state's role as *parens patriae*[19] can be traced to English common law and the case of *Eyre v. Shaftsbury,*[20] which concerned the propriety of surviving guardians continuing their decisionmaking for the minor after the death of one of the appointed guardians against the wishes of the natural mother. In that case, the Court of Chancery stated that the King as protector of all his subjects is more particularly concerned about those least able to care for themselves because of their youth or incapacities. Therefore, the Court of Chancery, representing the King's voice, had the power to hear and decide the case presented by the mother.[21]

Our modern concept developed from this 1722 case.[22] Currently, the use of this theory has several justifications which are broadly recognized.[23] First, a child's lack of experience and capacity requires that some entity be ultimately responsible for his or her basic needs. For example, Massachusetts law provides for the care of orphaned children,[24] thereby recognizing that someone or some organization must provide minimum necessities to minors. Second, society as a whole has an inherent interest in the future of its children who will carry on the growth and development of society's ideals and culture. Third, a delinquent or unstable child can be harmful to others and must be cared for to avoid this harm. In Massachusetts, the legislature has also attempted to deal with this problem through special legislation directed at the incorrigible or troubled minor.[25]

Protecting young children from abuse and serious deprivation for the

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19. This term is literally defined as parent of the country, which comes from *pater patriae,* meaning father of the country. The latter term traditionally applied to the King of England. As it evolved in the United States, it referred to the state's sovereign power of guardianship over persons under disability. BLACK'S LAW DICTIONARY, 1003 (5th ed. 1979).

20. 24 Eng. Rep. 659 (1722).

21. *Id.* at 666. The court, earlier in the opinion, also stated: "this court may . . . make an order to determine the right of guardianship in regard the care of all infants is lodged in the King as *pater patriae;* and by the King this case is delegated to his Court of Chancery." *Id.* at 664.

22. For an article on the earlier history of this theory, indicating that the explanation in *Eyre* was not itself based on tradition but was an aberration of the *pater patriae* doctrine, *see* Note, *The Parens Patriae Theory and Its Effects on the Constitutional Limits of Juvenile Court Powers,* 27 U. PITT. L. REV. 894 (1966).

23. Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause,* 4 SUFF. U. L. REV. 631, 632-33 (1970).

24. MASS. GEN. LAWS ANN. ch. 119, § 1 (West Supp. 1980). For the text of section 1 *see* note 8 *supra.*

25. MASS. GEN. LAWS ANN. ch. 119, § 39E (West Supp. 1980), which states in pertinent part:

> The juvenile courts . . . may receive and hear petitions seeking a determination that a

reasons outlined above has been a widely recognized state interest in this Commonwealth for many years.[26] Legislative recognition of this interest has remained essentially unchanged since the original enactment of the statute.[27] Although the actual bureaucracy involved in the petition procedure is today reflective of our more complicated society,[28] the language of the present version of this statute is strikingly similar to its ancestor. Pursuant to present Massachusetts law, a child growing up without the necessary and proper physical, educational or moral care and discipline will trigger a care and protection proceeding.[29] Thus the tradition of the state as *parens patriae* has been followed faithfully in Massachusetts.

B. State Power v. Parental Rights

The heart of the case law interpreting the various care and protection statutes has centered upon a balancing test between the parents' rights as natural guardians of their offspring, and the state's right to intrude as *parens patriae* on behalf of the defenseless minor. In the leading case of *Richards v. Forrest,*[30] the Massachusetts Supreme Judicial Court

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child is in need of services. . . . Proceedings . . . shall not be deemed criminal proceedings. . . . A parent or legal guardian . . . may apply for a petition . . . alleging that said child persistently runs away from the home . . . or persistently refuses to obey the lawful and reasonable commands of said parents. . . .

26. *See, e.g.,* 1866 Mass. Acts, ch. 283, § 3. *See also* In re Wares, 161 Mass. 70, 36 N.E. 586 (1894).

27. MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1980) (original version at 1866 Mass. Acts, ch. 283, § 3) which states in pertinent part:

> The Boston juvenile court or the juvenile sessions of any district court of the commonwealth, except the municipal court of the city of Boston, upon the petition of any person alleging on behalf of a child under the age of sixteen years within the jurisdiction of said court that said child is without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent or unavailable to provide such care, may issue a precept to bring such child before said court, shall issue a notice to the department, and shall issue summons to both parents of the child to show cause why the child should not be committed to the custody of the department of public welfare or other appropriate order made. If after reasonable search no such parent can be found, summons shall be issued to the child's lawful guardian, if any, known to reside within the commonwealth, and if not, to the person with whom such child last resided, if known. Upon the issuance of the precept and order of notice the court shall appoint a person qualified under section three, to make a report to the court under oath of an investigation into conditions affecting the child. Said report shall then be attached to the petition and be a part of the record.

28. In the 1800's communities had almshouses or poorhouses where the indigent could look for help. Also common was some type of board of overseers or board of health which was charged with caring for the abused and neglected children. Today, we have a more sophisticated bureaucracy which handles the problems of the poor as well as abused and neglected children. Notably, the Department of Public Welfare is charged with many of these responsibilities. *See* 1882 Mass. Acts ch. 181, § 3; Farnham v. Pierce, 141 Mass. 203, 204, 6 N.E. 830 (1866).

29. MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1980).

30. 278 Mass. 547, 180 N.E. 508 (1932).

summed up this balancing test by stating that parents, who are the natural guardians of their children, are entitled to custody.[31] However, parents have no absolute property right in their children, and the parents' rights will not be enforced to the detriment of their child.[32] Earlier cases supported the view expressed in *Richards*.[33] The court had consistently explained the state's role as one designed to provide the neglected child with the parental custody which has been lost through the parent's own failings.[34]

Traditionally, the court has strictly construed the state's role as a custodian of neglected or needy children. For example, in *Commonwealth v. Dee*,[35] the complaint against a destitute widow alleged that she had neglected her child because she failed to support him. The court found that due to her impoverished condition, this mother was unavoidably incapable of providing the necessities of life for her child.[36] By careful analysis of the neglect statute, the court found that the legislature did not intend "neglected" and "poor" to be interpreted synonymously for purposes of the statute.[37] The court acknowledged that the statute was designed to remove children from those parents who are undesirable and unfit, not from those who are merely poor.[38] Therefore, poverty alone is insufficient to countenance state intervention.

The Massachusetts Supreme Judicial Court later held in *Stinson v. Meegan*[39] that prolonged separation from the natural parent is, of itself, insufficient to warrant permanent removal from the custody of the

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31. *Id.* at 553, 180 N.E. at 514.

32. *Id.*

33. *See, e.g.*, Hirshson v. Gormley, 323 Mass. 504, 82 N.E.2d 811 (1948) (where the mother had allowed the child to remain in the care of petitioners without making an attempt to provide a home for the child and where mother lived with two men in a one bedroom apartment the court found the mother was an "unfit" parent); Bottoms v. Carlz, 310 Mass. 29, 36 N.E.2d 379 (1941) (where the child had been adopted by a couple aged sixty-nine and sixty and had been cared for by the couple for six years, their natural aging was not enough to find them unfit and return the child to his biological mother even though the natural mother was, at the time of the petition, in a better position financially and physically to care for the child); Commonwealth v. Ball, 259 Mass. 148, 156 N.E. 211 (1927) (where parents requested the trial judge's ruling that their child continue in foster care be reversed, the Supreme Judicial Court upheld the denial of parents' request stating in part the trial judge was correct when he stated: "He [the trial judge] should not base a denial of return merely upon his belief that the conditions of the home where the child is living under his custody are superior to those of the home of the parents." *Id.* at 152, 156 N.E. 211, 212); Farnham v. Pierce, 141 Mass. 203, 6 N.E. 830 (1886) (where child had been removed from parent under statute which did not provide for any notice to the parent or hearing for the parent, the removal of the child was not determinative of the parent's rights or of his fitness and he was entitled to a hearing to demonstrate his fitness).

34. Farnham v. Pierce, 141 Mass. 203, 204, 6 N.E. 830, 832 (1886).

35. 222 Mass. 184, 110 N.E. 287 (1915).

36. *Id.* at 188, 110 N.E. 287, 290.

37. *Id.* at 187-88, 110 N.E. 287, 290.

38. *Id.* at 186, 110 N.E. 287, 289.

39. 319 Mass. 682, 67 N.E.2d 465 (1946).

natural parents.[40] In that case, the father's initial petition for custody was denied by the trial court because the child had been residing with her maternal aunt and uncle for two years. The high court, however, reversed since there was no showing that the parent was unfit.[41] The court stated that the mere passage of time, standing alone, was not enough to prevent a parent otherwise entitled to custody from regaining such custody.[42] Thus, the traditional view in Massachusetts has been to protect children from serious harm while assisting families in maintaining themselves whenever possible.

The United States Supreme Court has been a source for theories upon which the state has relied in continuing its policy of protecting family integrity. The recent federal court case of *Alsager v. District Court of Polk City Iowa*[43] provides a catalogue of the Supreme Court cases which affect various aspects of family life.[44] In evaluating the plight of the Alsagers, who had lost custody of their children to the local welfare department, the federal district court concluded: "A plethora of opinions by the United States Supreme Court, addressed to the nature of

40. Today in Massachusetts lengths of time is held to be determinative in regard to termination of parental rights. MASS. GEN. LAWS ANN. ch. 210, § 3 (West Supp. 1980) provides in pertinent part that for purposes of adoption, a separation of at least one year where the parents have provided no support or demonstrated their interest in the child will terminate their right to consent to the adoption.

41. 319 Mass. 682, 67 N.E.2d 465 (1946).

42. *Id.* at 684, 67 N.E.2d 465, 466.

43. 406 F. Supp. 10 (D. Iowa 1975).

44. The opinion divides the Supreme Court cases into two categories: those based on a liberty right and those based on privacy. The liberty right cases, according to the *Alsager* court are: Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (invalidating mandatory leave provisions for pregnant school teachers because they unnecessarily interfered with the decision to raise a family); May v. Anderson, 345 U.S. 528 (1953) (denying full faith and credit to an *ex parte* custody decree because the Fourteenth Amendment's liberty included a parent's "right to care, custody, management, and companionship of . . . minor children."); Skinner v. Oklahoma, 316 U.S. 535 (1942) (emphasizing the constitutionally protected right to marry and to procreate, invalidating a statute allowing sterilization of habitual criminals); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding state statute prohibiting young children from soliciting sales on the public streets as a state action necessary for the protection of children, but stating affirmatively that parents have the primary right to custody of their children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down an Oregon statute requiring parents to send their children to public schools where private schools were providing essentially the same level of education); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding the right of parents to have their children taught the German language). Some of the decisions based on the privacy concept are: Roe v. Wade, 410 U.S. 113 (1973) (the Court discusses its previous "privacy right" decisions and notes that citizens have a right to a "guarantee of certain areas or zones" of privacy which are constitutionally recognized by the Court although not specifically mentioned anywhere in the Constitution); Stanley v. Illinois, 405 U.S. 645 (1972) (declaring the state's dependency statute unconstitutional because it deprived unmarried fathers of the care and custody of their natural children on the death of their mother); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972) (both supporting a woman's choice to have an abortion). The *Alsager* court concludes its review of the Supreme Court decisions thus: "The inescapable conclusion arising from the foregoing authorities is that the Alsagers possess a fundamental 'liberty' and 'privacy' interest in maintaining the integrity of their family unit." 406 F. Supp. 10, 16 (D. Iowa 1975).

constitutional interests implicated where various aspects of family life are threatened, indicate that the Alsagers have a fundamental right to family integrity."[45] In each case, the family's right to be free of state intrusion and the state's responsibility to step in when the situation warrants such action are balanced. The Massachusetts judiciary is constantly obligated to weigh these rights in all cases brought under Chapter 119[46] where concern over the child's development and the parents' right to their individual life style clash.

II. CUSTODY OF A MINOR

A. The Facts

The facts found by the trial judge in *Custody of a Minor*[47] are summarized as follows. The child who is the subject of this action was born on January 9, 1976. Shortly after his birth, the Department of Public Welfare (DPW)[48] petitioned the district court, pursuant to section 24 of chapter 119, for a determination that the child was in need of care and protection. The petition was granted, and custody was awarded to the department. The mother appealed to the Boston Juvenile Court where the judge made findings of fact and affirmed the district court's decision.[49]

The mother in this case was also the mother of three other children and had custody of two children who were a niece and nephew of her second husband. At the time of the last child's birth, all the other children had been removed from the home by the Department of Public Welfare.[50] DPW involvement with this family began in 1965 based on reports of the older children's truancy from school.[51] By 1970, reports indicated that these children were missing from school as often as fifty percent of the time.[52] A social worker visited the home and reported that the children and eight dogs were living in an apartment without heat, electricity, hot water, or gas.[53] The children were described as being poorly clothed and dirty.[54] The apartment was cold, cluttered, and

45. Alsager v. District Court of Polk City, Iowa, 406 F. Supp. 10, 15 (D. Iowa 1975).

46. MASS. GEN. LAWS ANN. ch. 119 (West Supp. 1980).

47. 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979). Section 38 of Chapter 119, in providing the names of parties to these proceedings will not be reported, states in pertinent part: "All hearings . . . shall be closed to the general public and it shall be unlawful to publish the names of persons before the court in any hearing provided for. . . ." MASS. GEN. LAWS ANN. ch. 119, § 38 (West Supp. 1980).

48. In this Comment "Department of Public Welfare," "DPW," and "department" will be used interchangeably to designate the Department of Public Welfare.

49. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1117-18, 389 N.E.2d 68, 69 (1979).

50. *Id.* at 1120, 389 N.E.2d at 71.

51. *Id.* at 1119, 389 N.E.2d at 71.

52. *Id.*

53. *Id.*

54. *Id.*

smelled of urine.[55] The mother justified the children's absences from school by explaining that she was in debt, the power had been shut off in her home, and she could not afford to properly clothe the children.[56] At this time the mother voluntarily placed the children with the DPW who found foster care for them.[57]

Social workers found it difficult to maintain contact with the mother and reported that she neither kept most of the appointments they made nor called to rearrange them.[58] In 1972 a new social worker was assigned to this case, and the children were sent to a foster care institution.[59] Meanwhile, a social worker continued making attempts to work with this mother.[60] The worker found no food in the house, garbage on the floor, and sundry other problems.[61] Again, reports indicated that the mother was not cooperating in keeping appointments.

In 1974 the mother began living with the father of the child who is the subject of this action.[62] As stated above, the child was born in January, 1976, and the department petitioned for his removal from the mother's custody the same month.

B. Issues and Holding

At the hearing which followed from this petition, the Department of Public Welfare's request was granted, and custody of the child was awarded to the department. The mother appealed to the Boston Juvenile Court, pursuant to section 27 of chapter 119,[63] where the judge entered specific findings of fact and affirmed the award of custody to the department.[64] The mother appealed to the Massachusetts Appeals Court, and the Supreme Judicial Court transferred the case for consideration on its own motion.[65]

Based on the facts set out above, the trial judge found the mother to be "a deprived, immature, impulsive, inconsistent, disorganized person whose inadequacies as a parent have deprived her children in the past of even basic physical needs of food, clothing and shelter, also, basic emotional needs."[66] For these reasons the judge declined to return the in-

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55. *Id.*
56. *Id.* at 1120, 389 N.E.2d at 71.
57. *Id.*
58. *Id.*
59. *Id.* Tests conducted at this institution indicated that all of the children had serious learning problems.
60. *Id.*
61. *Id.*
62. *Id.* at 1121, 389 N.E.2d at 72.
63. MASS. GEN. LAWS ANN. ch. 119, § 27 (West Supp. 1980) provides that parents or guardians may appeal the lower court adjudication in chapter 119 proceedings to the appeals court.
64. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1118, 389 N.E.2d 68 (1979).
65. *Id.*
66. *Id.* at 1121, 389 N.E.2d at 72.

fant to her custody. Both the specificity of these findings, all based on her past history with her other children, and the weight of evidence used to effect the removal were challenged by the mother in her appeal to the Supreme Judicial Court.[67] Regarding the issue of the appropriate standard of proof, the court reviewed the traditional tests[68] and found them sound, adding one caveat for all trial judges in the future. The court stated: "[W]e are persuaded that it is constitutionally demanded that a judge exercise the utmost care, as demonstrated through specific and detailed findings of fact, in rendering a judgment which deprives parents of child custody."[69] Concerning the basis upon which the trial judge relied in rendering his decision to remove the child in this case, the Supreme Judicial Court found the trial judge's application of the traditional tests of "best interests" and "parental fitness" adequate to support both the statutory and constitutional requirements for removing the child.

III. Standards Applied to Custody Proceedings

A. Traditional Tests

The first issue addressed by the Massachusetts Supreme Judicial Court in *Custody of a Minor*[70] centered upon the test to be applied in evaluating the facts in custody proceedings. One such test applied by the court is the "best interests of the child" standard.[71] Traditionally, the "best interests" standard was viewed by Massachusetts courts as paramount in all proceedings which removed children from parental custody.[72] The leading case of *Purinton v. Jamrock*[73] contains the following familiar and often quoted language:

> They [parents] are the natural guardians of their child, entitled to its custody . . . But this right is not an absolute and uncontrollable one. It will not be enforced to the detriment or destruction of the happiness and wellbeing of the child. As the child owes allegiance to the government of the country of its birth, so it is entitled to the protection of that government, which must consult its welfare, comfort and interests. . . .[74]

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67. *Id.* at 1118, 389 N.E.2d at 71.
68. *Id.* at 1124, 389 N.E.2d at 73.
69. *Id.* at 1118, 389 N.E.2d at 71.
70. 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979).
71. *Id.* at 1127, 389 N.E.2d at 74. *See* notes 72-74 and accompanying text *infra*.
72. Petition by The New England Home for Little Wanderers to Dispense with Consent for Adoption, 367 Mass. 631, 328 N.E.2d 854 (1975).
73. 195 Mass. 187, 80 N.E. 802 (1907).
74. *Id.* at 201, 80 N.E. at 806 (emphasis added).

Earlier in this same opinion the court stated, more than once, that the child's interests should be the paramount consideration.[75]

Another standard applied by the court in *Custody of a Minor* was the "parental fitness" test. Courts have traditionally found this subordinate standard difficult to define.[76] In *Richards v. Forrest,*[77] the Massachusetts Supreme Judicial Court attempted to set out the characteristics which would render a parent unfit. According to the *Richards* court, an unfit parent is one who exhibits traits "of moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control are unparental traits of character or conduct."[78]

Over the years Massachusetts courts have grappled with the appropriate application of these two standards in various factual contexts.[79] It was not until the 1975 case of *Petition of the New England Home for Little Wanderers*[80] that the court clarified this confusion by proposing the use of a dual standard.[81] The court noted that the distinc-

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75. *Id.* at 199, 80 N.E. at 805.

76. *See, e.g.,* Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings,* 66 GEO. L. REV. 213, 231-40 (1979).

77. 278 Mass. 547, 180 N.E. 508 (1932).

78. *Id.* at 553, 180 N.E. at 514.

79. Hirshson v. Gormley, 323 Mass. 504, 83 N.E.2d 811 (1948); Bottoms v. Carltz, 310 Mass. 29, 36 N.E.2d 379 (1941); Commonwealth v. Ball, 259 Mass. 148, 156 N.E. 11 (1927); Farnham v. Pierce, 141 Mass. 203, 6 N.E. 830 (1886).

80. 367 Mass. 631, 328 N.E.2d 854 (1975).

81. *Id.* at 636-40, 328 N.E.2d at 858-60. In this case, the mother voluntarily placed her newly born child with a child care institution. About ten months later, the institution brought a petition to the Probate Court in Suffolk County to dispense with the need for the mother's consent to the adoption of the child — pursuant to Chapter 210, § 3 of the Massachusetts General Laws which allows licensed child care agencies to commence such a proceeding regarding any child in its custody. Section 3 specifically states in pertinent part: "Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the . . . [parents] shall not be required if . . . the court . . . finds that the allowance of the petition is in the best interests of the child. . . ." MASS. GEN. LAWS ANN. ch. 210, § 3 (West Supp. 1980). The mother argued that since the placement had been voluntary, she had never relinquished her legal custody of the child and therefore application of this statute and the standard therein which requires the petitioner have custody was inappropriate. The mother suggested that the court should look to Massachusetts General Laws, Chapter 201, § 5 which sets out a method whereby the state may remove children from the custody of their parents. Essentially the mother argued that the state would have to terminate her right to custody first, and then place the child for adoption. Chapter 201, § 5 specifies that a parent must be found to be "unfit" before custody can be terminated. The mother contended that since this statute applied, the test of fitness required by § 5 must be met. The Supreme Judicial Court decided the tests of best interests and parental fitness were "cognate and connected." *Id.* at 641, 328 N.E.2d at 337. For a discussion on this case which concludes the Massachusetts court rejected the unfitness standard in this case *see* Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions,* 18 J. FAM. L. 79, 89-90 (1979-1980).

tions between the two tests were based upon a misunderstanding of the relationship between them. The court stated:

> The mother perceives the two criteria as tests as separate and distinct with each to be applied in certain clearly defined circumstances. We think that the relationship is more subtle, that elements of parental "unfitness" figure strongly in the "best interests" test, while elements of "best interests of the child" weigh in any consideration of whether a parent is fit to have custody of his child.[82]

The court further stated "the tests are not separate and distinct but cognate and connected."[83] Thus the court has attempted to set up a workable formula. However, the court to date has failed to explain the interrelationship between the "best interests" and "parental fitness" standards.

B. Least Detrimental Alternative — A Proposed Test

The two standards discussed above focus on the family members involved in the dispute. The "best interests" test focuses on the child while the "parental fitness" test obviously focuses on the parents.[84] Another standard which has been proposed focuses on the state's role in a custody dispute rather than that of family members.[85] The least detrimental alternative theory is based on the belief that minimum state intervention is the most desirable approach for the sovereign and that preservation of the family should be the primary concern. To implement this standard a state would have to adopt the principles of least intrusive invocation, adjudication, and disposition.[86] For example, under this standard, a petition for care and protection would only be brought where there was evidence of physical abuse or attempted physical abuse.[87] Thus, allegations would trigger an investigation, but removal would only take place where the appropriate agency found actual evidence of abuse. Additionally, a child could only be removed when the state had a plan for the child.[88]

The least detrimental alternative test is in harmony with the stated policy of Massachusetts to preserve the family.[89] Yet, the focus on the

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82. *Id.* at 636-37, 328 N.E.2d at 858.

83. *Id.* at 641, 328 N.E.2d at 860.

84. For a discussion of the standards applied to these tests *see* notes 71-83 and accompanying text, *supra.*

85. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 56-64 (1973).

86. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTEREST OF THE CHILD 24-25 (1979).

87. *Id.* at 194.

88. *Id.* at 189-90.

89. The stated policy in this area is set out in MASS. GEN. LAWS ANN. ch. 119, § 1 (West Supp. 1980). For the text of this statute, *see* note 11 *supra.*

family members' rights, responsibilities and individual situations has led to problems in implementing artificial standards such as the "best interests" standard which leaves room for subjective views of the particular social worker or trial judge involved to determine what the best interest of a certain child is.[90] Therefore, *Custody of a Minor* exhibits the court's continuing struggle to develop a satisfactory test without expressing a view as to a standard based on the above theories.

C. A Clearer Standard Required

Facing the issue of utilizing a dual standard based on the two traditional standards, the court affirmed both tests. In confirming the "best interest" standard the court stated: "If the court finds the allegations made pursuant to c. 119 section 24 proved . . . the judge may make any . . . order deemed appropriate to the child's best interests."[91]

The Massachusetts Supreme Judicial Court recognized two United States Supreme Court cases[92] thereby indicating that a finding of parental unfitness in this type of proceeding is as important as "best interests." Chief Justice Hennessy stated: "[I]t is now clear that the Commonwealth may not attempt to force the break-up of a natural family without an affirmative showing of parental unfitness."[93] Thus, the court attempted to bolster the balancing test which requires consideration of both standards as set out in *New England Home for Little Wanderers.*[94]

It is suggested that correct application of the second test has not been

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90. MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1980) provides, in part that the court shall appoint a qualified person to investigate the conditions affecting the child and make a report to the court. This report is attached to the petition and becomes part of the record. Traditionally, the investigative methods do not have to comply with any rules of evidence, such as hearsay, and therefore all information which is gathered, from any source under any circumstances deemed appropriate, becomes part of the record. Thus the subjective views of the investigator can come into the record. *See also* Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings,* 68 GEO. L. REV. 228 (1979).

91. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1123, 389 N.E.2d 68, 72 (1979).

92. *Id.* at 1123, 389 N.E.2d at 72, *citing* Quilloin v. Walcott, 434 U.S. 246 (1978) (where Court cited Smith v. Offer, 431 U.S. 816 (1977) (Stewart, J. concurring) approvingly concerning the suggestion by Stewart that an affirmative showing of unfitness is required. *Id.* at 255) and Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (Stewart, J. concurring) where Stewart wrote in a concurring opinion:

> If a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the state would have intruded impermissibly on "the private realm of family life which the state cannot enter.

Prince v. Massachusetts, 321 U.S. 158, 166. *Id.* at 862-63.

93. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1124, 389 N.E.2d 68, 73 (1979).

94. 367 Mass. 631, 328 N.E.2d 854 (1975). For a discussion of this case *see* note 81 and accompanying text *supra.*

adequately clarified by the court's decision. Traditionally, a finding of parental unfitness has been one of the major concerns in such proceedings, but it is always subsumed in the "best interests" test. The court does not indicate clearly whether the fitness test is now to be part of a co-equal, dual standard, or is to remain part of the "best interests" test, albeit a larger part.

It is submitted that the standard should be a dual one, with both tests bearing equal weight in the consideration of one's right to custody. The important fundamental rights of the parents demand very high standards when a child is to be removed from their care. The court in *Custody of a Minor* does acknowledge these rights:

> That a finding of current parental unfitness is required in a proceeding which results in a parent's loss of a child derives from the substantial respect we accord family autonomy. The existence of a "private realm of family life which the state cannot enter" is a cardinal precept of our jurisprudence.[95]

However, a clear statement that both elements are to be considered equally and must be fulfilled sufficiently has not issued from the Supreme Judicial Court.

D. At What Point in Time Should the Standards be Applied to the Facts?

Although a dual standard[96] is advocated, the question arises as to when either the traditional or the dual test[97] applies. Traditionally, courts tend to focus on present conduct when evaluating the parent's fitness.[98] In *Custody of a Minor,* the Massachusetts Supreme Judicial Court allowed the use of facts concerning the mother's past experiences with her other children to determine her unfitness.[99] The same question of when to apply the appropriate standard arises with respect to the "best interests" test.

For example, the Massachusetts Appeals Court has concluded that the "best interest" of the child requires an evaluation based on the child's present and future welfare.[100] A recent and vivid example of the Supreme Judicial Court's use of this standard with respect to present

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95. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1124, 389 N.E.2d 68, 72 (1979) (citation omitted).

96. For a discussion of the traditional standards applied in custody proceedings *see* notes 71-83 and accompanying text *supra.*

97. For a discussion of the dual standard test set out in Custody of a Minor, *see* notes 91-95 and accompanying text *supra.*

98. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1122, 389 N.E.2d 68, 72 (1979).

99. *Id.* at 1125, 389 N.E.2d at 73.

100. Custody of a Minor, 5 Mass. App. Ct. 741, 749, 370 N.E.2d 712, 717 (1977).

and future needs of the child is the Chad Green case[101] involving a leukemia-stricken child whose parents stopped his chemotherapy treatment. The child's present condition and his future chances for life were the natural focus for application of the "best interests" standard.[102] Indeed, the court stressed the child's future well-being as a major reason for granting partial custody to the Department of Public Welfare charged with seeing that medical care was administered.[103]

It is submitted that the facts in *Custody of a Minor* provide an example of the inherent difficulty in applying the "best interests" test at a specific time. In this case the mother could perhaps have been helped at an earlier time had the Department of Public Welfare been required to use other services such as homemakers or group sessions on parenting. The Department would have to possess the power to somehow require the troubled parent to participate. A rule requiring the Department to use means other than court action first would have to be imposed by the legislature, and the power to fulfill the responsibility would also have to be conferred upon the Department. Such a scheme would act as a preventive measure, assisting parents to confront problems early in their parenthood and would still be compatible with the spirit of chapter 119. However, the Supreme Judicial Court chose to continue struggling with the traditional standards.

In *Custody of a Minor,*[104] the Supreme Judicial Court acknowledged the child's present and future as its primary concerns.[105] The Court recognized that when it is not possible to maintain a stable continuous environment in the natural family, the state's interest in protecting children from neglect can be manifested through prevention of future harm as well as remedying past harm.[106] The court stated that "care and protection" should be afforded a child before he becomes maltreated.[107] Rather, an assessment of prognostic evidence derived from

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101. Custody of a Minor, 79 Mass. Adv. Sh. 2124, 393 N.E.2d 836 (1979).

102. *Id.* at 2140, 393 N.E.2d at 843-44. The court stated: "The essential inquiry involves application of the 'substantial judgment' or 'best interests of the child' principles. . . . On a proper showing that parental conduct threatens a child's well-being, the interests of the State and of the individual child may mandate intervention." The Supreme Judicial Court, in this case, affirmed the trial judge's finding. *Id.* at 2130, 393 N.E.2d at 839-40, that the child's present and future well-being were in jeopardy. *Id.* at 2147, 393 N.E.2d at 846.

103. Custody of a Minor, 78 Mass. Adv. Sh. 2002, 2030-34, 379 N.E.2d 1053, 1064-66 (1978). In both Chad Green decisions there is a strong indication that the court's largest concern was the child's chance for recovery.

104. 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979).

105. *Id.* at 1125-26, 389 N.E.2d at 73 (1979). The court stated in part, "[t]he State interest in protecting neglected children may properly be preventive as well as remedial." *Id.* at 1125, 368 N.E.2d at 73.

106. *Id.*

107. *Id.*

an ongoing pattern of parental neglect or misconduct is appropriate when determining future fitness and the likelihood of harm to the child.[108] Since the purposes of state intervention[109] include a concern for the individual's as well as society's growth and development, the Massachusetts Supreme Judicial Court has currently indicated that a sound evaluation of the child's probable future with the parent in question is the proper focus for a "best interests" test when evaluating evidence of neglect.[110] The appropriate time to use the related standard of parental fitness test is less clear, however.

Traditionally the parent's present and projected conduct has been viewed as crucial in determining fitness. The *amicus curiae* brief[111] in *Custody of a Minor* made a persuasive argument that state intervention should only be allowed when a child is *presently* suffering from harm due to parental conduct.[112] The language of the statute seems to support this view. As its purpose, section one ensures that children "are protected from the *harmful effects resulting from* the parent's absence, inability, [or] inadequacy. . . ." in providing for their children. The authors of the *amicus* brief also relied on cases which utilized present tense language such as the Chad Green case,[113] the court used the phrase "a child's well-being *is* placed in issue."[114] The thrust of this argument is that the child in the present case was not, at the time of his removal from his mother's custody, in any present danger or the victim of any abuse listed in the statute. However, this argument is a simplification of the problem of present harm or danger to a child. In the Chad Green case, the court further stated the following (which was not noted in the *amicus* brief): "On a proper showing that parental conduct *threatens* a child's well-being, the interests of the state and of the individual child may mandate intervention." (emphasis added).[115] The use of the word "threatens" implies that some facts have been found which lead the

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108. *Id.*

109. For a discussion of the state's role in neglect and abuse cases, *see* notes 6, 23, 19-46 and accompanying text *supra*.

110. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1125-26, 1127, 389 N.E.2d 68, 73-74 (1979).

111. Brief of *amicus curiae*, Custody of a Minor, 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979).

112. *Id.* at 18.

> Governing Massachusetts law when construed in light of principles of due process prohibits the Commonwealth from exercising its powers as *parens patriae* to intervene in family life to protect the interest of the child if the only reason for doing so is the 'best interests' of the child. Rather, such intervention is permissible only when it has been established that a child is presently suffering from harm due to his parents' conduct.

113. Custody of a Minor, 78 Mass. Adv. Sh. 2002, 379 N.E.2d 1053 (1978).

114. Custody of a Minor, 78 Mass. Adv. Sh. 2002, 2025-26, 379 N.E.2d 1053, 1063 (1978) (emphasis added in the *amicus curiae* brief).

115. *Id.* at 2026, 379 N.E.2d at 1063.

court to believe that a child, although not yet victimized, may be in danger. These facts must be found in the parents' past conduct; that is, conduct prior to the filing of the petition for a care and protection order. Any other interpretation would require that the court be presented with a maltreated child before it could act to remove the child from the harmful environment. Since the purpose of the statute is to carry out the state policy of protecting children,[116] and protection implies that the child will be shielded from harm as well as cared for after harm has occurred, such an interpretation would violate this purpose. While the court may have used a standard of present and possible future harm, it has not been precluded from using past actions as an indication of the future possibilities of harm. Indeed, past actions reported by the Department of Public Welfare or some other person[117] may, in some cases, constitute all the evidence the court has before it.

Unfortunately, the facts in *Custody of a Minor* tell the story of inadequate state intervention given too late. The mother here had been reported to the Department of Public Welfare several times before the infant in this case was born. If the Department had been able to provide adequate training and supervision to this mother when she was having her earlier problems, this case might not have been necessary. However, the opposite point of view, precluding intervention until a child is actually in a high risk situation, was strongly urged in this case by the *amicus* and by the mother.

Since the adoption of the *amicus* interpretation[118] would lead to the trial judge always being presented with a maltreated child, the court in the present case took the better position that past conduct should be considered.[119] Consequently, the trial judge may evaluate prognostic evidence based on patterns of parental neglect, or other conduct which will help the judge discern the future fitness of the parent. Any indication of actual harm or present danger, as suggested by the *amicus* brief, would be evidence of neglect or abuse for purposes of a chapter 119 proceeding.[120]

After allowing past history to be used in evaluating fitness, the court considers a determination of what type of past conduct is "unparental" and determinative of future fitness. Although the court might set out

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116. For a discussion of the state policy regarding this area *see* notes 8-18 and accompanying text *supra*.

117. MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1980). Pertinent text at footnote 10 *supra*.

118. *See* notes 111-12 and accompanying text *supra*.

119. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1125-26, 389 N.E.2d 68, 73 (1979).

120. For a discussion of chapter 119 proceedings, *see* notes 8-13 and accompanying text *supra*.

certain categories of people such as alcoholics, the mentally ill and those convicted of sexual abuse as being unfit *per se,* other people cannot be so easily categorized and might still abuse and neglect their children.[121] Classifying people more narrowly would seem arbitrary in that the court could not, for example, fairly state that all parents in certain poor neighborhoods are unfit. This kind of classification is inherently discriminatory and would be an attempt to bend the legal system further than it can go. Therefore, courts must evaluate parents on a case-by-case basis, using appropriate guidelines. The trial judge must be allowed to use past conduct as one indication of the parent's fitness.

As a result the court should also consider any change in circumstances between the time the petition was filed and the time of trial. If, for example, a parent has begun to respond favorably to psychiatric treatment, or has, in the interim, formulated a workable plan with the Department of Public Welfare or other agency to change the situation which initially led to the neglect, then a trial judge would have to consider these facts as well. The court's statement[122] does not imply that only an "ongoing pattern of parental neglect" should be considered. All relevant factors should be viewed carefully. In *Custody of a Minor,* the Massachusetts Supreme Judicial Court noted that the mother had not formulated any realistic plan for assuming care of her older children already in the Department of Public Welfare's custody.[123] The court's view on this point is further justified by the fact that the mother had rebuffed many attempts by Welfare workers to assist her.[124] In light of these facts, the court's decision to allow past conduct with other children to weigh heavily in a determination of parental unfitness seems entirely rational. A problem may arise, however, when the mother has no past relationship with other children.[125]

Whether any past conduct which is deemed "unparental" may be scrutinized by a trial judge who is faced with a care and protection petition must be considered. Certainly, it would be unreasonable to permit the Department of Public Welfare to step into a hospital room and remove a mother's first born child relying solely on her past behavior.[126]

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121. It should be noted that the original statute, 1866 Mass. Acts, ch. 283, § 3, specifically listed categories of people to be considered as unfit parents. These included criminals and drunkards. Subsequent amendments to the statute moved away from such classifications. The present statute, MASS. GEN. LAWS ANN. ch. 119 (West Supp. 1980), contains no specific categories and is broad in scope. For the relevant language of the statute, *see* notes 9-12 and accompanying text *supra.*

122. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979). The court stated: "an assessment of prognostic evidence derived from an ongoing pattern of parental neglect or misconduct is appropriate in the determination of future fitness and the likelihood of harm to the child." *Id.* at 1125, 389 N.E.2d at 73.

123. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1126, 389 N.E.2d 68, 73-74 (1979).

124. *Id.* at 1120-21, 389 N.E.2d at 71.

125. Custody of a Minor, 79 Mass. Adv. Sh. 2099, 393 N.E.2d 379 (1979).

126. The Supreme Judicial Court had the opportunity to face this issue in Custody of a

In a recent case,[127] the Massachusetts Supreme Judicial Court established a requirement that trial judges list the specific parental failings and characteristics which endanger the child.[128] Conclusions of an individual's mental instability or general incompetence are insufficient without further detail. Rather, the individual's past history, used as an indication of fitness, must be closely scrutinized for specific situations. Findings based on the parent's actions must be clearly delineated.[129]

The Massachusetts court has clearly indicated that a parent's problems must be listed in detail and must be directly related to the child's safety and well-being. Although the Supreme Judicial Court could have been more specific by illustrating certain types of problems that could harm children, its intent is to encourage flexibility in the role of the trial judge. The trial judge must have room to weigh various facts concerning the fitness of the parent against the "best interests" of the child. Since state invasion of the home is an offensive and delicate matter,[130] resolution of family problems through litigation must be a last resort. However, once the adversary system is employed, the trial judge must consider subtle factors such as the parent's past relationships with other children or other family members, support of welfare services and extended family, and the child's needs. With stricter guidelines the trial judge could not act within the spirit of the statute. Although chapter 119 provides that a judge may make any recommendation necessary,[131] this does not mean that termination of parental custody is the only alternative to returning the child to his parents. The judge can order bifurcated custody with the Department of Public Welfare or another agency or parental custody conditioned upon the parents' receipt of certain kinds of professional help.[132] If the judge has such broad power to render a final decision, it is only logical, and only fair to both parents and children, that the judge be allowed to consider all of the relevant facts.

Minor, 79 Mass. Adv. Sh. 2099, 393 N.E.2d 379 (1979), which arose soon after Custody of a Minor, 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979). Relying on that case as allowing past conduct to be used as evidence of unfitness, the court remanded the case for more specific findings. In the first proceeding, the trial judge found the mother to be mentally ill and unable to care for herself. Accordingly, the trial judge found she was incapable of caring for her newborn child. *Id.* at 2112, 393 N.E.2d at 385. The Massachusetts Supreme Judicial Court, on appeal, found these statements conclusory and set out the following "crucial questions" to be asked: "From what shortcomings or handicaps does the parent suffer that would endanger the well-being of this child if exposed, and has the necessity of permanently removing the child from its parent persuasively been shown?" *Id.* at 2112, 393 N.E.2d at 385.

127. Custody of a Minor, 79 Mass. Adv. Sh. 2099, 393 N.E.2d 379 (1979).

128. *See* note 126 *supra.*

129. *Id.*

130. *See* note 43 *supra.*

131. MASS. GEN. LAWS ANN. ch. 119, § 26 (West Supp. 1980). *See* note 9 *supra* for the text of this section.

132. *See* note 9 *supra*, for the specific language in MASS. GEN. LAWS ANN. ch. 119, § 26 endowing trial judges with broad discretionary powers in this area.

In *Custody of a Minor,* the mother argued that this flexible standard did not provide her with enough protection. Therefore, she contended that the weight of evidence needed to prove that a child is in need of "care and protection" should be raised from a mere preponderance to a standard of clear and convincing evidence.[133]

IV. Sufficiency of the Evidence

The sufficiency or weight of evidence relates to the degree of certainty with which the burdened party must persuade the trier of fact.[134] Although the amount of evidence is generally governed by the type of proceeding, in most civil cases a party must prove the elements of his claim by a preponderance of the evidence.[135] This is sometimes explained by phrases such as "greater weight of the evidence" or "more probable than not."[136] In a criminal trial, the degree of certainty to which the trier of fact must be convinced is "beyond a reasonable doubt."[137] This is a very high standard and requires much more certainty than the mere "preponderance" standard. In between these two commonly recognized standards are intermediate standards which vary from state to state.[138] Loosely called the "clear and convincing" standard of proof, this intermediate standard generally requires a higher degree of proof than a preponderance but not so much as a reasonable doubt standard. The exact meaning, if discernible at all, is found in the case law of each state utilizing the standard.

The "clear and convincing" and "preponderance" standards are the two which were at issue in *Custody of a Minor.*[139] Traditionally, preponderance has been the standard in care and protection proceedings.[140] For the first time in Massachusetts, the mother in *Custody of a Minor* argued that preponderance is not a sufficient standard to protect parental rights.[141] Indicating instead that the requisite protection would be provided where the trial judge made specific findings of fact,[142] the high court simply declined to consider utilizing this standard. The court

133. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1127, 389 N.E.2d 268 (1979).

134. G. Lilly, An Introduction to the Law of Evidence 41 (1978). *See generally* C. McCormick, Handbook on the Law of Evidence, §§ 339-41 (2d ed. Supp. 1978).

135. G. Lilly, *supra* note 134, at 41.

136. *Id.*

137. *Id.*

138. *Id.* at 42.

139. 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979).

140. *Id.* at 1117, 389 N.E.2d at 68.

141. The court stated: "We think that the objective sought can be better accomplished by a requirement of specific findings than by the injection of a standard of proof which is intermediate between the standards originally applied in civil and criminal matters." *Id.* For a discussion of the approach taken in California *see,* Note, *Dependency and Termination Proceedings in California — Standards of Proof,* 30 Hastings L. J. 1815 (1979).

142. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1127, 389 N.E.2d 68, 74 (1979).

went on to note that the important constitutional rights involved did warrant an "extra measure of evidentiary protection."[143] Obviously, the court believed that requiring a trial judge to make specific findings of fact will give the family involved that "extra measure" of protection. Justice Hennessy specifically acknowledged that an order terminating parental custody placed a heavy burden on family integrity and was deserving of "added judicial attention."[144]

The court's conclusion appears to be anomalous. First, the judges declined to consider the use of a higher standard, which courts have traditionally defined for themselves.[145] The court should have given more serious consideration to this issue since the judges themselves could have defined the limits and application of a somewhat higher standard. Second, the court acknowledged a "sufficient burden" to "make the determination deserving of added attention."[146] The rationale for not elevating this "added attention" into the form of a higher standard was not explicitly stated.

Since the state must bring an action under chapter 119,[147] based on evidence which state officials consider sufficient to remove a child, the sovereign has assumed the role of a super caretaker for neglected children. The power to fill this role necessitates invading constitutionally protected family integrity.[148] Consequently, the state's burden of proof should be substantial. It can be argued that removing a child from its natural parents is a fundamental matter analogous to an involuntary commitment procedure. In Massachusetts, evidence for the involuntary commitment procedure must rise to the "reasonable doubt" standard.[149] Similarly, termination of parental custody should require evidence more certain than a "mere preponderance."

In *Custody of a Minor,* the Supreme Judicial Court referred to several sources which contain a requirement of clear and convincing

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143. Custody of a Minor, 79 Mass. Adv. Sh. at 1128, 389 N.E.2d at 74. The court stated: "we think the effect of such an order determining custody in favor of the department places a sufficient burden on family integrity to make the determination deserving of added judicial attention." *Id.*

144. *Id.*

145. *See* Superintendent of Worcester State Hospital v. Hagberg, 78 Mass. Adv. Sh. 187, 192-93, 372 N.E.2d 242, 245 (1978), and cases cited therein. *See also,* notes 149, 162-71 and accompanying text *infra,* for discussion of *Hagberg.*

146. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1128, 389 N.E.2d 68, 74 (1979).

147. MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1980). *See* note 9 for an appropriate excerpt of this section.

148. *See* note 43 and accompanying text *supra.*

149. Superintendent of Worcester State Hospital v. Hagberg, 78 Mass. Adv. Sh. 187, 372 N.E.2d 242 (1978). This case set out the high standard of "beyond a reasonable doubt" in involuntary commitment proceedings under MASS. GEN. LAWS ANN. ch. 123, §§ 7, 8 (West Supp. 1980) for the first time. Until *Hagberg,* it appears that only claims of violations of due process had been brought in Massachusetts. *See, e.g.,* Petition of Rohrer, 353 Mass. 282, 230 N.E.2d 915 (1967); Petition of Gentile, 339 Mass. 319, 159 N.E.2d 86 (1959).

evidence.[150] In *Alsager v. District Court of Polk City, Iowa,*[151] the federal court held that the standard of "clear and convincing" evidence should be adhered to in parental termination adjudications, just as it is adhered to in neglect, dependency and delinquency adjudications under the Code of Iowa.[152] The federal court based its determination, in part, on the United States Supreme Court case of *In re Winship.*[153] In that case the Justices looked to the nature of the rights involved in order to determine what standard of proof should be employed.[154] The *Alsager* court concluded that the rights involved in a termination of parental custody were serious enough to warrant a higher standard than a mere preponderance[155] of the evidence. Considering the emphasis placed on comparing the procedure to other procedures in the same jurisdiction[156] and an examination of the rights involved,[157] the Massachusetts Supreme Judicial Court had enough legal precedent to warrant a clearer expression of the higher burden of proof.

The ABA Standards Relating to Abuse and Neglect,[158] urge the use of the "clear and convincing" standard. The Commonwealth's highest court has explicitly rejected this standard,[159] although it acknowledged that something more than a mere preponderance is appropriate.[160] As a result, the court relied in part on sources which urge "clear and convincing" as the measure to be used when something more is necessary. By confusing the use of sources and engaging in a double-edged analysis, the court created an anomalous result.

Before *Custody of a Minor,* the parents could request that the judge make findings if they were going to appeal the decision and the judge was required to comply.[161] After this case, chapter 119 petitions will receive some closer scrutiny, the level of which remains undefined, and the parents' rights will be safeguarded by the judge's responsibility to make specific findings of fact. Although parents presently do not have

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150. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1128-29, 389 N.E.2d 68, 74 (1979).

151. 406 F. Supp. 10 (D. Iowa 1975), *aff'd,* 545 F.2d 1137 (8th Cir. 1976).

152. *Id.*

153. 397 U.S. 358, 363-64, 365-66 (1967) (Court found that juveniles are entitled to standard of proof "beyond a reasonable doubt" in juvenile proceeding based in part on the serious nature of the rights involved).

154. *Id.*

155. Alsager v. District Court of Polk City, Iowa, 406 F. Supp. 10, 25 (D. Iowa 1975), *aff'd,* 545 F.2d 1137 (8th Cir. 1976).

156. *Id.*

157. *See* ABA STANDARDS RELATING TO ABUSE AND NEGLECT, Part V, § 5.3E(2) (Tent. ed. 1977).

158. *Id.* The standards provide, in part: "The burden should rest on the prosecutor of the petition to prove by clear and convincing evidence allegations to support the petition." *Id.*

159. Custody of a Minor, 79 Mass. Adv. Sh. 1117, 1127, 389 N.E.2d 68, 74 (1979).

160. *Id.* at 1128-29, 389 N.E.2d at 74.

161. *See, e.g.,* MASS. R. CIV. PRO. 52, Domestic Relations Procedure (a-c) and MASS. GEN. LAWS ANN. ch. 215, § 11 (West Supp. 1980).

to request that findings be made since the judge will automatically do this to comply with the rule of *Custody of a Minor,* this concession does not seem adequate to protect parents' constitutionally guaranteed rights.

The Supreme Judicial Court attempted to rationalize its rejection of the "clear and convincing" standard by explaining that this standard has at times been used as the "functional equivalent"[162] for the "reasonable doubt" standard. This confusion over whether "clear and convincing" is actually applied as a test congruous to "beyond a reasonable doubt" arose in the case of *Superintendent of Worcester State Hospital v. Hagberg,*[163] in which the court held that a standard of "reasonable doubt" would apply in an involuntary commitment proceeding. The decision was based on the lack of faith the justices had in applying three different standards where two seemed to suffice.[164] The court relied on the traditional use of "clear and convincing" proof in civil cases relating to findings and rulings of a judge rather than a jury.[165] This standard has been used in the past in situations similar to the one now mandated by the court where the trial judge makes specific findings of fact.[166] The court's reliance on *Hagberg's* expression that the standard is too confusing demonstrates a superficial reading of that case.[167] Since the level of "clear and convincing" has traditionally been used when the judge is trier of fact,[168] it should follow that the level would be easy to implement along with the requirement of specific findings.

In *Stone v. Essex City Newspaper, Inc.,*[169] a case relied on in the

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162. Superintendent of Worcester State Hospital v. Hagberg, 78 Mass. Adv. Sh. 187, 372 N.E.2d 242 (1978).

163. *Id.* at 193, 372 N.E.2d at 245.

164. *Id.* at 192, 372 N.E.2d at 245.

165. *Id.*

166. *Id.*

167. Superintendent of Worcester State Hospital v. Hagberg, 78 Mass. Adv. Sh. 187, 372 N.E.2d 242 (1978), concerned the Massachusetts proceeding to commit an individual to a mental health facility. The Court decided to require the reasonable doubt standard in mental commitment proceedings since the person involved stood to lose their freedom and would be stigmatized for life as being "mentally ill." But, the court did not "rest on any precise calibration of freedom or stigma." They simply doubted the utility of maintaining three standards of evidence. However, the court chose to rely in part on cases which demonstrated that the "clear and convincing" standard did have a long history in Massachusetts and notably in another case which touched a person's moral and social integrity. The *Hagberg* court cited Stone v. Essex City Newspaper, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975) which was a libel and slander action against a newspaper which had printed an article stating the plaintiff owned a narcotic drug. The *Stone* court outlined the "clear and convincing" standard, stating: "It has been said that the proof must be strong, positive and free from doubt," and "full, clear and decisive." (citations omitted). *Id.* at 871, 330 N.E.2d at 175.

168. Superintendent of Worcester State Hospital v. Hagberg, 78 Mass. Adv. Sh. 187, 192, 372 N.E.2d 242, 245 (1978).

169. 367 Mass. 849, 330 N.E.2d 161 (1975).

Hagberg analysis, the court defined clear and convincing proof as that which "evidences a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt. . . ."[170] Clarifying this definition, the court in *Stone* explained that proof must be strong, positive and free from doubt as well as full, clear and decisive.[171] This language in *Stone* seems as definite as the language in *Custody of a Minor,* indicating that the trial judge must make specific findings of fact and acknowledging that an "extra measure" of protection is due parents who may lose their children through such a proceeding. The Supreme Judicial Court finds itself in a quandary. In seeking to provide the greatest amount of protection to the child, the court must strongly consider the appropriate constitutional protection to the child, the appropriate constitutional protection mandated by the United States Supreme Court to the parents, and the great amount of flexibility needed by the trial judge.

V. Legislative Intervention Recommended

One ever-present theme running throughout all of the statutory and case law is the breadth of the state's power to intrude in family life. While the statute's basic tenets have changed little over time, the language has become broader, and the judiciary's power granted in the statutes has similarly increased. *Custody of a Minor*[172] illustrates very clearly the problems inherent in this broad, general power. The judiciary has struggled to set up guidelines, standards, and tests for the most imprecise area the law governs — family problems. Some critics will go so far as to say that state intervention in family affairs should be nil; occurring only when family problems touch other more clearly defined areas of the law such as the criminal law or tort law. However, there is an appropriate level of state intervention at a point before a crime or tort has been committed. The difficulty is that the court system is the least capable area of the legal system to administer this power.

The Legislature should consider adopting new premises for state intervention. First, if a child has actually been seriously abused and if this abuse is confirmed by medical experts, a parent's rights should be automatically and permanently terminated. The court should not be able to give these parents a chance to inflict more serious injury or even to kill their children. Second, if physical neglect is strongly evidenced, as it was in this case, the Department of Public Welfare should be required

170. *Id.* at 871, 330 N.E.2d at 175.
171. *Id.*
172. 79 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979).

to utilize all other available services before filing any type of petition for removal. Too often, the department is quick to remove a child without having a suitable place to put him or her. There are many services offered by private agencies, many of which already have contracts with the state of Massachusetts to assist in providing services,[173] and their use should be primary and mandatory. These services often include homemaker assistance, counseling personal as well as financial problems and more sophisticated psychological counseling for those who need it. No case devoid of a serious attempt to utilize such programs should ever reach the court.

Finally, when a case does come before a judge, he or she should have the flexibility indicated in the statute, now confirmed by *Custody of a Minor*. The choice the judge makes need not be between the parents and the Department of Public Welfare. The present statutory language allowing any recommendation, should be retained. Presumably, the trial judge is in the best position to make a workable decision. He or she sees the department workers who have reported on the case, the other service agency people who have attempted to implement the needed services, and the parents themselves. In some cases, a judge can make a better decision than any other individual or group involved. However, this situation should be arrived at only as a last resort.

Short of revamping the statute as it now stands,[174] and in light of the continuing confusion over appropriate tests to protect the rights of parent and child,[175] the court has made a wise choice in emphasizing the parental fitness aspect of a test and in requiring that specific findings of fact be made by the trial judge. The actual weight of emphasis on "fitness" needs clarification. This should be accorded the same weight as "best interests." Also, the level of evidence required to remove a child should be more clearly defined. To say that the facts in *Custody of a Minor* were specific enough to warrant termination of custody gives some indication of the depth and detail required, but this is not clear enough. Setting up a "clear and convincing" standard, or any standard higher than preponderance could clarify the amount of evidence needed to terminate custody since the judiciary itself defines this intermediate standard.[176]

Working within the present statutory structure, the Supreme Judicial Court in this case made some positive if restrained movement toward

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173. Interview with Supervisor (who wishes to remain unnamed), Child Protective Services, Department of Public Welfare, in Boston (March 11, 1980).

174. MASS. GEN. LAWS ANN. ch. 119 (West Supp. 1980). For pertinent sections *see* notes 8-12 *supra*.

175. For a discussion of the various tests applied, *see* notes 72-95 and accompanying text *supra*.

176. For a discussion of these standards, *see* notes 134-71 and accompanying text *supra*.

clarifying the standards used in terminating parental custody. It remains to be seen whether the Legislature will consider approaching this problem from a more sensible and workable set of premises.

CONCLUSION

This Comment has examined the historical background of child neglect law in Massachusetts, analyzed the traditional standards of "best interest" and "parental fitness" (which have been generally applied in child neglect cases in varying amounts of importance), and discussed the confusing problem of the appropriate weight of evidence in child neglect cases. In Massachusetts, the law in this area has changed over time: the early statutes listed specific characteristics as indicating parental unfitness, and the present statute is written in broad terms to allow a case by case analysis. In order to accommodate the essential policy of maintaining familial relationships, decisions have been made under general standards like "the best interests of the child" standard on a case by case basis. Consequently, decisions display a lack of consistency which causes confusion. *Custody of a Minor* is an attempt by the Supreme Judicial Court to reconcile the various individual rights and the public policies inherent in the child neglect statute. By requiring the trial judge to exercise the "utmost care, as demonstrated through specific and detailed findings of fact," the court attempts to strike a workable balance among these various rights and responsibilities. The court also strove to preserve the trial judge's flexibility, a necessity where a decision with both life and death consequences is often the judge's dilemma.

C. DEBORAH PHILLIPS

BOOKS RECEIVED

THE POLITICS OF PRIVACY, COMPUTERS, AND CRIMINAL JUSTICE RECORDS CONTROLLING THE SOCIAL COSTS OF TECHNOLOGICAL CHANGE. By Donald A. Marchand. Arlington, Virginia: Information Resources Press. 1980. Pp. xvi, 433. $34.95. Clothbound. The author, Dr. Donald A. Marchand, has served as an investigator for studies related to the assessment of the National Crime Information Center by the Office of Technology Assessment of the U.S. Congress. In his book, Dr. Marchand has assessed the use of information technology in criminal justice record keeping and examined its impact on one particular social value—privacy. One major conclusion is that the existing policymaking process does not protect the citizenry against misuse or abuse of criminal justice records. This problem is in conflict with the need for complete records that are readily accessible to criminal justice agencies. This book examines the relationship between potentially deleterious effects of criminal justice record keeping and the policymaking processes that are or could be used to control these effects. Part I attempts to identify these effects, their significance and their relationship to problems of collective action and public policy formation. Part II is a case study of criminal justice information systems and information policy, to illustrate the application of the perspective developed in Part I. Part III assesses the political and administrative implications of the effects of technological change in government agencies in a democratic society.

PRIVILEGED COMMUNICATION AND THE PRESS: THE CITIZEN'S RIGHT TO KNOW VERSUS THE LAW'S RIGHT TO CONFIDENTIAL NEWS SOURCE EVIDENCE, CONTRIBUTIONS IN POLITICAL SCIENCE, NO. 19. By Maurice Van Gerpen. Westport, Conn.: Greenwood Press. 1979. Pp. ix, 239, $22.95. Hardcover. This book is a comprehensive historical review of U.S. judicial and legislative attempts to deal with the complex issue of media privilege. The controversy has generally pitted the special interest of the press in maintaining its confidential sources and information against the society's right to the disclosure of everyman's evidence. Van Gerpen intitially documents those cases where newsmen have sought to protect their sources against legislative inquiries, federal subpoenas, and judicial and grand jury proceedings. In resisting subpoena and contempt citations (which are cited as being more prolific since the

protest era of the 1960's), newsmen have urged that the public will receive less communication if news sources cannot be assured confidentiality. The author outlines the arguments used to support privileged communication and news dissemination by examining the common law privilege doctrines and the First Amendment. He points out that the existence of common law privileges such as attorney-client and informer-government have demonstrated exceptions to the disclosure of all evidence proposition, but that courts have not applied the same principle of exemption to journalists and their sources. In seeking Constitutional protection under the First Amendment, newsmen were met with similar frustration through a landmark Supreme Court decision in 1972 which ruled that journalists do not have a First Amendment right to withhold the identity of confidential sources or information from a grand jury. Van Gerpen interprets this split decision at length and shows why there is continued confusion over the scope of the opinion despite a majority ruling on the constitutional question. The book goes on to examine the various state shield laws which have established qualified press privileges and the vain attempts and problems in using those statutes as guides in enacting national legislation on the issue. In the absence of common law privilege, First Amendment protection, absolute state shield laws or Congressional legislation, the author concludes by leaving the controversy unresolved and stating (without documentation) that the lack of confidential protection for press sources and information has had a chilling effect on the gathering of controversial information. If that result can be substantiated, the validity of past theories for denying a press privilege (as outlined in the book) could be significantly challenged in future judicial and legislative action.

THE RAPE CRISIS INTERVENTION HANDBOOK A GUIDE FOR VICTIM CARE. Edited by Sharon L. McCombie. 1980 Plenum Press, New York. Pp. vii, 235, $19.50. Clothbound. The essays collected in this book are the result of a clinical project entitled the Rape Crisis Intervention Program which was designed to provide comprehensive emergency, medical and psychological assistance to women who had been raped as well as to the families of the victim. The handbook is organized into seven sections beginning with the exploration of the myths and realities surrounding rape, care and counseling in the hospital emergency room and follows with a section regarding how to deal with the police investigation and the judicial process. The handbook also offers coordinated guidelines regard-

ing rape laws and necessary courtroom preparation. The chapter culminates in the experiences of the rape victim in the courtroom. The sections regarding the psychological overview of rape trauma and psychological intervention address the sociopolitical, epidemiological, medical, legal and psychological issues of sexual assault. Special consideration is given to the child rape victim and a female rape victim who receives a male counselor. Finally, there is an appendix to the handbook which offers guidelines and precautions to be taken by a potential victim, the victim, and the staff who offers care to the victim and the family. The primary function of this handbook is to offer a comprehensive resource manual for medical, legal, counseling, and related personnel involved in providing rape crisis intervention to rape victims.